FEDERAL REGISTER

Vol. 85 Friday,

No. 239 December 11, 2020

Pages 79777–80580

OFFICE OF THE FEDERAL REGISTER

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Presidential Documents

Title 3—

The President

Executive Order 13962 of December 8, 2020

Ensuring Access to United States Government COVID–19 Vaccines

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

Section 1. *Purpose.* Through unprecedented collaboration across the United States Government, industry, and international partners, the United States expects to soon have safe and effective COVID–19 vaccines available for the American people. To ensure the health and safety of our citizens, to strengthen our economy, and to enhance the security of our Nation, we must ensure that Americans have priority access to COVID–19 vaccines developed in the United States or procured by the United States Government (''United States Government COVID–19 Vaccines'').

Sec. 2. *Policy.* It is the policy of the United States to ensure Americans have priority access to free, safe, and effective COVID–19 vaccines. After ensuring the ability to meet the vaccination needs of the American people, it is in the interest of the United States to facilitate international access to United States Government COVID–19 Vaccines.

Sec. 3. *American Access to COVID–19 Vaccines.* (a) The Secretary of Health and Human Services, through Operation Warp Speed and with the support of the Secretary of Defense, shall ensure safe and effective COVID–19 vaccines are available to the American people, coordinating with public and private entities—including State, territorial, and tribal governments, where appropriate—to enable the timely distribution of such vaccines.

(b) The Secretary of Health and Human Services, in consultation with the Secretary of Defense and the heads of other executive departments and agencies (agencies), as appropriate, shall ensure that Americans have priority access to United States Government COVID–19 Vaccines, and shall ensure that the most vulnerable United States populations have first access to such vaccines.

(c) The Secretary of Health and Human Services shall ensure that a sufficient supply of COVID–19 vaccine doses is available for all Americans who choose to be vaccinated in order to safeguard America from COVID–19.

Sec. 4. *International Access to United States Government COVID–19 Vaccines.* After determining that there exists a sufficient supply of COVID–19 vaccine doses for all Americans who choose to be vaccinated, as required by section 3(b) of this order, the Secretary of Health and Human Services and the Secretary of State, in coordination with the Administrator of the United States Agency for International Development, the Chief Executive Officer of the United States International Development Finance Corporation, the Chairman and President of the Export-Import Bank of the United States, and the heads of other agencies, shall facilitate international access to United States Government COVID–19 Vaccines for allies, partners, and others, as appropriate and consistent with applicable law.

Sec. 5. *Coordination of International Access to United States Government COVID–19 Vaccines.* Within 30 days of the date of this order, the Assistant to the President for National Security Affairs shall coordinate development of an interagency strategy for the implementation of section 4 of this order.

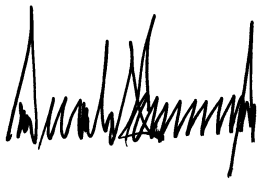
Sec. 6. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

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

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

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

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



THE WHITE HOUSE,
December 8, 2020.

[FR Doc. 2020–27455
Filed 12–10–20; 8:45 am]
Billing code 3295–F1–P

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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 407 and 457

[Docket ID FCIC–20–0008]

RIN 0563–AC70

Area Risk Protection Insurance Regulations; Common Crop Insurance Policy Basic Provisions; Common Crop Insurance Regulations, Sunflower Seed Crop Insurance Provisions; and Common Crop Insurance Regulations, Dry Pea Crop Insurance Provisions

Correction

In rule document 2020–26036, beginning on page 76420 in the issue of Monday, November 30, 2020, make the following changes:

§ 457.108 [Corrected]

■ On page 76427, in § 457.108, in the third column, in the fourth and fifth lines from the bottom, ''■ 5. Cancellation and Termination Dates.'' should read ''4. Cancellation and Termination Dates.''

[FR Doc. C1–2020–26036 Filed 12–10–20; 8:45 am]
BILLING CODE 1301–00–D

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

9 CFR Part 201

[Doc. No. AMS–FTPP–18–0101]

RIN 0581–AD81

Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule establishes a new regulation containing criteria the Secretary of Agriculture will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of the Packers and Stockyards Act, 1921 (Act). A provision of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) requires the Secretary to establish the criteria. The Act protects fair trade, financial integrity, and competitive marketing for livestock, meat, and poultry.

DATES: Effective January 11, 2021.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Chief Legal Officer/Policy Advisor; Packers and Stockyards Division, USDA, AMS Fair Trade Practices Program; phone: 202–690–4355 or email: *S.Brett.Offutt@usda.gov.*

SUPPLEMENTARY INFORMATION: The Act at 7 U.S.C. 202(b) specifies that it is unlawful for any packer, swine contractor, or live poultry dealer to either make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect. In administering this provision of the Act, the United States Secretary of Agriculture (Secretary) determines whether the conduct of regulated entities is considered a violation of the Act.

In the past, each determination was analyzed using general principles on a case-by-case basis, exercising the regulatory flexibility Congress provided when it passed the Act. Section 11006(1) of the 2008 Farm Bill (Pub. L. 110–234) requires the Secretary to promulgate regulations establishing criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. At that time, the Secretary delegated responsibility for establishing the required criteria to the Grain Inspection, Packers and Stockyards Administration (GIPSA). In 2017, GIPSA merged with the Agricultural Marketing Service (AMS). AMS now administers the regulations under the Act and undertook this rulemaking to meet the statutory requirement. This rule adds a new § 201.211 to 9 CFR part 201—Regulations Under the Packers and Stockyards Act (P&S regulations). This rule retains a flexible framework for the Secretary's determinations, while providing criteria to support transparency in the Secretary's determinations. Accordingly, the regulated industry and the public now have a reference to the general framework that AMS will use to determine whether there is an unlawful preference or advantage under section 202(b) of the Act.

Newly added § 201.211 requires the Secretary to consider four specified criteria when determining whether any undue or unreasonable preference or advantage has been given or made to any particular person or locality in any respect in violation of the Act. The Secretary is not limited to considering only these four criteria but can also take other factors into consideration as appropriate on a case-by-case basis. We discuss each of the four criteria later in this document.

AMS published a proposed rule regarding this matter in the **Federal Register** on January 13, 2020 (85 FR 1771). The proposed rule invited public comments on the addition of the proposed criteria to the P&S regulations. AMS allowed a 60-day public comment period for interested parties to submit comments. The comment period ended March 13, 2020. AMS received 2,351 comments on the proposed rule, of which 235 were unique. The remaining comments represented 48 groupings of similar comments, each group having at least 80 percent matching text. Commenters represented numerous segments of the livestock and poultry industry, from individual poultry growers and livestock producers to trade organizations representing producers, poultry companies, the meat packing industry, and state and national level agriculture groups. After considering the comments received, AMS determined to adopt the proposed criteria with two modifications. Analysis of the comments and AMS's responses are included later in this document.

Background

As mentioned above, the 2008 Farm Bill directs the Secretary to establish criteria the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. At the time the 2008 Farm Bill was enacted, what is now the Packers and Stockyards Division (PSD) of AMS's Fair Trade Practices Program operated within GIPSA. GIPSA undertook the responsibility for developing criteria for consideration. In June 2010, GIPSA

published a proposed rule (75 FR 35338 (June 22, 2010)) that was never finalized, due to Congressional prohibitions included in the Consolidated Appropriations Acts for fiscal years 2012 through 2015, which disallowed any further work on the new criteria rulemaking. *See* Sec. 721, Public Law 112–55, November 18, 2011; Sec. 742, Public Law 113–6, March 26, 2013; Sec. 744, Public Law 113–76, January 17, 2014; and Sec. 731, Public Law 113–235, December 16, 2014. GIPSA resumed its efforts to promulgate the required criteria in December 2016 with publication of a second proposed rule (81 FR 92703 (December 20, 2016)), but decided to take no further action on that proposal (82 FR 48603 (October 18, 2017)). AMS accomplishes Congress's 2008 Farm Bill directive with the promulgation of this final rule that establishes the required criteria.

The PSD oversees day-to-day administration of the P&S regulations and is called upon to investigate alleged violations of section 202(b). Many of the alleged violations related to contractual dealings between regulated entities and the livestock producers, swine production contract growers, and poultry growers with whom they do business. Other entities, including retailers and the public, can also be harmed by violations of section 202(b). Difficulty lies in determining whether particular instances of preferences or advantages made or given to one or more persons or localities would be undue or unreasonable and violations of the Act.

New Provisions

Section 202(b) of the Act prohibits buyers to ''make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.'' It is not unusual for buyers or sellers of livestock or poultry to receive advantages. For example, between two competing sellers, one may receive a better price from a buyer. The Act only prohibits those preferences or advantages that are undue or unreasonable. It follows that there are legitimate reasons for the existence of preferences or advantages that are not undue or unreasonable. Reasonable differences in contract terms may result from negotiations over particular interests between the parties. Some courts have gone so far as to say it is not the purpose of the Act to interfere with contract negotiations or to upset the traditional principles of freedom of contract.[1] The Act does not create an entitlement to obtain the same type of contract offered to other producers or growers. However, greater clarity on the terms associated with grower contracts may increase transparency in the marketplace and reduce the number of claims of undue or unreasonable preference.

Under new § 202.211, the Secretary will consider four specific criteria when determining whether a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect. Section 201.211 lists the criteria for consideration and provides that the Secretary is not limited to those four. Because § 202(b) of the P&S Act prohibits any undue or unreasonable preferences or advantages, in addition to considering the specified criteria in § 201.221, the Secretary may also consider other factors relevant to each situation on a case-by-case basis.

Under § 201.211(a), the Secretary will consider whether the preference or advantage in question cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers. Under § 201.211(b), the Secretary will consider whether the preference or advantage in question cannot be justified on the basis of meeting a competitor's prices. Under § 201.211(c), the Secretary will consider whether the preference or advantage in question cannot be justified on the basis of meeting other terms offered by a competitor. Under § 201.211(d), the Secretary will consider whether the preference or advantage in question cannot be justified as a reasonable business decision.

Historically, the Secretary has considered criteria similar to these when determining whether to commence disciplinary or judicial actions under the Act. PSD made these decisions on a case-by-case basis, examining the facts of each complaint separately. AMS chose these new criteria, and retained the flexibility to consider other criteria, based on this past experience. In doing so, AMS strikes a balance between the interests of all segments of the industry while carrying out its enforcement responsibilities. On the one hand, the law charges AMS with protecting producers, growers, retailers, and the public from potential harm resulting from undue or unreasonable preferences or advantages. On the other hand, AMS recognizes that among the numerous complaints the Secretary has examined in the past, many preferences or advantages given to individuals or groups have been determined to be lawful, while relatively few preferences or advantages were found undue or unreasonable.

Disparate contract terms are not undue or unreasonable just because the terms are not identical. Some disparities in contract terms can be attributed to reasonable business negotiations between contracting parties. For example, price differences offered to different sellers may reflect differences in transportation costs to a slaughter facility or may reflect one producer's ability and willingness to supply livestock in the early morning hours. In the case of a live poultry dealer that pays a premium to a poultry grower who agrees to use experimental vaccines, the grower has increased risk of financial loss if the vaccine proves to be unsuccessful. Based on the criteria in § 201.211, the apparent preference or advantage might be justified on the basis of the company saving the expense of testing the vaccines through other means. The premium paid to the grower for providing the extra service of testing vaccines and for accepting greater financial risk might not be considered undue or unreasonable. In another example, a livestock packer pays higher prices later in the day or week after competitors have raised the market price. Based on the criteria in § 201.211, the apparent preference or advantage might be justified as necessary to meet competitors' prices, and the higher price might not be considered undue or unreasonable. Finally, where a live poultry dealer's competitors have offered long term contracts to their growers, the poultry dealer finds that he must offer comparable terms to his growers in the same locality. Based on the criteria in § 201.211, the apparent preference given to growers in that locality might not be considered undue or unreasonable because the difference in contract terms might be justified by the need to meet a competitor's other contract terms in that locality.

Some preferences or advantages, however, might be considered undue or unreasonable if they are so unfair that they would tend to restrain trade, creating such excessively favorable conditions for one or more persons that the competitors would have reduced chances of business success. In such a case, a higher price, referred to as a premium, offered to one person or locality but not offered to other persons or localities similarly situated could

[1] *Jackson* v. *Swift Eckrich, Inc.,* 53 F.3d 1452 (8th Cir. 1995), *IBP* v. *Glickman,* 187 F.3d 974 (8th Cir. 1999), *Griffin* v. *Smithfield Foods,* 183 F. Supp. 2d 824 (E.D.Va. 2002).

constitute a violation of the Act. A livestock packer negotiating preferential live basis prices with only one favored livestock supplier and not with similarly situated suppliers, may be in violation of the Act. After considering the criteria in § 201.211, the Secretary may conclude that the packer cannot justify its actions on the basis of cost savings, meeting a competitor's prices, meeting other terms offered by a competitor, or making a reasonable business decision.

Under § 201.211(a) through (c), the Secretary will consider whether preferences or advantages given to one or more persons are based on cost savings related to dealing with different producers, sellers, or growers or on the need to meet a competitor's prices or other contract terms. For example, a live poultry dealer offering a higher base price to a favored grower, but not to other growers in the same complex with the same housing types, may be in violation of the Act. The Secretary will consider all of the specified criteria. Under criterion (a), there would be no cost savings in a higher base price. Under criteria (b) and (c), the Secretary will consider whether the higher base price meets a competitor's price or other terms. If the reason for giving the favored grower the higher price cannot be justified by meeting a competitor's price or other terms, and if consideration of other factors particular to the situation does not suggest otherwise, the higher base price may be an undue or unreasonable preference or advantage.

Under § 201.211(d), the Secretary will consider whether the preference or advantage in question cannot be justified as a reasonable business decision. A packer, swine contractor, or live poultry dealer may have a reasonable business reason for treating some persons or groups more favorably than others. For example, in the cattle industry a packer may pay producers a premium for delivering cattle that meet an established certified beef program, such as ''Certified Angus Beef,'' because the packer can realize a greater profit from the sale of meat branded under those programs. Based on the criterion in § 201.211(d), it is likely that the apparent preference or advantage to sellers of cattle meeting certain specifications in that situation would be justified as a reasonable business decision and not considered undue or unreasonable. In another example, a live poultry dealer may pay a premium to growers who raise test flocks utilizing a new breed of chicken, as this provides the live poultry dealer with data from which it can make future business decisions. Based on the criterion in § 201.211(d), the premium might be justified as a reasonable business decision, so the Secretary might not determine the preference or advantage to be undue or unreasonable.

Live poultry dealers, packers, and swine contractors should enter into contracts that do not discriminate, unless the differences are due to cost savings or meeting competitors' prices and terms or are legitimate business decisions. Preferences that are not grounded in ordinary business considerations may be based upon reasons of unjust advantage.

It should be noted that an alleged preference or advantage being seemingly justified under one criterion does not automatically confer immunity against all other criteria. For example, a preference or advantage may still be deemed undue or unreasonable, even though it is apparently given to meet a competitor's offer, if the Secretary determines the preference or advantage was unreasonable based on another criterion. Thus, the criteria specified in § 201.211 are not safe harbors, as suggested by some comments on the proposed rule.

The flexibility in § 201.211 to consider criteria other than the four specified in the rule allows the Secretary to determine whether other pertinent factors may have influenced the business decisions of contracting parties. For example, one comment submitted on the proposed rule recommended the Secretary consider whether an apparent preference or advantage could be ascribed to an emergency situation, such as a government requisition for food after a natural disaster or during a military crisis. While AMS did not add this particular criterion to the four specified in the rule, it is nevertheless a good example of the type of additional criteria the Secretary may consider. The discretion to consider other criteria, however, is not boundless.

In addition to the criteria enumerated in § 201.211, the Secretary may consider the overall competitive effects of any particular agreement. In doing so, the Secretary should apply the antitrust ''rule of reason'' analysis, as used by courts and antitrust agencies. Section 1 of the Sherman Act of 1890, 15 U.S.C. 1–38, prohibits agreements in ''restraint of trade.'' The Supreme Court interpreted this prohibition to be limited to unreasonable restraints. *See Ohio* v. *American Express Co.,* 138 S.Ct. 2274, 2283 (2018) (citing *State Oil Co.* v. *Khan,* 522 U.S. 3, 10 (1997)). Certain types of agreements (such as price fixing) are so likely to harm competition and to have no significant procompetitive benefit that they are challenged as per se unlawful. *See FTC* v. *Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 432–36 (1990). All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. *See California Dental Ass'n* v. *FTC,* 119 S. Ct. 1604, 1617–18 (1999); *FTC* v. *Indiana Fed'n of Dentists,* 476 U.S. 447, 459–61 (1986); *National Collegiate Athletic Ass'n* v. *Board of Regents of the Univ. of Okla.,* 468 U.S. 85, 104–13 (1984). The Supreme Court first applied this framework to antitrust cases under the Sherman Act in *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 282–283 (CA6 1898), aff'd, 175 U.S. 211 (1899). The rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. See ''U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors U.S. Department of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors the Licensing of Competitors the Licensing of Intellectual Property'' § 1.2 (April 2000). If the agreement raises competitive concerns, the analysis considers whether the agreement is necessary to achieve any procompetitive benefits that would offset competitive harm. *Id.* This rule provides the analytical framework for AMS to evaluate specific activity.

While the agency expects a short-term increase in the cost of review for livestock producers, poultry growers, and regulated entities in existing contracts, in the long-term, innovative contracts should be less costly to negotiate even when those contracts provide for preferences and advantages. Because this framework of criteria can be understood in the context of legitimate business decisions, regulated entities may more easily review contracts for compliance with the Act.

By following a framework of criteria that promote fair dealing based in rational decision-making, AMS promotes protection for producers and localities that might otherwise have

been unable to obtain preferential contract terms or price advantages. Therefore, this rule is expected to improve the negotiating position of growers and producers.

AMS expects adding the criteria in § 201.211 to the P&S regulations to provide a framework in which the Secretary will consider potential violations of the Act, help the industry understand what the Secretary will consider when evaluating violation claims, and fulfill the Congressional mandate to establish criteria for making determinations regarding potentially unacceptable conduct under the Act.

Changes From the Proposed Rule

As originally proposed, the regulation required the Secretary to consider one or more specific criteria listed in the regulation, and provided that the Secretary was not limited to considering those four criteria when determining whether an undue or unreasonable preference or advantage has been given in violation of the Act. One comment asked for clarification about whether the Secretary was required to consider at least one of the four specified criteria, in addition to being able to consider other criteria. The 2008 Farm Bill requires the Secretary to establish criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of the Act. Therefore, based on its original understanding of the statute and on the comment, AMS revised the introductory paragraph of § 201.211 to make it clear that the Secretary must consider all four specified criteria, and that the Secretary may also consider additional criteria, in determining whether an undue preference or advantage has occurred in violation of the Act.

As originally proposed, criterion (d) would have required the Secretary to consider whether the alleged preference or advantage cannot be justified as a reasonable business decision that would be customary in the industry. Almost unanimously, public comments submitted in response to the proposal objected to the clause regarding whether a business decision is customary in the industry. Comments otherwise supporting the proposal said what is ''customary in the industry'' is ambiguous and could be open to broad interpretation. Comments opposed to the proposal generally opposed this clause specifically, asserting that illegal discrimination, retaliation, and use of unfair marketing practices have become customary in the industry and that the wording of the proposed provision would offer packers, swine contractors, and live poultry dealers a convenient justification for unacceptable actions. Based on the comments, AMS determined to remove the words ''that would be customary in the industry'' from the language of criterion (d). Thus, § 201.211(d) provides that the Secretary will consider among other criteria whether the preference or advantage under consideration cannot be justified as a reasonable business decision.

Comment Analysis

AMS received 2,351 comments on the proposed rule, some with multiple signatories. Comments are summarized by topic below and include AMS's responses.

Comment Period Extension

Comment: AMS provided 60 days for public comment on the proposed rule. Twelve comments included requests that AMS extend the comment period by at least 90 days. Requesters said that the proposed rule and the issues it addressed are complex and important and that commenters needed more time to analyze their implications across the industry and provide meaningful comments. Requesters also noted the comment period overlapped with some states' legislative sessions and that commenters were dealing with ongoing stress created by continued low farm prices, both requiring commenters' focus at the time.

AMS response: AMS proposed this rule following litigation that concerned a prior proposed rule on this subject. In the course of that litigation, the USDA committed to initiate timely rulemaking on this subject. As part of the rulemaking, the agency chose a 60-day comment period as it believed this to be an adequate amount of time for interested persons to review the proposal and to provide comment that the agency should consider. Therefore, AMS decided against extending the comment period beyond the deadline of March 13, 2020.

Criteria Generally

AMS proposed four specific criteria the Secretary will consider when making determinations about whether an action could be considered a violation of the Act. Some comments addressed one or more criteria individually, while some addressed them generally. Here we address comments on the proposed criteria in general.

Comment: Several comments supported the proposed criteria generally, saying farmers and ranchers have long been at a disadvantage due to uncertainty about what actions violate the Act. Comments agreed that the proposed criteria would provide much needed clarity for the industry and should minimize or eliminate legal uncertainty in the marketplace.

On the other hand, numerous comments opposed the proposed criteria generally, saying they are inadequate, vague, ambiguous, and open to a wide variety of interpretations. These comments said the proposed criteria fail to address significant and harmful practices in the industry that are both anti-competitive and detrimental to farmer livelihoods. Comments also claimed that AMS had proposed specific conclusory criteria for determining when a violation has not occurred. These comments opposed the structure of the proposed regulation, saying that framing the criteria in negative terms (*e.g.,* ''cannot be justified'') fails to articulate what *would* be considered an undue or unreasonable preference or advantage and a violation of the Act, thus failing to comply with Congress's mandate. Commenters claim that this is the reverse of Congress's directive and renders the Act's express prohibitions meaningless.

Comments also criticized the criteria for being too general. They argued that different adjudicators may come to different conclusions when considering the same facts.

For these reasons, comments asserted the criteria should establish standards on which to base decisions about whether a packer has violated the Act. Commenters asked for standards that state what conduct constitutes a violation. Comments urged USDA to develop clear, specific criteria, so that the violations would be unequivocal.

AMS response: AMS attempted to balance the interests of all segments of the livestock, meat, and poultry industries. Producers and growers must be protected from potential harm resulting from undue or unreasonable preferences or advantages. At the same time, regulated entities may give preferences or advantages to individuals or groups for lawful reasons. AMS believes that the proposed criteria will provide a framework from which both producers and processors can benefit, while not harming consumers.

Regarding the comments that suggest the rule should prohibit specific conduct—rather than providing criteria that can be applied across a wide range of behaviors—the 2008 Farm Bill directed the Secretary to establish criteria to consider when determining whether conduct gives an undue or unreasonable preference or advantage. AMS has chosen general criteria in this rule. Further, the criteria are not

conclusory; just because an action may appear justified under one criterion does not mean that it cannot be determined to be undue or unreasonable.

The criteria comply with the promulgation requirement, whether they are written in positive or negative terms. The Farm Bill provides: ''As soon as practicable, but not later than 2 years after the date of the enactment of this Act, the Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*) to establish criteria that the Secretary will consider in determining (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act;'' Criteria are standards, rules, or tests on which a judgment or decision can be based. American Heritage Dictionary of the English Language (5th ed. 2020). Criteria are typically ''reference point[s] against which other things can be evaluated; a characterizing mark or trait.'' Black's Law Dictionary (11th ed. 2019). Nothing in the 2008 Farm Bill suggests that the Secretary was called upon to describe these criteria in a positive or negative form. All that is required is that the criteria provide traits and standards that the Secretary can use as a base for judgment. AMS considered drafting criteria in a positive form and determined that the negative form better represented Congressional intent. Criteria used to evaluate whether preferences or advantages ''cannot be justified . . .'' in some manner could establish that an undue preference or advantage has occurred. Conversely, if written in a positive form, the criteria would be presented as exceptions, for example, a criterion could state that a preference or advantage is undue or unreasonable, unless it ''can be justified . . .'' in some manner.

The Farm Bill does not require the Secretary to consider any specific factor or information in developing the criteria. AMS's criteria apply across a wide range of behaviors in multiple industries. This approach, rather than setting forth specific examples of unlawful conduct, provides the Secretary with the flexibility Congress intended when passing the Act. AMS made no changes to the rule as proposed based on these comments.

Comment: One comment asked AMS to clarify whether the Secretary would be required to consider at least one of the four criteria specified in the proposed regulation, in addition to considering any other criteria that may be relevant to the situation.

AMS response: AMS appreciates the comment requesting clarification of the proposed language. Our intention was to specify four criteria the Secretary is required to consider, and to provide flexibility for the consideration of additional criteria as appropriate for the situation. Accordingly, based on the comment, and to ensure that the meaning of the regulation is clear, we revised the introductory paragraph of proposed § 201.211 to clarify that the Secretary will consider each of the criteria specified in the regulation and may consider additional criteria.

Unlimited Criteria for Consideration

The proposed rule provides that the Secretary will consider certain criteria when determining whether a violation of section 202(b) of the Act has occurred. The proposed rule specifies four criteria for consideration but provides that the Secretary is not limited to considering those four.

Comment: Many comments supported including flexibility to consider additional criteria on a case-by-case basis, explaining that there can be many other relevant factors to consider in different situations. Other comments argued that the provision is too ambiguous, and that its application is unclear. Some comments recommended the Secretary be required to consider only one of the listed criteria, or that consideration of other criteria be limited to certain situations.

Some comments insisted the criteria list be exhaustive and not broad, as proposed. According to comments, no segment of the supply chain would know which practices are prohibited or permissible under the proposed language, making compliance with the Act nearly impossible, and exposing the contacting parties to unforeseeable liability and associated litigation and the cost of protecting their respective marketing arrangements.

One comment opposed to the provision said that AMS's approach is inconsistent with Congress's directive in the 2008 Farm Bill to establish criteria and with the agency's stated desire to provide transparency to the process of determining whether a violation of the Act has occurred. The comment asserted that giving the Secretary flexibility to consider other criteria would give both the Secretary and other right of action plaintiffs who believe they have been wronged the opportunity to file complaints based on unspecified criteria.

One comment supported the proposal not foreclosing the possibility that other activities could be violations of the Act. According to the comment, the four listed criteria identify the most familiar indications of unfair practices, but other non-competitive conduct might escape the scope of the identified criteria, or other criteria might be found to better capture predatory practices.

Another comment suggested AMS clarify in the final rule that the four criteria specified in the proposed rule are broadly encompassing of all potential scenarios and that the Secretary will rarely, if ever, need to consider other criteria.

AMS response: The final rule retains the provision allowing the Secretary to consider criteria other than the four set forth in § 201.211. The U.S. Supreme Court noted in 1922 in the case of *Stafford* v. *Wallace,* 258 U.S. 495, 521, that the Packers and Stockyards Act is ''remedial legislation.'' A remedial measure ''is to be construed liberally, and so as to effectuate the purpose of Congress and secure the relief which was designed'' (*U.S.* v. *Southern Pacific R. Co.,* 184 U.S. 49, 56 (1902); *Logan* v. *Davis,* 233 U.S. 613, 628 (1914)). ''It would be an 'unnatural construction' of a remedial statute to require an administrative agency 'to sit idly by and wink at practices' which are subversive of effective regulation.'' (quoting *American Trucking Assns.* v. *U.S.,* 344 U.S. 298, 311 (1953)).

AMS does not consider the criteria exhaustive; rather, the criteria provide notice to the industry of the types of conduct that may be found unlawful. It would be impossible to develop an exhaustive list of specific criteria that would remain relevant for very long in an evolving market environment. The criteria in this rule respond to a need for clarity among industry participants regarding practices that could be deemed unduly preferential. Although it is unlikely that all future litigation will be avoided, AMS believes contracting parties may be able to avoid some litigation by applying the criteria and the principles behind them when drafting—and contracting for—marketing arrangements.

Thus, this final rule allows the Secretary to consider other factors that may not be included among the four listed criteria, but are evidence of an undue preference or advantage, nonetheless. The rule gives the Secretary principles by which to analyze the conduct of regulated entities that may violate the Act, for the Secretary's investigations and administrative or judicial enforcement. The Secretary's analysis involves investigative methods currently in use, including examination of overall market conditions, competitors' pricing and practices, and individual entities' business records to substantiate and justify different pricing or other

differing treatment of suppliers or territories.

These criteria are for the Secretary's determination of whether preferences are undue or unreasonable; the rule does not apply to private plaintiffs filing suits for damages under section 308 of the Act. Accordingly, no changes were made to the rule as proposed based on these comments.

Criterion (a)—Cost Savings

The proposed rule requires the Secretary to consider certain criteria when determining whether a violation of the Act has occurred. The proposed rule lists four criteria for consideration but does not limit consideration to those four. The first of these, criterion (a), asks whether the preference or advantage under consideration cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers.

Comment: One comment said this criterion is subjective and does not incorporate clear standards for its application in relation to dealing with different producers, sellers, or growers. Another asserted that this criterion's vagueness could be interpreted to mean that if a packer, swine contractor, or live poultry dealer is using a business practice that saves themselves money, it can be justified under section 202(b) of the Act, no matter the impact on producers, sellers or growers.

AMS response: AMS intends this criterion to be broad and flexible for the Secretary to apply it across a wide range of conduct in the livestock, meat, and poultry industries. In applying the criteria generally, the Secretary will examine the facts of each case and apply those facts to the criteria. Costs are relevant to many preferential contracts. If a preference does not have a cost-based justification, then the absence of a cost-based justification could indicate an undue or unreasonable preference or advantage. Or the Secretary may find that cost savings justify a preference given to one producer over another. No changes were made to the rule as proposed based on the comments.

Comment: Several comments said that justifications under criterion (a) for costs savings based solely on volume should be prohibited to avoid discriminating against smaller livestock or poultry growers. Comments explained that an integrator can easily claim cost savings based on volume by contracting with a large-scale livestock or poultry grower over a smaller-scale livestock or poultry grower or an association of smaller growers. According to comments, this would result in small-to-medium sized growers routinely being unduly disadvantaged and undue preference being given to larger growers strictly based on size of operation. One comment said small farms are struggling to stay viable while larger farms are increasing in size. The comment argued that justifying a preference or advantage as a cost savings based solely on volume would only further contribute to the decline in sales and ultimately the viability of small and mid-sized poultry and livestock farms.

AMS response: The rule is not intended to set forth prohibitions but rather to establish criteria the Secretary will consider when determining whether a preference is undue or unreasonable. A packer's justification of a preference based solely on the size of the grower operation as the comment suggests does not automatically make the packer's conduct lawful. The criteria are broad and flexible for the Secretary to apply criteria across a wide range of conduct in the livestock, meat, and poultry industries. In applying these criteria, the Secretary will examine the facts of each case and apply those facts to each of the criteria. In the comment's example, resulting cost savings would need to be clearly demonstrated to the Secretary's satisfaction, and other criteria would have to be considered. AMS believes it is up to contracting parties to negotiate terms in marketing arrangements that make business sense for all. Accordingly, no changes were made to the rule as proposed based on these comments.

Comment: One comment said that criterion (a) should be revised to provide clear examples of when cost savings are or are not warranted. Other comments gave examples of when cost savings could be used as a justification for disparate treatment: When there are measurable and verifiable differences in carcass and meat quality, if those standards are applied to producers of all sizes; when there is a specified time of delivery or times of urgent need for delivery, if those criteria are offered to producers of all sizes; when there are volume-related savings that result from documented efficacies in the cost of procuring, transporting or handling livestock and conducting other transactions that occur outside of the plant.

AMS response: The purpose of the regulation is to provide criteria that are broad enough to cover a majority of the types of conduct that could be found in violation of the Act. AMS believes that narrow examples do not encompass all of the situations that might result in an undue or unreasonable preference or advantage. Therefore, it is not the intention of the agency to set forth a laundry list of examples, but rather to establish criteria the Secretary will consider when examining the facts of wide-ranging types of conduct within the livestock, meat, and poultry industries. The comment's proposed examples present the underlying factual situation that the agency would consider. For illustrative purposes, AMS suggests as one example where cost savings used as justification for disparate treatment could be unlawful, the use of consumer coupons for meat products. Where a packer offers a coupon discount on the price of bacon in a specific geographic region, for example, and the resulting price is below the packer's cost in order to undercut competition, the behavior could represent an undue preference in that geographic region. After consideration, no changes were made to the rule as proposed based on these comments.

Comment: Comments requested that the regulation specifically prohibit justifications under criterion (a) based on so-called efficiencies that occur within a processing plant or from operating the plant at full capacity. Comments explained for example that hog producers who pool their hogs and deliver a truckload that is the size commonly handled by a processing plant should be on the same footing as a larger single producer who provides the same size truckload to the plant.

AMS response: The rule is not intended to set forth prohibitions but rather to establish criteria the Secretary will consider when determining whether a preference is undue or unreasonable. One of the criteria the Secretary will consider is whether there is a cost savings in dealing with one producer or grower over another. Based on the limited facts in the example provided by the commenter, plant operating efficiencies alone would not necessarily justify paying a single supplier more for hogs than several suppliers who pool hogs to provide similar volume. The general criteria still apply to the comment's example, even if there is no explicit ban on a particular preference or advantage. No changes were made to the rule as proposed based on these comments.

Criteria (b) and (c)—Meeting Competitors' Prices and Other Terms

Comments generally addressed jointly criteria (b) and (c). Under proposed criterion (b), the Secretary would consider whether the preference or advantage in question cannot be justified on the basis of meeting a competitor's prices. Under proposed

criterion (c), the Secretary would consider whether the preference or advantage cannot be justified on the basis of meeting other terms offered by a competitor. In general, comments said the two criteria are vague, favor packers and integrators, invite collusion, and conflict with confidentiality laws.

Comment: Comments expressed concern that criteria (b) and (c) would disadvantage farmers and growers, who have no voice in negotiations between other farmers and competing packers and integrators. According to comments, packers and integrators could individually, or could conspire to, set low prices or otherwise impractical terms agreeable to one farmer and use criteria (b) and (c) to justify applying the same prices and terms to other farmers for whom those prices or terms would be unacceptable, unworkable, or—as the comment implies—fail to reflect the ordinary forces of supply and demand.

AMS response: The criteria are neither requirements nor prohibitions. Nor are they justifications for unlawful behavior. In applying these criteria, the Secretary will carefully examine the facts of each case. In the example provided by commenters, low prices and other impractical terms given to one farmer for the purpose of justifying low prices and terms offered to other farmers would likely violate one or more of sections 202(c) through 202(g) of the Act. Price manipulation, for example, violates other sections of the Act. No changes were made to the rule as proposed based on these comments.

Comment: Comments suggested that in a fully functioning competitive market with transparent price discovery, applying criterion (b) might be rational, but in the livestock and poultry sector, where commenters say price discovery and price transparency are broken at best, and in the case of poultry, completely nonexistent, criterion (b) is extremely dangerous to farmers. According to comments, criterion (b) invites competitors to collude on pricing because justification under this criterion would insulate them from scrutiny under section 202(b) of the Act.

AMS response: Collusion to fix prices among packers, swine contractors, and live poultry dealers is prohibited under the Packers and Stockyards Act.[2] When the Secretary considers a regulated entity's justification for granting a preference based on meeting either the prices or other terms offered by a competitor, the Secretary may also consider if this behavior resulted in other violations of the Act. The rule does not justify, require, promote, or encourage price fixing conduct. Regulated entities, however, legitimately receive information—in the form of market reports, open bids, and contract negotiations with sellers—that may result in granting legitimate price preferences to meet a competitor's price. No changes were made to the rule as proposed based on these comments.

Comment: Comments cited USDA policy that protects the confidentiality of prices and terms of sale that packers pay for livestock under the Livestock Mandatory Reporting Act of 1999 (Pub. L. 106–78, Title IX; October 22, 1999). According to comments, the proposed rule would establish a standard involving prices and other terms of sale as defense for a packer's alleged violation of the Act while the public is simultaneously precluded from knowing the prices and terms of sale offered by any particular packer. Thus, according to comments, the proposed rule appears to facilitate and promote collusion among packers to share confidential pricing and terms of sale information with each other to ensure that the prices and terms they offer are similar, if not identical, to the prices and terms offered by competitors.

AMS response: This rule provides the Secretary with broad and flexible criteria to consider when determining if a preference is undue or unreasonable. The rule does not require, promote, or encourage regulated entities to agree to share prices and other contract terms between themselves. Nothing within this rule is intended to limit or conflict with the Livestock Mandatory Reporting Act of 1999 or any other Federal law. No changes were made to the rule as proposed based on these comments.

Comment: Comments claimed criteria (b) and (c) encourage collusion and conspiracy between regulated entities and are in direct conflict with the overall intent of the statute, as well as the specific price manipulation and control prohibitions in sections 202(d) through 202(g) of the Act. One comment suggested criteria (b) and (c) seemingly incentivize collusion between competitors and could decrease competition in the livestock and poultry industries. The comment said proposed criterion (b) should be withdrawn, and criterion (c) should be modified to require packers, swine contractors, and live poultry dealers to provide verifiable proof that the decision to meet a competitor's terms results in performance of efficiency gains. The comment said that the regulations should make it clear that collusive behavior between competing firms is unacceptable.

AMS response: This rule provides the Secretary with broad and flexible criteria to consider when determining if a preference is undue or unreasonable. The rule does not require, promote, or encourage collusion between packers, swine contractors or live poultry dealers. Other subsections of section 202 of the Act make clear that such conduct is prohibited. Subject entities are required by other sections of the P&S Act and regulations to keep adequate records of their business operations. Such records should provide adequate information for the Secretary to consider in making determinations under § 201.211. Accordingly, no changes were made to the rule as proposed based on these comments.

Comment: Comments suggested regulated entities should be required to maintain and provide when challenged contemporaneous and detailed records to prove that costs, prices, and terms offered to one farmer are justified on the basis of meeting those given to other similarly situated farmers.

AMS response: Entities regulated under the Packers and Stockyards Act are required to keep adequate records of their business operations.[3] The regulations do not specify which records entities should keep. Regulated entities have the flexibility to determine what type of records best meet the needs of their individual businesses. AMS expects that these records would include those necessary to justify preferential terms offered to a producer on the basis of any of the criteria within this rule. No changes were made to the rule as proposed based on these comments.

Criterion (d)—Reasonable Business Decisions

The fourth proposed criterion for the Secretary to consider is criterion (d)—whether the preference or advantage cannot be justified as a reasonable business decision that would be customary in the industry. Many comments addressed this particular proposal.

Comment: Several comments supported the inclusion of criterion (d) with the other proposed criteria, saying in general that they appear all-encompassing. Those comments recommended no changes to proposed criterion (d). Other comments recommended clarifying criterion (d) to indicate what would be considered a reasonable business decision that would be customary in the industry. Many comments asked further that AMS list the marketing arrangements and other

[2] 7 U.S.C. 192(d) & (f) (prohibiting conspiracies to manipulate or control prices).

[3] 7 U.S.C. 221; 9 CFR 201.94, 201.95.

business practices commonly expected to constitute legitimate business justifications. Some comments further recommended developing different lists for different industry sectors. Other comments asked that such lists not be considered finite, giving the industry room to adopt new types of acceptable arrangements in the future.

One comment suggested the term ''reasonable business decision'' could change over time and vary from individual to individual and from one USDA administration to the next. The comment explained contracting parties might be uncertain about how a contract provision that appears reasonable today might be viewed at some point in the future. Thus, the comment recommended USDA define what it considers to be ''reasonable'' in making business decisions or simply limit any interpretation of what was a ''reasonable business decision'' to the relative positions, beliefs, and understandings of the contracting parties at the time and place the contract was entered into.

AMS response: AMS has not defined or standardized the meaning of ''reasonable'' in the regulation because the word ''reasonable'' assumes the commonly understood meaning of an objective standard. That is, a reasonable decision is a decision that a reasonable person would make under similar circumstances. Further, we do not agree that the regulation should attempt to identify every possible industry business decision or marketing arrangement that might be reasonable now and in the future. Rather, the Secretary can apply the timeless standard of reasonableness to examine an alleged preference or advantage. Accordingly, AMS made no changes to the rule as proposed based on these comments.

Comment: Several comments asked AMS to clarify that just because an unfair practice may have become common within the industry, that does not mean it would be justified under proposed criterion (d) and not a violation of section 202(b) of the Act. Others said that the proposed criteria protected regulated entities from legal challenges to practices that are customary in the industry when a practice that is ''customary'' may violate the Act. Many comments described practices they say are unfair but have become commonplace within the industry, such as retaliation, racial discrimination, favoritism, use of tournament systems in the poultry sector, poultry pay systems where buyers control most grower quality inputs, and giving ''sweetheart deals'' to certain ranchers or feeders in the cattle industry. Comments said that these practices, although they might be called ''customary,'' should not be justified under proposed criterion (d). Some comments recommended using examples from this list to develop other criteria for determining whether a preference or advantage is undue or unreasonable. Other comments asked that the qualifier ''that would be customary in the industry'' be decoupled from ''reasonable business decision,'' leaving the latter to stand on its own as a criterion. One comment suggested AMS could develop another criterion to incorporate ''customary in the industry.''

AMS response: While the agency's intent is to establish a criterion that would allow preferences supported by reasonable business decisions, AMS does not intend to legitimize unlawfully discriminatory practices in the industry. As noted, some comments raised concerns that some ''customary practices in the industry'' may also be unlawful preferences or advantages. Thus, comments have raised concerns which, after careful consideration, justify modification of the rule. Accordingly, based on consideration of comments, AMS revised proposed criterion (d) by deleting the phrase, ''customary in the industry,'' and providing that criterion (d) read, ''whether the preference or advantage cannot be justified as a reasonable business decision.''

Comment: Many comments advocated removing criterion (d) entirely from the proposed regulation, arguing that both ''reasonable'' and ''customary'' are subjective. Comments claimed application of criterion (d) would allow the Secretary to permit anticompetitive behavior of the type the Act was intended to prevent. Comments said AMS should instead adopt stronger rules that would fulfill Congress's intent to curb anticompetitive practices.

AMS response: As explained above, AMS believes reasonableness is an objective measure with timeless application to the determination of whether a preference or advantage might be undue or unreasonable and a violation of the Act. Under this objective standard, what is reasonable does not rely on the intent of the individual. An objective legal standard ''is based on conduct and perceptions external to a particular person.'' [4] Thus a ''reasonable-person standard'' is objective because it does not require a determination of what the regulated entity thinks. We removed the phrase ''customary in the industry'' from the language of criterion (d), and believe that change is sufficient to make the criterion a useful tool for the Secretary's determinations. Accordingly, we made no further changes to the rule as proposed based on these comments.

Additional Criteria for Consideration

A few comments suggested additional criteria the Secretary should consider when determining whether certain actions are violations of section 202(b) of the Act.

Comment: One comment suggested the Secretary consider the relative bargaining power of the parties involved in a dispute about an alleged violation. The comment gave the example of a poultry grower with five-year-old chicken houses trying to negotiate a contract with a party who knows the grower has no other real options. The comment said this situation does not allow for true freedom of negotiation, and provisions should be developed to protect against the imbalance.

AMS response: The example the commenter provides appears to illustrate a possible undue or unreasonable disadvantage imposed on the poultry grower. That is, poultry growers lack the economic resources to demand higher value for their work, and they are at a disadvantage. When they negotiate, they may receive a lower price under their contract. The relative strength of their bargaining power is a distinct disadvantage, leading to unfavorable terms to the poultry grower. The relative strength of bargaining power may be an additional factor to consider for a given preference or advantage, but, as the commenter's example illustrates, preferences or advantages are unlikely to result from the bargaining disparities between poultry growers and live poultry dealers. This rule is limited in scope to addressing undue or unreasonable preferences or advantages. Accordingly, AMS is making no changes to the rule as proposed based on this comment.

Comment: Another comment recommended addition of a fifth criterion (e) and proposed the Secretary consider whether an apparent preference or advantage ''cannot be justified as needed to address a natural disaster or military necessity, such as but not limited to an emergency for which the Federal government has invoked its authority in relation to food supplies under the Stafford Act or the Defense Production Act.'' The comment explained that packers, swine contractors, and live poultry dealers might be required to award preferential contracts to certain farmers or localities

[4] STANDARD, Black's Law Dictionary (11th ed. 2019).

to address emergencies such as natural disasters or military necessities. The comment suggested that without the recommended language, entities might hesitate to forge such contracts, despite the proposed rule's provision that other factors besides the four listed criteria could be considered.

AMS response: The commenter's suggestion of a fifth criterion (e) is appreciated and provides an example of a situation in which the Secretary's consideration of criteria should not be limited only to the four criteria set forth in the rule. Natural disasters and other emergencies would likely create situations in which a packer, swine contractor, or live poultry dealer may give a lawful preference or advantage to one producer as compared to another. A preference given in response to an Executive Order may also apply in these situations. While these are instances in which the Secretary would carefully examine the facts to determine whether a preference is undue or unreasonable, it is not necessary to explicitly include a criterion for this conduct. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Comment: Some comments encouraged AMS to include as criteria for the Secretary's consideration whether the alleged preference or advantage given to certain farmers reflects retaliation or racial discrimination against others; reflects unreasonable reductions in payments based on tournament incentive systems or other payment arrangements where the company, rather than the farmer, controls inputs that factor into the farmer's pay; or reflects unreasonable ''sweetheart'' deals given by companies to some farmers and ranchers to the disadvantage of others.

AMS response: Existing law prohibits retaliation and racial discrimination.[5] Issues of retaliation and racial discrimination typically would arise in complaints of undue or unreasonable prejudices or disadvantages. This rule is limited in scope to addressing undue or unreasonable preferences or advantages. AMS acknowledges, however, that retaliation and racial discrimination can be factors in cases of preferential treatment. Such conduct would also be considered by the Secretary under the broad authority granted by the Act when determining whether a preference is undue or unreasonable but need not be explicitly set forth in the rule. Accordingly, AMS is making no changes to the rule as proposed based on these comments.

Comment: Several comments stated that there are important differences between the marketing arrangements and structures of the cattle, swine, and poultry industries and that, where appropriate, separate criteria should be developed to account for these differences.

AMS response: The prohibitions of section 202 of the P&S Act apply to packers, swine contractors and live poultry dealers. The law does not specify prohibitions that apply only to cattle, or swine, or poultry. AMS proposed broad criteria that can apply across all segments of the livestock and poultry industries. If a behavior specific to only one segment of the livestock or poultry industry is unlawful, it will likely fit within one of the criteria set forth in this final rule. Criteria describing specific behaviors were not proposed as they could be viewed as limiting the Secretary's ability to enforce this regulation. Maintaining broadly written criteria also provides sufficient flexibility to easily adapt to changing technology and business practices used across the industry. Accordingly, no changes were made to the proposed rule based on the comments.

Other Recommended Modifications to the Proposed Rule

A number of comments recommended modifications to the proposed rule. Many comments referred to USDA's previous rulemaking efforts to establish the mandated criteria for considering alleged violations of § 202(b) of the Act and recommended proposed provisions from earlier attempts be reintroduced. Several comments addressed perceived inadequacies in the current regulations and enforcement of the Act.

Comment: Numerous comments called for the addition of specific protections for farmers, including ranchers and growers, and provided examples of the types of protection they sought. Comments asked for protection that would allow farmers to file complaints, identify wrongdoing, speak with the media and elected officials, and form and join farmer associations without the threat of retaliation. Comments asked for protection against discrimination of any kind, including national origin, sex, race, religion, disability, political beliefs, marital or family status, or any other protected category. Comments said the proposed rule does not provide that protection, despite there being several documented cases of discrimination in the industry. Several comments asked that the rule include detailed, specific protections for contract poultry and livestock producers that apply to all forms of poultry and livestock, that are suitable for the future of the industry, are enforceable, and provide for real consequences for violations of section 202(b) of the Act.

AMS response: Congress directed the Secretary in the 2008 Farm Bill to establish criteria to guide the Secretary's consideration of facts in determining whether an apparent preference or advantage is undue or unreasonable and a violation of the Act. Protection against some of the unfair and discriminatory practices described by commenters is afforded under existing laws and under other provisions of the P&S regulations.[6] Farmers have the right to file complaints regarding wrongdoing, speak with media and elected officials, and form and join farmer associations. If retaliation occurs, there is likely discrimination, which may be unlawful under the P&S Act or other laws. While this rule cannot specify protections for every grievance suggested by comments, AMS believes the establishment of the criteria in this rule serves broadly as protection for industry members and others who may be subjected to undue or unreasonable preferences in violation of the Act. Accordingly, no changes were made to the proposed rule based on these comments.

Comment: Comments asked that the rule require contract prices to be based on clear, transparent, and predictable standards. Comments said prices should not be based on inputs the packing or processing company provides that may dictate the health of animals or the quality of feed. Comments also called for enforcement of fair pricing systems that don't involve price fixing or collusion. Other comments said that poultry integrators should be required to communicate clearly to all their contracted growers about actions that appear to be, but are not, undue preferences, such as the examples provided in the proposed rule's preamble. Comments further recommended that this communication be required at the time of signing contracts between growers and integrators and in routinely updated communications from the integrator to all the growers under contract with that integrator.

AMS response: Comments appear to suggest that live poultry dealers should

[5] *See, e.g.,* Agricultural Fair Practices Act of 1967, 7 U.S.C. 2301–2036; Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e–17.

[6] *See, e.g.,* Packers and Stockyards Act, 9 U.S.C. 192(a)–(g); 7 CFR 201.216–201.218; 7 CFR 203.12 (policy statement); Agricultural Fair Practices Act of 1967, 7 U.S.C. 2301–2036; Civil Rights Act of 1964, 42 U.S.C. 2000e–2000e–17; Sherman Act, 15 U.S.C. 1–7; Clayton Antitrust Act, 15 U.S.C. 12–27, 29 U.S.C. 52–53.

be required to discuss with poultry growers information about the business of other poultry growers. This rule does not require that confidential business information of some poultry growers be shared with other poultry growers. P&S regulations currently require that live poultry dealers furnish growers with a copy of their contract and all applicable terms.[7] Live poultry dealers must also provide settlement sheets and all information and supporting documents needed to compute payment. This rule does not change these existing disclosure requirements. Accordingly, no changes were made to the rule as proposed based on these comments.

Comment: Some comments suggested the proposed rule could be improved by the addition of implementation and enforcement methods. One comment suggested that the proposed rule include a methodology for the determination process the Secretary would employ prior to considering whether the allegedly undue or unreasonable preference or advantage meets the proposed criteria. According to the commenter, establishing such a methodology would provide a more standardized structure and make the process less subjective. Other comments asked AMS to establish methods to continuously review and monitor industry practices to ensure new practices are not evolving that would circumvent the purposes of the Act.

AMS response: The suggestions to establish implementation and enforcement methods have merit, but do not address the establishment of criteria for the determination of whether and are therefore outside the scope of this rule. The Act sets forth the Secretary's investigative and enforcement authority over packers, swine contractors, and live poultry dealers. These powers and procedures establish the methodology to be followed in applying the criteria. Accordingly, no changes were made to the proposed rule based on these comments.

Comment: One comment suggested the rule could be improved by codifying the need to show competitive harm, and the comment provided regulatory applicability language for such a provision. The comment's recommended language would require the Secretary to find that the challenged conduct or action lacks a legitimate business justification *and* harms—or is likely to harm—competition to bring a claim under sections 202(a) and (b) of the Act.

AMS response: Several, but not all, U.S. Circuit Courts of Appeal have established case precedent requiring a showing of harm to competition.[8] For that reason, USDA previously withdrew the December 2016 interim final rule that would have codified that harm to competition is not required to prove a violation. Given the history and conflicting opinions on this topic, AMS does not believe that this rulemaking is the appropriate avenue for interpreting the statute's intent. Accordingly, AMS is making no changes to the rule as proposed based on this comment.

Comment: Another comment suggested the proposed rule could be improved by first distinguishing between preferences, advantages, prejudices, and disadvantages; and second by defining what would be considered undue or unreasonable versions of each.

AMS response: The terms ''preferences'' and ''advantages'' have already been defined by the Judicial Officer. Giving an advantage to any person and not to other similarly situated persons is making or giving a preference. Conferring a benefit on any person and not on all similarly situated persons is making or giving an advantage. (See *In Re: IBP, Inc.,* 57 Agric. Dec. 1353 (July 31, 1998)). Thus, AMS finds it unnecessary to codify those definitions in the rule. Accordingly, AMS is making no changes to the rule as proposed based on the comments.

Comment: Several comments said that AMS should not finalize this rule but should instead adopt provisions from prior rules. This included two rules GIPSA published in December 2016 (81 FR 92703 and 81 FR 92723, December 20, 2016). One comment characterized the 2016 rules as making progress toward an antitrust framework that would protect farmers. One comment recommended restoring provisions from the June 2010 proposed rule. Comments preferred provisions from all those rules that would have formally established that proof of actual or likely competitive harm is not needed for violations of section 202(b); created lists of ''per se'' and likely violations of the Act (such as attempted delays of payment and ''hold-up'' scenarios, respectively); established that any conduct which harms or likely harms competition is a violation of the Act; and provided more specific, grounded criteria for evaluating violations of section 202(b), including whether a grower is treated fairly as compared to other similarly situated growers who have engaged in lawful assertion of their rights, or is treated differently due to arbitrary reasons unrelated to the grower's livestock or poultry operation. Comments claim that the provisions of those rules would better address the current competitive imbalance in the market.

Comments asked that many different provisions of the prior rules be incorporated into this rule. Comments asked for explicit prohibition against the use of tournament incentive system. Some comments also urged a ban on packer ownership of livestock, which is currently permitted. Comments also said that certain cattle procurement agreements, when offered selectively to some cattle sellers and not others, should be identified as per se violations of section 202(b) of the Act. Other comments listed specific conduct that commenters believe should be considered per se violations of the Act and recommended they be added to the regulations.

One comment recommended USDA republish for public comment a petition submitted to GIPSA in 1996 calling for rules to restrict certain procurement practices in the meat packing industry.[9] According to the comment, the petition's proposal would better define undue preference in live cattle markets, facilitate reestablishing price discovery for domestic and import markets, and lessen the pending threat of beef plant closures and the corresponding loss of good paying jobs.

AMS response: The prior rulemakings referenced in these comments contained greater breadth of rulemaking and proposed a number of prohibited acts. This rule does not have the same breadth as those previous rules. Nor does this rule expand on earlier rulemaking. As explained in the proposed rule, this rule represents a fresh start at fulfilling the 2008 Farm Bill mandate to establish criteria to consider when determining whether conduct makes or gives an undue or unreasonable preference or advantage. The criteria established in this rule can be applied across a wide range of behaviors and meets the 2008 Farm Bill mandate.

Further, some of the examples of prohibited behaviors comments cited from abandoned rulemaking would be examples of undue or unreasonable prejudices or disadvantages, rather than preferences or advantages, and are therefore outside the scope of this rule.

[7] 9 CFR 201.100.

[8] For courts ruling that 202(b) cases require a showing of harm to competition for violations see *Wheeler* v. *Pilgrim's Pride Corp.,* 591 F.3d 355 (5th Cir. 2009)(sections 202(a) and (b) of the P&S Act) and *Terry* v. *Tyson Farms, Inc.,* 604 F.3d 272 (6th Cir. 2010)(sections 202(a) and (b) of the P&S Act).

[9] Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices; 62 FR 1845, published January 14, 1997.

Accordingly, AMS is making no changes to the rule as proposed based on these comments.

Comment: Some comments recommended that the examples of potentially undue or unreasonable preferences or advantages given in the proposed rule's preamble be codified as explicit violations of section 202(b). Comments explained that doing so would help bring the proposed criteria into line with the purpose of the Act and the 2008 Farm Bill mandate from Congress. Comments cited examples of premiums offered to one person or locality but not offered to similarly situated other persons or localities, livestock packers negotiating preferential live basis prices with only one favored livestock supplier and not with similarly situated suppliers, and live poultry dealers offering a higher base price to a favored grower but not to other growers in the same complex with the same housing types.

AMS response: As explained in an earlier comment response, AMS has chosen not to codify a list of per se violations because we believe that narrow examples cannot possibly encompass all of the situations that might result in an undue or unreasonable preference or advantage. The purpose of the regulation is to provide criteria that are broad enough to cover a majority of the types of conduct that could be violations of the Act. Further, AMS believes the criteria established in this rule are aligned with the purposes of the Act and the 2008 Farm Bill mandate because they provide the framework the Secretary will use when examining the facts of wide-ranging types of conduct within the livestock, meat, and poultry industries. Accordingly, no changes were made to the proposed rule based on these comments.

Competitive Harm

Many comments addressed the notion of competitive harm and whether proof of such harm or likelihood of such harm is required to bring claims of violation of section 202(b) of the Act. Past findings in the Fifth, Sixth, Tenth, and Eleventh Circuits have held that under the Act plaintiffs must show competition, and not just an individual, is or is likely to be injured through preferences or advantages given to certain individuals or localities.[10] Other Circuits that are often cited for the proposition—in the Fourth, Seventh, Eighth, and Ninth Circuits—did not go so far. For example, courts in those circuits have agreed with USDA that certain violations of the Packers and Stockyards Act are ''unfair practices'' because those practices harm competition, or courts have opined on whether a specific practice would require harm to competition.[11] In past rulemaking efforts to establish the mandated criteria, USDA reiterated its position that harm to competition is not required in all cases under the Packers and Stockyards Act. AMS explained in the preamble of the current proposed rule that this rulemaking is independent of previous rulemaking efforts to establish the mandated criteria to guide determinations about undue and unreasonable preferences and advantages under the Act and did not make a policy statement about competitive harm.

Comments: Comments from the meat production, livestock production, and poultry segments of the industry expressed concern that AMS did not take a position on competitive harm in the proposed rule. Comments representing the interests of some livestock producers and poultry growers advocated clarifying that plaintiffs do not have to prove competitive harm to the entire industry to bring a case claiming undue and unreasonable practices. Comments said the burden of proof against large companies is too high for most farmers and that companies should not be allowed to continue unlawful practices just because a farmer cannot show harm to the entire industry.

One comment said it seems false to state in the proposed rule that AMS does not intend to create criteria that conflict with case precedent, when case precedent is mixed on the issue of the need to show competitive harm. The comment suggests AMS is apparently siding with the approach that requires demonstration of competitive harm to the entire industry. The comment perceived the proposed rule to be an unprecedented failure because it did not address the issue of competitive harm.

Comments asserted USDA has the authority and responsibility to issue rules for enforcing the Act that may conflict with court precedent under the Supreme Court doctrine of *Chevron* deference. According to comments, by not affirming in the proposed rule its historic position that a violation of section 202(b) may occur in some circumstances without a showing of competitive injury or likelihood of competitive injury, USDA could set a precedent that undermines its own policymaking power and codifies what commenters called judicial overreach and novel interpretation of the Act that contradicts the will of Congress. Thus, according to comments, the proposed rule leaves the Act largely unenforceable for individual farmers and ranchers.

One comment questioned AMS's refusal to adhere to its historic position on competitive harm and cited the October 2017 withdrawal of the December 2016 interim final rule on the Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, which said: ''Contrary to comments that GIPSA failed to show that USDA's interpretation was longstanding, USDA has adhered to this interpretation of the P&S Act for decades. DOJ has filed amicus briefs with several federal appellate courts arguing against the need to show the likelihood of competitive harm for all violations of 7 U.S.C. 192(a) and (b).'' One comment said Congress has not amended section 202(b), so there is no apparent justification for USDA's refusal to assert its longstanding interpretation regarding the statute. Another said by not affirming its historic policy on competitive harm AMS is dismissing the possibility of industry reform and violating the intent of the Act.

Comments representing packers, swine contractors, and live poultry dealers disagreed with farmer comments and said the proposed rule must clarify that plaintiffs should be required to prove competitive injury across the industry to bring a claim of undue or unreasonable preference or advantage and violation under the Act. Comments argued that failure to recognize case precedent on competitive harm, in conjunction with the ''plus other criteria'' approach in the proposed rule, could create uncertainty about whether certain preferences or advantages are justifiable under the law and subject the industry to needless, costly lawsuits.

[10] London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005) (section 202(a) of the P&S Act); Been v. O.K. Indus., Inc., 495 F.3d 1217 (10th Cir. 2007) (section 202(a) of the P&S Act); Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355 (5th Cir. 2009) (sections 202(a) and (b) of the P&S Act); Terry v. Tyson Farms, Inc., 604 F.3d 272 (6th Cir. 2010)(sections 202(a) and (b) of the P&S Act).

[11] De Jong Packing Co. v. U.S. Dep't of Agric., 618 F.2d 1329 (9th Cir. 1980) (agreeing with USDA that conspiracy to fix ''subject'' term in bidding is harmful to competition); IBP, Inc. v. Glickman, 187 F.3d 974 (8th Cir. 1999) (agreeing with USDA on rights of first refusal can harm to competition); Philson v. Goldsboro Mill Co., 164 F.3d 625, Nos. 96–2542, 96–2631, 1998 WL 709324 (4th Cir. Oct. 5, 1998) (finding retaliation requires a showing of likelihood of harm to competition); Jackson v. Swift Eckrich, Inc., 53 F.3d 1452 (8th Cir. 1995) (finding that while allegations disparate contracting requires a showing of harm to competition, breach of contract and fraud claims under the Packers and Stockyards Act did not require harm to competition).

Comments argued that while Congress intended with the Act to combat restraints on trade and promote healthy competition in the livestock industry, it did not intend to discourage what comments called regular, healthy business competition. Comments referenced findings under other antitrust laws to assert that under the Act, alleged violations of sections 202(a) and (b) must show antitrust injury, which requires proof that competition as a whole was harmed by the defendant's conduct. Comments urged AMS to interpret sections 202(a) and (b) as requiring proof of actual or likely harm to competition to reinforce the Act's purpose, which according to comments is to protect competition in the industry.

One comment recommended AMS address both sections 202 (a) and (b) when discussing injury to competition because, according to the comment, both are rooted in antitrust jurisprudence and both require injury to competition as a prerequisite to establishing a violation. According to the comment, addressing injury to competition in the context of only section 202(b) risks creating unnecessary confusion about the interpretation of section 202(a).

AMS response: Given the history and conflicting opinions on this topic, AMS does not believe this rulemaking on preferences and advantages is the appropriate avenue for interpreting the statute's intent with respect to all portions of sections 202(a) and (b) of the Act.

The 2008 Farm Bill requires the Secretary to establish criteria to consider when determining if conduct is an undue or unreasonable preference or advantage. The criteria the Secretary establishes through the rulemaking are not exclusive, and pertain only to part of section 202(b) of the Act, which also prohibits undue or unreasonable prejudices and disadvantages. Whether competitive injury is required to establish a violation of the Act is a broader question applicable to the full provisions of sections 202(a) and 202(b) and is therefore outside the narrow scope of this rule. Accordingly, AMS is making no changes to the rule as proposed based on these comments.

Starting Over

Comment: Several comments urged AMS to abandon the proposed rule and start the rulemaking process all over. Comments claimed the proposed rule is inadequate and fails to meet the Congressional mandate to provide clear criteria for determining whether certain conduct or actions would be violations of section 202(b) of the Act. Other comments said the proposed rule failed to incorporate recommendations submitted in a June 2019 letter to AMS by associations representing farmers' interests and recommendations in a July 2019 letter to USDA from 17 members of Congress, both of which advocated stronger protections for farmers. Still other comments said the proposed rule does nothing more than fulfil a congressional mandate, while maintaining the status quo.

Some comments said AMS should start over because the proposed rule reduces and eliminates competition, facilitates corporate abuse of concentrated and predatory market power, invites collusion, and allows manipulation of live cattle prices.

One comment said the proposed rule was well intentioned, but does not accurately reflect needed modernization changes and improvements within the packers and stockyards industry. The comment urged USDA to withdraw the proposed rule and convene a livestock industry stakeholder summit to outline a course of action.

AMS response: The purpose of the rule is to provide criteria that are broad enough to cover a majority of the types of conduct that could be found in violation of the Act. It is not the intention of the agency to set forth a laundry list of examples, as many of the commenters suggest, but rather to establish criteria the Secretary will consider when examining the facts of wide-ranging types of conduct within the livestock, meat, and poultry industries. AMS is committed to finalizing the rule as required by the 2008 Farm Bill mandate to establish such criteria and fulfilling USDA's commitment to the Court to complete the rulemaking expeditiously. Therefore, AMS is neither withdrawing nor making changes to the rule as proposed based on these comments.

Additional Concerns Raised by Comments

Comment: Numerous comments expressed doubt that the proposed rule would remedy what they identified as serious problems in the livestock and poultry industry. Comments said farmers have little market power in dealings with large meat packing and poultry processing companies. Comments described what they called systematic discrimination and unchecked abusive treatment of farmers. Comments provided data demonstrating declines in farm prices that are not reflected in consumer prices, and they warned that the demise of small and family farms threatens U.S. food security, the economic health of rural communities, and the environment. Comments claimed finally that USDA does not act in the interest of small farmers.

AMS response: AMS appreciates the comments that expressed these concerns. Moreover, AMS understands the struggles farmers face across the U.S. Some of the concerns raised could be the result of preferences or advantages given by packers, swine contractors or live poultry dealers. Whether those preferences or advantages are undue or unreasonable is for the Secretary to determine utilizing the criteria set forth in this rule. The criteria are written broadly to cover wide ranging behaviors in the industry, including some of those identified by commenters, rather than narrowly addressing specific conduct. Some other concerns raised by the commenters are outside the scope of the Packers and Stockyards Act. AMS encourages commenters to continue the dialogue with USDA on these important issues so that together we can make improvements.

Regulatory and Economic Impact Analysis

Comment: Several comments addressed the regulatory impact analysis included (RIA) in the proposed rule. Most of those comments concerned statements in the analysis that some found contradictory. Comments asserted the RIA's cost-benefit analysis shows that the rule will have no meaningful impact on the anti-competitive and improper practices that are already in place. According to comments, the statement that AMS does not expect the proposed rule to result in a decrease in the use of alternative marketing agreements (AMAs), poultry tournament systems, or other incentive payment systems; or decreased economic efficiencies in the cattle, hog, and poultry industries shows that the proposed rule is essentially toothless. Comments argued that the Act was not intended to maximize economic efficiencies, but to provide for a fair, competitive marketplace by preventing abuses by large, supposedly ''efficient'' entities. One comment asserted that if AMS does not expect the proposed rule to change anything about the current state of the market nor give farmers any more protection than they currently have, the total cost to industry of this rule is effectively zero and the cost-benefit analysis in the final rule should reflect this.

AMS response: AMS believes the rule will have a meaningful impact on anti-competitive practices that may exist in the industry. Although the cost benefit

analysis in the proposed rule did not quantify projected benefits, it provided qualitative descriptions of the types of benefits expected from establishment of the proposed rule, such as improved parity of negotiating power between contracting parties with a clearer understand of what constitutes an undue or unreasonable preference or advantage under the Act.

The rule is not intended to dictate to industry the types of marketing arrangements employed. Understanding how the Secretary will evaluate allegations of violations of section 202(b) of the Act should induce packers, live poultry dealers, and swine contractors to reevaluate—and adjust if necessary—marketing agreements to make sure they comply with the law.

Even though the number and type of marketing agreements may not change because of the rule, this rule, like most rules, is expected to generate some costs. As explained in the RIA, most of the estimated costs for the final rule are associated with reviewing and, if necessary, adjusting contracts to make certain they comply with the rule.

Finally, AMS would like to distinguish operational efficiency of a firm from market efficiency. The operational efficiency of a firm improves when it can produce a good or service at a lower cost. A characteristic of market efficiency, on the other hand, is that the prices of goods or services represent unbiased indicators of their value to consumers and society, and contribute to the public benefit. The most efficient firm operations do not always lead to the most efficient markets. For example, industries in which unit costs continually decline with increased scale, such as water and electric utilities are considered natural monopolies. The firm that emerges as the monopolist in those industries will be the most operationally efficient, but if left unregulated, would be able to exploit its market power, for example by restricting output and charging a higher price. AMS believes this rule does not impede operational efficiency of the regulated firms, but does inhibit practices that could reduce market efficiency. Market efficiency, therefore, should be considered when evaluating the costs and benefits of this regulation.

AMS is making no changes to the rule or the RIA as proposed based on these comments.

Comment: One comment expressed concern with two statements in the regulatory impact analysis. The first projects that the proposed rule may lead to increased litigation costs to test case precedents regarding violations of the Act. The second states that AMS does not intend to create criteria that conflict with case precedent. The comment asked why, if the latter is true, did AMS not reduce confusion and the need for further litigation and affirmatively state the need to prove competitive harm in the regulation. Comments suggested that reinforcing the need to demonstrate injury or likely injury to competition would eliminate much of the precedent-confirming litigation that AMS anticipates flowing from the final rule, which in turn would significantly reduce the anticipated costs of the rule.

AMS response: This rule is intended to establish criteria the Secretary will consider when determining whether conduct is an undue or unreasonable preference or advantage. Whether competitive injury is required for a violation of sections 202(a) or 202(b) of the Act is beyond the narrow scope of this rule. Additionally, as explained earlier, the criteria in this rule pertain to the Secretary's evaluations of alleged misconduct and not to those of the courts. Even if AMS were to state a position on the need to show competitive harm, it would do little to limit litigation, as those opposing that position would likely challenge it in the courts. Thus, it is anticipated that litigation costs will increase initially as market participants—who choose to do so—test the provisions of the new regulation in court. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Comment: One comment questioned the claim in the RIA that the proposed rule would ''increase the amount of relevant information available to market participants and offset any potential abuse of buyer-side market power by clearly stating to all contracting parties'' the criteria for violations. The comment says it is not clear what basis AMS has to make this claim if all potential violations can be justified by cost savings, and no current customary practices across the industry will be considered a violation.

AMS response: AMS believes that establishment of the criteria in this rule will provide clearer information to market participants about how the Secretary will evaluate allegations of misconduct under section 202(b) of the Act. AMS anticipates that as producers and growers become aware of this information, they will be better able to negotiate fair contract terms with packers, contractors, and integrators considered to wield greater market power. AMS disagrees with the comment's conclusion that all potential violations can be justified by cost savings and that no currently customary practices will be considered violations. In fact, this rule gives the Secretary flexibility to consider multiple factors other than cost savings to determine whether a preference or advantage is undue or unreasonable. Removal of the ''customary in the industry'' clause from proposed criterion (d) also clarifies that the Secretary can make determinations about industry decisions and practices based on their reasonableness and not on whether they are widely adopted. AMS is making no changes to the rule as proposed based on this comment.

Miscellaneous Comments

Comment: One comment argued that the Secretary of Agriculture and those appointed by the Secretary should not act as judges in matters of law and that allegations of violations of the Act should only be tried in courts of law.

AMS response: The Act clearly establishes that the Secretary has authority to enforce administratively violations of section 202(b) against packers and swine contractors. Congress granted the Secretary authority to investigate persons subject to the Act and provided for administrative enforcement of violations. Changing these authorities is beyond the scope of this rule. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Comment: Once comment interpreted the RIA's statement that it is not the purpose of the Act to interfere with contract negotiations or to upset the traditional principles of freedom of contract to mean that the proposed rule is not expected to decrease the use of differing contracting structures, such as the incentive-based contracting arrangements often used in the poultry industry. The comment said it is crucial that the proposed rule not disrupt the existing contracting structures commonly used by the industry, and that any preferences or advantages arising from the use of these types of arrangements be evaluated first on whether they cause injury or likely injury to competition, and second based on the four criteria in the proposed rule.

AMS response: As explained in earlier comment responses, AMS does not intend the rule to promote or prohibit any particular types of contracting arrangements. This rule is intended only to establish criteria the Secretary will consider when determining if a preference or advantage is undue or unreasonable. Whether competitive injury is required to prove a violation is a concept broader than the narrow focus of this rule. Accordingly, AMS is making no changes to the rule as proposed based on the comment.

Required Impact Analyses

Executive Orders 12866, 13563, and 13771 and the Regulatory Impact Analysis

AMS is issuing this rule in conformance with Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

In the development of this rule, AMS determined to take a different approach to developing the necessary criteria than had been taken in previous rulemaking efforts. AMS determined that including the criteria as part of the framework for consideration of preferences and advantages in buyer-seller contracts would best serve the needs of the industry and fulfill the 2008 Farm Bill mandate. AMS expects the new regulation to bring transparency to considerations of potential violations of sections 202(b) of the Act and certainty to industry members forging contracts related to the buying and selling of poultry and livestock. The rule is not expected to provide any environmental, public health, or safety benefits.

This rule has been determined to be significant for the purposes of Executive Order 12866 and therefore has been reviewed by OMB. This rule has also been determined to be an Executive Order 13771 regulatory action. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

AMS is adding a new § 201.211, which provides four criteria in response to requirements of the 2008 Farm Bill for the Secretary of Agriculture to consider in determining whether a packer, swine contractor, or live poultry dealer has engaged in conduct resulting in an undue preference or advantage to any particular person or locality in any respect in violation of section 202(b) of the Act. Based on its familiarity with the industry, PSD prepared an economic analysis of new § 201.211 as part of the regulatory process. The economic analysis presents the cost-benefit analysis of implementing § 201.211. PSD then discusses the impact on small businesses.

This rule is independent of previous rulemaking. PSD reviewed certain cost projections developed in conjunction with previous rulemaking in analyzing the regulatory impact of this final rule. All costs and benefits described in this economic analysis pertain to the language in this final rule.

Regulatory Impact Analysis

The 2008 Farm Bill requires the Secretary of Agriculture to promulgate a regulation establishing criteria that the Secretary will consider in determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b) of the Act. This rulemaking fulfills that requirement.

Responsibility for establishing the required criteria was originally delegated to the Grain Inspection, Packers and Stockyards Administration (GIPSA), which subsequently merged with AMS. AMS now administers the regulations under the Act and has undertaken this rulemaking.

For this economic analysis, PSD considered the impact of three alternatives for this rule. PSD considered the impact of maintaining the status quo, the impact of adopting regulatory language that had been proposed in 2016, and the impact of adopting the language in this final rule.

PSD considered the impact of taking no further action on a previous version of § 201.211 GIPSA [12] had proposed on December 20, 2016.[13] GIPSA subsequently provided notice in the **Federal Register** on October 18, 2017,[14] that it would take no further action on the 2016 proposed rule. Taking no further action would result in no additional out-of-pocket costs to businesses in the livestock and poultry industries but that action would not fulfill the requirements of the 2008 Farm Bill.

AMS could have proposed the same regulatory language as in the 2016 proposed rule. The 2016 proposed rule contained six criteria the Secretary would consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. To determine the impact of adopting the 2016 proposed rule, PSD looked to the estimated costs of the 2016 rule as described in that rule's economic analysis, which was provided in the 2016 notice of proposed rulemaking. The total first year costs of the 2016 proposed rule were projected to be $15.37 million.

This current rulemaking represents a different approach than used in previous rulemakings and establishes an analytical framework for considering whether a violation of section 202(b) of the Act has occurred. The final rule includes new criteria to bring transparency to the determination process for the industry. PSD estimates that the total first year costs of this rule are $9.67 million.

Introduction

As required by the 2008 Farm Bill, § 201.211 specifies criteria the Secretary will consider when determining whether an undue or unreasonable preference or advantage has occurred in violation of section 202(b) of the Act. The criteria provide a framework to analyze whether a particular person or locality receives an undue or unreasonable preference or advantage as compared to other similarly situated persons or localities. AMS expects the four criteria to clarify the legal standard for the public, promote honest competition and fair dealing, and improve the negotiating position of growers and producers.

Cost-Benefit Analysis

PSD estimated the costs and benefits of the final rule assuming its publication and effectuation in May 2020. The costs and benefits of the final rule are discussed in order below.

A. Cost Estimation

PSD believes that the costs of § 201.211 would mostly consist of the direct costs of reviewing and, if necessary, re-writing marketing and production contracts to ensure that packers, swine contractors, and live poultry dealers are not providing an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower compared to other similarly situated person or localities. PSD believes some in the industry may initiate litigation to test the new regulations, resulting in additional costs.

Section 201.211 does not impose any new requirements on regulated entities, but it serves as guidance for their compliance with section 202(b) of the Act. Since the rule clarifies the Secretary's consideration of unlawful undue or unreasonable preferences or advantages, regulated entities should face less risk of violating the Act. The rule does not prohibit the use of

[12] On November 14, 2017, Secretary of Agriculture, Sonny Perdue, issued a memorandum eliminating GIPSA as a standalone agency and transferred the regulatory authority for the Act to AMS. PSD has day-to-day oversight of the Packers and Stockyards activities in AMS.

[13] **Federal Register**, Volume 81, No. 244, pages 92703–92723.

[14] **Federal Register**, Volume 82, No. 200, pages 48603–48604.

alternative marketing agreements [15] (AMAs), poultry tournament systems, or other incentive payment systems, and is not expected to decrease economic efficiencies in the cattle, hog, and poultry industries. Additionally, PSD does not expect this rule to inhibit the ability of regulated entities and producers and growers to develop and enter into mutually advantageous contracts.

To estimate costs, PSD divided costs into two major categories, direct and indirect costs. In addition, PSD expects there are two direct costs: administrative costs and litigation costs.

With respect to direct costs, administrative costs for regulated entities would include items such as review of marketing and production contracts, additional record keeping,[16] and all other associated administrative office work to demonstrate that they do not provide an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower compared to other similarly situated person or localities.

Litigation costs for the livestock and poultry industries will initially increase until there is a body of case law interpreting the regulations. Once the courts establish precedent, PSD expects additional litigation to decline.

With respect to indirect costs, those costs include costs caused by changes in supply and/or demand and any resulting efficiency losses in the national markets for beef, pork, and chicken and the related input markets for cattle, hogs, and poultry resulting from the direct costs of the rule.

1. Direct Costs—Administrative Costs

To estimate administrative costs of the rule, PSD relied on its experience reviewing contracts and other business records commonly maintained in the livestock and poultry industries for compliance with the Act and regulations. PSD has data on the number of production contracts between swine production contract growers and swine contractors and poultry growers and live poultry dealers. PSD estimated the number of cattle marketing contracts between producers and packers based on the number of feedlots and the percentage of livestock procured under AMAs. PSD then multiplied hourly estimates of the administrative functions of reviewing and revising contracts by average hourly labor costs for administrative, management, and legal personnel to arrive at the total estimated administrative costs. PSD measured all costs in constant 2016 dollars in accordance with guidance on complying with E.O. 13771.[17]

Since packers, swine contractors, and live poultry dealers will likely choose to review their contracts as a precautionary measure to ensure that they are not engaging in conduct or action that in any way gives an undue or unreasonable preference or advantage to any livestock producer, swine production contract grower, or poultry grower, PSD estimates that the regulated entities will review each contract or each contract type once and will renegotiate any contracts that contain language that could be considered a violation of section 202(b) of the Act.

One may view this estimate as an upper bound to the direct cost of the rule, as not every packer, swine contractor, or live poultry dealer will choose to conduct such a review. Some may choose to ''wait and see'' what effect, if any, the rule has on the industry, and whether courts rule on it in any way that would warrant such a review of their contracts.

Based on PSD's experience, it developed estimates for regulated entities of the number of hours for attorneys and company managers to review and revise marketing and production contracts and for administrative staff to make changes, copy, and obtain signed copies of the contracts. For poultry contracts, PSD estimates that each unique contract type would require one hour of attorney time to review and rewrite a contract, two hours of company management time, and for each individual contract, one hour of administrative time, and one hour of additional record keeping time.[18] PSD estimates that each of the 93 live poultry dealers who report to PSD rely on 10 unique contract types on average. PSD data indicates that there are 24,101 individual poultry growing contracts. PSD estimates that each of the 237 hog packers has 10 marketing agreements. The 2017 Census of Agriculture (Ag. Census) [19] indicates that the universe of swine production contracts in the U.S. is 8,557. For hog production and marketing contracts, PSD estimates that each production contract and marketing agreement would require one-half hour of attorney time to review and rewrite a contract, one hour of company management time, one hour of administrative time, and one hour of additional record keeping time. For cattle processors, PSD estimates that each of the estimated 1,099 marketing agreements would require one hour of attorney time to review and rewrite a contract, two hours of company management time, one hour of administrative time, and one hour of additional record keeping time.[20]

PSD multiplied estimated hours to conduct these administrative tasks by the average hourly wages for managers at $62/hour, attorneys at $84/hour, and administrative assistants at $36/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for regulated entities.[21]

PSD recognizes that contract review costs will also be borne by livestock producers, swine production contract growers, and poultry growers. PSD estimates that each livestock producer, swine production contract grower, and poultry grower will, in its due course of business, spend one hour of time reviewing a contract or marketing agreement and will spend one-half hour of its attorney's time to review the contract. As with the regulated entities, one may view this estimate as an upper bound to the direct cost of the rule, as not every producer or grower will choose to conduct such a review. Some may choose to ''wait and see'' what effect, if any, the rule has on the industry, and whether courts rule on it in any way that would warrant such a review of their contracts.

[15] AMAs are marketing contracts, where producers market their livestock to a packer under a verbal or written agreement. Pricing mechanisms vary across AMAs. Some rely on a spot market for at least one aspect of their prices, while others involve complicated pricing formulas with premiums and discounts based on carcass merits. The livestock seller and packer agree on a pricing mechanism under AMAs, but usually not on a specific price.

[16] There are no additional mandatory record keeping requirements in the final rule. PSD expects that regulated entities may opt to keep additional records to justify advantages or preferences to demonstrate compliance with the final rule in case of a PSD investigation or private litigation action.

[17] *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf*

[18] Again, there are no additional mandatory record keeping requirements in the final rule.

[19] *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[20] Ibid.

[21] All salary costs are based on mean annual salaries for May 2018, adjusted for benefit costs, set to an hourly basis, and converted in to constant 2016 dollars. *http://www.bls.gov/oes/.* Accessed on April 9, 2019.

PSD multiplied one hour of livestock producer, swine production contract grower, and poultry grower management time and one-half hour of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at $84/hour and managers at $62/hour as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. PSD then applied this cost to the estimated 1,099 cattle marketing contracts, 2,370 hog marketing contracts, 8,557 hog production contracts, and 24,101 poultry growing contracts that have been reported to PSD.

After determining the administrative costs to both the regulated entities and those they contract with, PSD added the administrative costs of the regulated entities and the livestock producers, swine production contract growers, and poultry growers together to arrive at the first-year total estimated administrative costs attributable to the regulation. A summary of the first-year total estimated administrative costs for § 201.211 appear in the following table:

TABLE 1—FIRST-YEAR ADMINISTRATIVE COSTS

Regulation	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
201.211	$0.42	$3.05	$4.42	$7.89

The first-year total administrative costs are $7.89 million for § 201.211, and include costs for cattle, hogs, and poultry because packers, swine contractors, live poultry dealers, livestock producers, swine production contract growers, and poultry growers would conduct administrative functions of contract review and record keeping in response to the regulation. The administrative costs are the highest for poultry, followed by hogs and cattle. This is due to the greater prevalence of contract growing arrangements in the poultry industry.

Based on comments received to the proposed rule, AMS abbreviated criterion (d) in the final rule by removing the ''customary in the industry'' clause from proposed criterion. Since all contracts will likely be reviewed in their entirety for potential violations of the Packers and Stockyards Act, AMS does not expect the removal of this clause to appreciably reduce the amount of time for the administrative functions of contract review and additional record keeping. Thus, AMS expects the costs in the final rule to be unchanged from the proposed rule.

2. Direct Costs—Litigation Costs

In considering the costs of the rules it proposed in 2016, GIPSA performed an in-depth analysis of litigation costs expected as a result of the package of four proposed new regulations.[22] GIPSA estimated the total costs of litigating a case alleging violations of the Act. The main costs are attorney fees to litigate a case in a court of law. The cost of litigating a case includes the costs to all parties including the respondent and the USDA in a case brought by the USDA and the costs of the plaintiff and the defendant in the case of private litigation.

To estimate litigation costs for the 2016 proposed rules, GIPSA examined the actual cases decided under the Act from 1926 to 2014 as reported by the National Agricultural Law Center at the University of Arkansas.[23] The litigation costs estimated in the 2016 proposed rules are measured in constant 2016 dollars and are for regulated entities, producers, and growers. The 2016 analysis of litigation costs estimated that the interim final rule at § 201.3(a) was the primary source of litigation costs and that the litigation costs for all four proposed rules were counted under § 201.3(a).[24] The 2016 analysis split out the estimated litigation costs between sections 202(a) and 202(b).

The National Agricultural Law Center at the University of Arkansas has not reported any additional cases decided under the P&S Act since 2015. Since new § 201.211 establishes criteria for violations of section 202(b) and there has not been any recent litigation reported by the National Agricultural Law Center at the University of Arkansas, PSD used the estimated litigation costs associated with section 202(b) from the 2016 proposed rules as the starting point for this analysis.

The section 202(b) estimated litigation costs serve as an upper boundary of estimated costs since the estimates assumed that § 201.3(a) and § 201.211 would both be promulgated. PSD estimates that there would be additional litigation when § 201.211 becomes effective, even in the absence of § 201.3(a). Therefore, PSD uses the following section 202(b) litigation costs estimates in Table 14 from the 2016 proposed rule as the estimated first-year litigation costs assuming the rule becomes effective in May 2020.[25]

[22] The four proposed rules were published on December 20, 2016, in Volume 81, No. 244 of the **Federal Register**.

[23] *http://nationalaglawcenter.org/aglaw-reporter/case-law-index/packers-and-stockyards.*

[24] The USDA withdrew Section 201.3(a) on October 18, 2017, in Volume 82, No. 200 of the **Federal Register**.

[25] **Federal Register**, Volume 81, No. 244, page 92580.

TABLE 2—PROJECTED FIRST-YEAR LITIGATION COSTS

Section 202(b) of the act	Cattle ($ millions)	Hog ($ millions)	Poultry ($ millions)	Total ($ millions)
Total	$0.24	$0.04	$1.49	$1.77

PSD expects § 201.211 will result in an additional $1.77 million in litigation costs in the first full year after the rule becomes effective. Using the number of complaints PSD has received from industry participants as an indicator, PSD estimates that the majority of the litigation will be in the poultry industry. Most of the complaints concerning undue or unreasonable preferences that PSD has received since 2009 have come from the poultry industry.

3. Total Direct Costs

The total first-year direct costs of § 201.211 are the sum of administrative and litigation costs from above and are summarized in the following table.

TABLE 3—FIRST YEAR DIRECT COSTS [26]

Cost type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	$0.42	$3.05	$4.42	$7.89
Litigation Costs	0.24	0.04	1.49	1.77
Total Direct Costs	0.66	3.09	5.91	9.67

PSD estimates the total direct costs of § 201.211 to be $9.67 million. As the above table shows, the costs are highest for the poultry industry, followed by the hog and cattle industries. The primary reason is the high utilization of growing contracts and the corresponding higher estimated administrative costs in the poultry industry. To put this direct cost in perspective, the actual impact on retail prices from these direct costs would be less than one one-hundredth of a cent.

4. Indirect Costs

PSD estimates that the indirect costs of § 201.211 on the cattle, hog, and poultry industries are near zero. For the purposes of this analysis, indirect costs are social welfare losses due to any potential price and output changes from the direct costs of the rule and are in addition to the direct costs (administrative and litigation costs) on regulated entities, producers, and growers who are directly impacted by the rule. The economy will experience indirect costs, for example, if the rule causes packers and live poultry dealers to reduce production, increasing the price of meat products and reducing the amount of meat consumed by consumers.

As previously discussed, the regulation clarifies the Secretary's consideration of whether a conduct or action constitutes an undue or unreasonable preference or advantage. PSD does not expect, therefore, that § 201.211 will result in a decreased use of AMAs, use of poultry grower ranking systems or other incentive pay, reduced capital formation, inhibit development of new contracts, or decreased economic efficiencies in the livestock, meat, and poultry industries. Accordingly, PSD does not project indirect costs resulting from decreased use of AMAs, reduced capital, efficiency losses, or lost consumer and producer surplus. Indirect costs that could theoretically be anticipated are due to shifts in industry demand and supply curves resulting from the increases in industry direct costs attributable to the final rule. These shifts may result in quantity and price changes in the retail markets for beef, pork, and poultry, and the related input markets for cattle, hogs, and poultry. However, litigation costs are unrelated to the quantity of production—in other words, they are not marginal costs—so it is not appropriate to include them in the amount of a supply curve shift. Contract reviews and revisions are somewhat related to production quantity, but even they are less than fully compelling as a component of marginal cost. Litigation and administrative costs, however, are part of fixed costs of regulated entities. If the increase in fixed costs is significant enough, it could lead some firms to exit the industry in the long run. These nuances are not reflected in the assessment that follows, and thus it should be interpreted as a bounding exercise.

To calculate an upper bound on this type of indirect costs based on supply curves shifting, PSD modeled the impact of the increase in direct costs of implementing § 201.211 in a Marketing Margins Model (MMM) framework.[27] The MMM allows for the estimation of changes in consumer and producer prices and quantities produced caused by changes in supply and demand in the retail markets for beef, pork, and poultry and the input markets for cattle, hogs, and poultry.

PSD modeled—again, as a bounding exercise—the indirect costs as an inward (or upward) shift in the supply curves for beef, pork, and poultry. This has the effect of increasing the equilibrium prices and reducing the equilibrium quantity produced. This also has the effect of reducing the derived demand for cattle, hogs, and poultry, which causes a reduction in the equilibrium prices and quantity produced. Economic theory suggests that these shifts in the supply curves and derived demand curves will result in price and quantity impacts and potential dead weight losses to society.[28]

To estimate the output and input supply and demand curves for the MMM, PSD constructed linear supply and demand curves around equilibrium price and quantity points using price elasticities of supply and demand from the GIPSA Livestock Meat and Marketing Study and from USDA's

[26] The detail in this table and other tables in this analysis may not add to the totals due to rounding.

[27] The framework is explained in detail in Tomek, W.G. and K.L. Robinson ''Agricultural Product Prices,'' third edition, 1990, Cornell University Press.

[28] A dead weight loss is the cost to society of an inefficient allocation of resources in a market. Causes of deadweight losses can include market failures, such as market power or externalities, or an intervention by a non-market force, such as government regulation or taxation.

Economic Research Service.[29] With the supply curves established from this data, PSD then shifted the supply curves for beef, pork, and chicken up by the amount of the increase in direct costs for each industry. PSD calculated the new equilibrium prices and quantities in the input markets resulting from the decreases in derived demand that result from higher direct costs. This allows for the calculation of the indirect cost from the lower relative quantity produced at the relatively higher price when the industry's direct costs increase.

The calculation of an upper bound on the price impacts from the increases in direct costs from § 201.211 resulted in price increases of less than one one-hundredth of a cent per pound in retail prices for beef, pork, and poultry. This is because the increase in direct costs is very small in relation to total industry costs.[30] The result is that the price and quantity effects from the increases in direct costs are indistinguishable from zero and, therefore, PSD concludes that the indirect costs of § 201.211 for each industry are also zero.

5. Total Costs

PSD added all direct costs to the indirect costs (near zero), to arrive at the estimated total first-year costs of § 201.211. The total first-year costs are summarized in Table 4.

TABLE 4—TOTAL FIRST YEAR COSTS

Cost type	Cattle ($ millions)	Hogs ($ millions)	Poultry ($ millions)	Total ($ millions)
Admin Costs	$0.42	$3.05	$4.42	$7.89
Litigation Costs	0.24	0.04	1.49	1.77
Total Direct Costs	0.66	3.09	5.91	9.67
Total Indirect Costs	0.00	0.00	0.00	0.00
Total Costs	0.66	3.09	5.91	9.67

PSD estimates that the total costs will be $9.67 million in the first year of implementation.

6. Ten-Year Total Costs

To arrive at the estimated ten-year administrative costs of § 201.211, PSD estimates that in each of the first five years, 20 percent of all contracts will either expire and need to be renewed each year or new marketing and production contracts will be put in place each year. While PSD expects the costs of reviewing and revising, if necessary, each contract will remain constant in the first five years, it expects the administrative costs will be lower after the first year because the direct administrative costs of reviewing and revising contracts would only apply to the 20 percent of expiring contracts or new contracts. PSD estimates that in the second five years, the direct administrative costs of reviewing and revising contracts will decrease by 50 percent per year as the contracts would already reflect language modifications, if any, necessitated by implementation of the regulation. PSD estimates that after ten years, the direct administrative costs will return to where they would have been absent the rule, and the additional administrative costs associated with the rule will remain at $0 after ten years.

In estimating the estimated ten-year litigation costs of § 201.211, PSD expects the litigation costs to be constant for the first five years while courts are setting precedents for the interpretation of § 201.211. PSD expects that case law with respect to the regulation would be settled after five years and by then, industry participants will know how PSD would enforce the regulation and how courts would interpret the regulation. The effect of courts establishing precedents is that litigation costs would decline after five years as the livestock and poultry industries understand how the courts interpret the regulation.

To arrive at the estimated ten-year litigation costs of § 201.211, PSD estimates that litigation costs for the first five years will occur at the same rate and at the same cost as in the first full year of the rule ending in May 2021. In the sixth through tenth years, PSD estimates that additional litigation costs will decrease each year and return to where they would have been absent the rule in the tenth year after the rule is effective and remain at $0 after 10 years. PSD estimates this decrease in litigation costs to be linear, with the same decrease in costs each year.

The ten-year total costs of § 201.211 appear in the table below.[31]

TABLE 5—TEN-YEAR TOTAL COSTS—YEARS ENDED MAY [32]

Year	Administrative ($ millions)	Litigation ($ millions)	Total direct ($ millions)
2021	$7.89	$1.77	$9.67
2022	1.58	1.77	3.35
2023	1.58	1.77	3.35
2024	1.58	1.77	3.35
2025	1.58	1.77	3.35
2026	0.79	1.48	2.27
2027	0.39	1.18	1.58
2028	0.20	0.89	1.08
2029	0.10	0.59	0.69

[29] RTI International ''GIPSA Livestock Meat and Marketing Study'' prepared for Grain Inspection, Packers and Stockyards Administration, 2007. ERS Price Elasticities: *http://www.ers.usda.gov/data-products/commodity-and-food-elasticities/demand-elasticities-from-literature.aspx.*

[30] The $9.67 million increase in total industry costs from § 201.211 is only 0.0043 percent of direct industry costs of approximately $223 billion for the beef, pork, and poultry industries.

[31] As discussed above, PSD expects total administrative and litigation costs to return to where they would have been absent the rule and the additional costs associated with the rule will remain at $0 after ten years.

TABLE 5—TEN-YEAR TOTAL COSTS—YEARS ENDED MAY [32]—Continued

Year	Administrative ($ millions)	Litigation ($ millions)	Total direct ($ millions)
2030	0.05	0.30	0.35
Totals	15.74	13.31	29.05

Based on the analysis, PSD expects the ten-year total costs will be $29.05 million.

7. Present Value of Ten-Year Total Costs

The total costs of § 201.211 in the table above show that the costs are highest in the first year, decline to a constant and significantly lower level over the next four years, and then gradually decrease again over the subsequent five years. Costs to be incurred in the future are less expensive than the same costs to be incurred today. This is because the money that would be used to pay the costs in the future could be invested today and earn interest until the time period in which the costs are incurred.

To account for the time value of money, the costs of the regulation to be incurred in the future are discounted back to today's dollars using a discount rate. The sum of all costs discounted back to the present is called the present value (PV) of total costs. PSD relied on both a 3 percent and 7 percent discount rate as discussed in Circular A–4.[33] PSD measured all costs using constant 2016 dollars.

PSD calculated the PV of the ten-year total costs of the regulation using both a 3 percent and 7 percent discount rate and the PVs appear in the following table.

TABLE 6—PV OF TEN-YEAR TOTAL COSTS

Discount rate (percent)	($ millions)
3	$26.31
7	23.33

PSD expects the PV of the ten-year total costs would be $26.31 million at a 3 percent discount rate and $23.33 million at a 7 percent discount rate.

8. Annualized Costs

PSD annualized the PV of the ten-year total costs (referred to as annualized costs) of § 201.211 using both a 3 percent and 7 percent discount rate as required by Circular A–4 and the results appear in the following table.[34]

TABLE 7—TEN-YEAR ANNUALIZED COSTS

Discount rate (percent)	($ millions)
3	$3.08
7	3.32

PSD expects the annualized costs of § 201.211 would be $3.08 million at a 3 percent discount rate and $3.32 million at a 7 percent discount rate.

PSD also annualized the PV of the ten-year total costs into perpetuity of § 201.211 using both a 3 percent and 7 percent discount rate following the guidance on complying with E.O. 13771. The results appear in the following table.[35]

TABLE 8—ANNUALIZED COSTS INTO PERPETUITY

Discount rate (percent)	($ millions)
3	$0.69
7	1.21

PSD expects the costs of § 201.211 annualized into perpetuity would be $0.69 million at a 3 percent discount rate and $1.21 million at a 7 percent discount rate. Based on the costs in Table 8, and in accordance with guidance on complying with E.O. 13771, the single primary estimate of the costs of this final rule is $1.21 million, the total costs annualized in perpetuity using a 7 percent discount rate.

B. Benefits

PSD was unable to quantify the benefits of § 201.211. However, the rule contains several provisions that PSD expects to improve economic efficiencies in the regulated markets for cattle, hogs, and poultry and reduce market failures. Regulations that increase the amount of relevant information available to market participants, protect private property rights, and foster competition can improve economic efficiencies and generate benefits for consumers and producers.

Section 201.211 will increase the amount of relevant information available to market participants and offset any potential abuse of buyer-side market power by clearly stating to all contracting parties the criteria that the Secretary will consider in determining whether conduct or action constitutes an undue or unreasonable preference or advantage in violation of section 202(b) of the Act.

The regulation will also reduce the risk of violating section 202(b) because it clarifies the criteria the Secretary will consider in determining whether the conduct or action in the livestock and poultry industries constitutes an undue or unreasonable preference or advantage and a violation of section 202(b) of the Act. Other benefits of clarifying the criteria may include reducing litigation risk; decreasing contracting costs; promoting competitiveness and fairness in contracting; and providing protections for livestock producers, swine production contract growers, and poultry growers.

Benefits to the livestock and poultry industries and the cattle, hog, and poultry markets also arise from improving parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers. The improvement in parity comes when contracting parties negotiate new contracts and when they review and renegotiate any existing contract terms that contain language that could be considered a violation of section 202(b) of the Act.

Since the regulation increases the amount of relevant information by clarifying what might be considered an undue or unreasonable preference, it increases parity in negotiating contracts, and thereby reduces the ability to abuse buyer-side market power with the

[32] PSD uses May 2021 as the end of the first year after the rule is in effect for analytical purposes only. The date the rule becomes final was not known at the time of the analysis.

[33] *https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.*

[34] Ibid.

[35] *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf.*

resulting welfare losses.[36] Establishing parity of negotiating power in contracts promotes fairness and equity and is consistent with PSD's mission to protect fair trade practices, financial integrity, and competitive markets for livestock, meats, and poultry.[37]

C. Cost-Benefit Summary

PSD expects the ten-year annualized costs of § 201.211 to be $3.08 million at a 3 percent discount rate and $3.32 million at a 7 percent discount rate and the costs annualized into perpetuity to be $0.69 million at a 3 percent discount rate and $1.21 million at a 7 percent discount rate. PSD expects the costs will be highest for the poultry industry due to its extensive use of poultry growing contracts, followed by the hog industry and the cattle industry, respectively.

PSD was unable to quantify the benefits of the new regulation, but they explained numerous qualitative benefits that would protect livestock producers, swine production contract growers, and poultry growers; promote fairness and equity in contracting; increase economic efficiencies; and reduce the negative effects of market failures throughout the entire livestock and poultry value chain. The primary benefit of § 201.211 is expected to be reduced occurrences of undue or unreasonable preferences or advantages and increased economic efficiencies in the marketplace. This benefit of additional enforcement of the Act accrues to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers.

Regulatory Flexibility Analysis

The Small Business Administration (SBA) defines small businesses by their North American Industry Classification System Codes (NAICS).[38] SBA considers broiler and turkey producers/growers and swine contractors, NAICS codes 112320, 112330, and 112210 respectively, to be small businesses if sales are less than $1,000,000 per year. Cattle feeders are considered small if they have less than $8 million in sales per year. Beef and pork packers, NAICS 311611, are small businesses if they have fewer than 1,000 employees.

The Packers and Stockyards Act regulates live poultry dealers, which is a group similar but not identical to the NAICS category for poultry processors. Poultry processors, NAICS 311611, are considered small business if they have fewer than 1,250 employees. PSD applied SBA's definition for small poultry processors to live poultry dealers as the best standard available, and it considers live poultry dealers with fewer than 1,250 employees to be small businesses.

PSD maintains data on live poultry dealers from the annual reports these firms file with PSD. Currently, 93 live poultry dealers would be subject to the new regulation. Seventy-Four of the live poultry dealers would be small businesses according to the SBA standard. Although there were many more small businesses than large, small businesses produced only about 6.5 percent of the poultry in the United States in 2017.

Live poultry dealers classified as large businesses are responsible for about 93.5 percent of the poultry contracts. Assuming that small businesses would bear 6.5 percent of the costs, in the first year the regulation is effective, $222,687[39] would fall on live poultry dealers classified as small businesses. This amounts to average estimated costs for each small live poultry dealer of $3,009.

As of February 2019, PSD records identified 381 beef and pork packers actively purchasing cattle or hogs for slaughter. Many firms slaughtered more than one species of livestock. Of the 381 beef and pork packers, 172 processed both cattle and hogs, 144 processed cattle but not hogs, and 65 processed hogs but not cattle.

PSD estimates that small businesses accounted for 23.1 percent of the cattle and 19.2 percent of the hogs slaughtered in 2017. If the costs of implementing § 201.211 are proportional to the number of head processed, then in the first full year the regulation is effective, PSD estimates that $126,501[40] in additional costs would fall on beef packers classified as small businesses. This amounts to estimated costs of $407 for each small beef packer.

In total, $81,603[41] in additional first-year costs would be expected to fall on pork packers classified as small businesses, and $30,863[42] would fall on swine contractors classified as small businesses. This amounts to average estimated costs for each small pork packer of $356, and average estimated costs for each small swine contractor of $286 in the first year the regulation is effective. To the extent that smaller beef and pork packers rely on AMA purchases less than large packers, the estimates might tend to overstate costs.

PSD then annualized the present value of ten-year total costs of the proposed rule on regulated entities, multiplied by the percent of small business. Ten-year annualized costs discounted at a 3 percent rate would be $61,097 for the cattle and beef industry, $32,463 for the hog and pork industry, and $119,271 for the poultry industry. This amounts to annualized costs of $196 for each beef packer, $103 for each pork packer, $82 for each swine contractor, and $1,612 for each live poultry dealer that is a small business. The total annualized costs for regulated small businesses would be $212,830.

Ten-year annualized costs at a 7 percent discount rate would be $64,458 for the regulated cattle and beef industry, $35,416 for the regulated hog and pork industry, and $125,696 for the poultry industry. This amounts to ten-year annualized costs of $207 for each beef packer, $112 for each pork packer, $90 for each swine contractor, and $1,699 for each live poultry dealer that is a small business. The total ten-year annualized costs at 7 percent for regulated small businesses would be $225,570.

The table below lists the estimated additional costs associated with the regulation in the first year. It also lists annualized costs discounted at 3 percent and 7 percent discount rates, and annualized PV of costs extended into perpetuity discounted at 3 and 7 percent.

[36] Nigel Key and Jim M. MacDonald discuss evidence for the effect of concentration on grower compensation in ''Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey'' selected paper American Agri. Economics Assn. meeting Orlando, Florida, July 27–29, 2008.

[37] See additional discussion in Steven Y. Wu and James MacDonald (2015) ''Economics of Agricultural Contract Grower Protection Legislation,'' *Choices* 30(3): 1–6.

[38] U.S. Small Business Administration. *Table of Small Business Size Standards Matched to North American Industry Classification System Codes. Effective August 19, 2019. https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.*

[39] Estimated cost to live poultry dealers of $3,412,301 × 6.52 percent of firms that are small businesses = $222,687.

[40] Estimated cost to beef packers of $547,643 × 23.1 percent of firms that are small businesses = $126,501.

[41] Estimated cost to hogs and pork of $1,959,550 × 19.2 percent of slaughter in small businesses × 21.7 percent of costs attributed to packers = $81,603.

[42] Estimated cost to hogs and pork of $1,959,550 × 2.01 percent of contracted hogs produced by swine contractors that are small businesses × 78.3 percent of costs attributed to contractors = $30,863.

TABLE 9—ESTIMATED INDUSTRY TOTAL COSTS TO REGULATED SMALL BUSINESSES

Estimate type	Beef packers ($)	Pork packers and swine contractors ($)	Poultry processors ($)	Total ($)
First-Year Costs	$126,501	$112,466	$222,687	$461,653
10 years Annualized at 3%	61,097	32,463	119,271	212,830
10 years Annualized at 7%	64,458	35,416	125,696	225,570
Annualized Total Cost into Perpetuity Discounted at 3%	13,720	7,290	26,784	47,794
Annualized Total Cost into Perpetuity Discounted at 7%	23,492	12,907	45,810	82,209

In considering the impact on small businesses, PSD considered the average costs and revenues of each regulated small business impacted by § 201.211. The number of small businesses impacted, by NAICS code, as well as the costs per entity in the first-year, ten-year annualized costs per entity at both the 3 percent and 7 percent discount rates, and annualized PV of the total costs extended into perpetuity discounted at 3 and 7 percent appear in the following table.

TABLE 10—PER ENTITY COSTS TO REGULATED SMALL BUSINESSES

NAICS	Number of small businesses	First year ($)	Ten-year annualized costs-3% ($)	Ten-year annualized costs-7% ($)	Perpetuity 3% ($)	Perpetuity 7% ($)
112210—Swine Contractor	108	$286	$82	$90	$19	$33
311615—Poultry Processor	74	3,009	1,612	1,699	362	619
311611—Beef Packer	311	407	196	207	44	76
311611—Pork Packer	229	356	103	112	23	41

The following table compares the average per entity first-year and annualized costs of § 201.211 to the average revenue per establishment for all regulated small businesses in the same NAICS code. The annualized costs are slightly higher at the 7 percent rate than at the 3 percent rate, so only the 7 percent rate is included in the table as the more conservative estimate.

TABLE 11—COMPARISON OF PER ENTITY COST TO REVENUES FOR REGULATED SMALL BUSINESSES

NAICS	Average revenue per establishment ($)	First-year cost as percentage of revenue	Ten-year annualized cost as percentage of revenue	Annualized cost to perpetuity as percentage of revenue
112210—Swine Contractor	$485,860	$0.06	$0.02	$0.007
311615—Poultry Processor	13,842,548	0.02	0.01	0.004
311611—Beef Packer	6,882,205	0.01	0.00	0.001
311611—Pork Packer	6,882,205	0.01	0.00	0.001

The revenue figures in the above table come from U.S. Census data for live poultry dealers and cattle and hog slaughterers, NAICS codes 311615 and 311611, respectively.[43] Ag. Census data have the number of head sold by size classes for farms that sold their own hogs and pigs in 2017 and that identified themselves as contractors or integrators, but not the value of sales nor the number of head sold from the farms of the contracted production. To estimate average revenue per establishment, PSD used the estimated average value per head for sales of all swine operations and the production values for firms in the Ag. Census size classes for swine contractors. The results in Table 11 demonstrate, the costs of § 201.211 as a percent of revenue are less than 1 percent.[44]

Although the Packers and Stockyards Act does not regulate livestock producers or poultry growers, PSD recognizes that they will also incur contract review costs. PSD estimates that each livestock producer and poultry grower will, in its due course of business, spend one hour of time reviewing a contract or marketing agreement and will spend one-half hour of its attorney's time to review the contract. As with the regulated entities, one may view this estimate as an upper bound to the direct cost of the rule, as not every producer or grower will choose to conduct such a review. Some may choose to ''wait and see'' what effect, if any, the rule has on the industry, and whether courts rule on it in any way that would warrant such a review of their contracts.

[43] *https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US.*

[44] There are significant differences in average revenues between swine contractors and cattle, hog, and poultry processors, resulting from the difference in SBA thresholds.

PSD multiplied one hour of livestock producer, swine production contract grower, and poultry grower management time and one-half hour of attorney time to conduct the marketing and production contract review by the average hourly wages for attorneys at $84/hour and managers at $62/hour, as reported by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics, to arrive at its estimate of contract review costs for livestock producers, swine contract growers, and poultry growers. The result is that each small livestock producer and each small poultry that sells livestock or raises poultry on a contract is expected to bear $104 in first year costs, $23 in ten-year annualized costs discounted at 3 percent, $25 in ten-year annualized costs discounted at 7 percent, and $9 discounted into perpetuity at 7 percent. Table 12 lists expected costs to livestock producers and poultry growers that are small businesses.

TABLE 12—TOTAL COSTS TO UNREGULATED SMALL BUSINESSES

Estimate type	Cattle feeders ($)	Hog producers ($)	Poultry growers ($)	Total ($)
First-Year Costs	$111,866	$459,707	$2,501,106	$3,072,679
10 years Annualized at 3%	24,274	99,754	542,727	666,755
10 years Annualized at 7%	26,917	110,614	601,812	739,342
Annualized Total Cost into Perpetuity Discounted at 3%	$5,451	$22,401	$121,876	$149,728
Annualized Total Cost into Perpetuity Discounted at 7%	9,810	40,313	219,329	269,452

The Ag. Census indicates there were 575 farms that sold hogs or pigs in 2017 and identified themselves as contractors or integrators. About 19 percent of swine contractors had sales of less than $1,000,000 in 2017 and would have been classified as small businesses. These small businesses accounted for only 2 percent of the hogs produced under production contracts.

Additionally, there were 8,557 swine producers in 2017 with swine contracts, and about 41 percent of these producers would have been classified as small businesses. PSD estimated an additional 2,370 pork producers had marketing agreements with pork packers. If 41 percent are small businesses, then 4,480 hog producers could incur contract review costs. PSD estimated as many as 1,099 cattle feeders had marketing agreements or contracts that could need adjustment due to the new rule. If 98 percent are small businesses, 1,078 could bear costs of reviewing contracts. Table 13 compares cost to revenues for producer unregulated producers that are small businesses.

PSD records indicated poultry processors had 24,101 poultry production contracts in effect in 2017. The 24,101 poultry growers holding the other end of the contracts are almost all small businesses by SBA's definitions.

TABLE 13—COMPARISON OF TOTAL COST TO REVENUES FOR UNREGULATED SMALL BUSINESSES

NAICS	Number of small businesses	Average revenue ($)	First-year cost as percentage of revenue	Ten-year annualized cost as percentage of revenue	Annualized cost to perpetuity as percentage of revenue
112212—Cattle Feeders	1,078	$305,229	0.03	0.01	0.003
112210—Hog Producers	4,480	333,607	0.03	0.01	0.003
112320—Poultry Growers	24,101	181,545	0.06	0.01	0.005

Ten-year annualized cost savings of exempting small businesses would be $212,830 using a 3 percent discount rate and $225,570 using a 7 percent discount rate. The cost savings annualized into perpetuity of exempting small businesses would be $47,794 using a 3 percent discount rate and $82,209 using a 7 percent discount rate. However, one purpose of § 201.211 is to protect all livestock producers, swine production contract growers, and poultry growers from unfair and unreasonable preferences or advantages, regardless of whether the producer or grower and the packer, swine contractor, or live poultry dealer to which they sell or contract is a large or small business. PSD believes that the benefits of § 201.211 will be captured by all livestock producers, swine production contract growers, and poultry growers. For this reason, AMS did not consider exempting small business from this final rule.

The number of regulated entities that could experience a cost increase is substantial. Most regulated packers and live poultry dealers are small businesses. However, the expected cost increases for each entity are not significant. For all four groups of regulated entities—beef packers, pork packers, live poultry dealers, and swine contractors—average first year costs are expected to amount to less than one tenth of one percent of annual revenue. Ten-year annualized costs discounted at 7 percent are highest for swine contractors at two one hundredths of one percent of revenue. Annualized expected costs of $90 and $112 for swine contractors and pork packers, respectively, are near the cost of one hog. An annualized expected cost of $207 for beef packers is much less than the cost of one fed steer. Expected costs for live poultry dealers are higher, but as a percent of revenue, expected costs to live poultry dealers are very low. AMS expects that the additional costs to small packers, live poultry dealers, and swine contractors will not change their ability to continue operations or place any of them at a competitive disadvantage.

The number of unregulated entities that could experience a cost increase is also substantial. Most affected livestock producers and poultry growers are small businesses. Again, expected costs for individual entities are not significant. The expected first year cost for each unregulated livestock producer or poultry grower is $104. Annualized expected 10-year costs discounted at 3

percent are $23. Costs as a percent of revenue are expected to be well below 1 percent. AMS expects that $23 per year will not change any producer's or poultry grower's ability to continue operations or place any livestock producer or poultry grower at a competitive disadvantage.

As discussed in the Regulatory Impact Analysis, AMS does not expect welfare transfers among market segments or within segments. Estimated changes in prices and quantities are indistinguishable from zero. AMS does not expect § 201.211 to cause changes in production or marketing for small businesses, and the increase in direct costs is very small in relation to total costs.

Comments on the Regulatory Flexibility Analysis

In the proposed rule, AMS solicited public comment on whether § 201.211 as proposed would have a significant economic impact on a substantial number of small business entities. None of the public comments specifically addressed the Regulatory Flexibility Analysis in the proposed rule. However, several comments were submitted by small farmers who said they find it increasingly difficult to compete in the consolidated livestock and poultry industries. Many comments expected the proposed rule, particularly proposed criterion (d), to legitimize what they characterized as unfair, but customary, business arrangements in which they feel powerless to affect more favorable contract terms for themselves.

In response to comments, AMS revised the language of criterion (d) to provide that the Secretary can determine whether a preference or advantage is undue or unreasonable and a violation of the Act by considering whether the action is the result of a reasonable business decision. AMS removed the proposed language that examined whether the action was also customary in the industry, thus addressing some of the concerns expressed by comments. AMS does not expect revision of criterion (d) to impact the conclusions of this analysis.

Based on the above analyses and the comments received, AMS does not expect § 201.211 to have a significant economic impact on a substantial number of small business entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Civil Rights Review

AMS has considered the potential civil rights implications of this rule on members of protected groups to ensure that no person or group would be adversely or disproportionately at risk or discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This rule does not contain any requirements related to eligibility, benefits, or services that would have the purpose or effect of excluding, limiting, or otherwise disadvantaging any individual, group, or class of persons on one or more prohibited bases. AMS has developed an outreach program to ensure information about the regulation is made available to socially and economically disadvantaged or limited resource farmers, producers, growers, and members of racial and ethnic minority groups.

In its review, AMS conducted a disparate impact analysis, using the required calculations, which resulted in a finding that Asian Americans, Pacific Islanders, and Native Hawaiians met the condition for adverse impacts. The regulation itself would provide benefits to all farmers and ranchers equally. AMS will institute enhanced efforts to notify the groups found to be adversely impacted of the regulation and its benefits. It is of particular importance that impacted individuals and groups be made aware of the benefits the new regulation may provide them. AMS will specifically target seven organizations representing the interests of these impacted groups for outreach.

Paperwork Reduction Act

This rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the Federal Government. According to PSD records, there were approximately 312 bonded packers; 1,326 market agencies selling on commission; 4,582 livestock dealers and commission buyers; and 95 live poultry dealers regulated under the Act in 2018. The 2017 Census of Agriculture indicated that there were 575 swine contractors in 2017. The 2017 Census of Agriculture also indicated that there were 826,733 livestock producers and poultry growers. None of these entities are required to submit forms or other information to AMS or to keep additional records in consequence of this rule.

E-Government Act

USDA is committed to complying with the E-Government Act by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175—Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule may have Tribal implications that require continued outreach efforts to determine if Tribal consultation under Executive Order 13175 is required, but OTR does not believe that consultation is required at this time.

If a Tribe requests consultation, AMS will work with the OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

Congressional Review Act

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

Executive Order 12988

This rule has been reviewed under Executive Order 12988—Civil Justice Reform. This rule is not intended to have retroactive effect. This rule does not preempt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule. Nothing in this rule is intended to interfere with a person's right to enforce liability against any person subject to the Act under authority granted in section 308 of the Act.

List of Subjects in 9 CFR Part 201

Confidential business information, Reporting and recordkeeping

requirements, Stockyards, Surety bonds, Trade practices.

For the reasons set forth in the preamble, USDA amends 9 CFR part 201 as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 7 U.S.C. 181—229c.

■ 2. Section 201.211 is added to read as follows:

§ 201.211 Undue or unreasonable preferences or advantages.

The Secretary will consider the following criteria, and may consider additional criteria, when determining whether a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable preference or advantage to any particular person or locality in any respect in violation of section 202(b) of the Act. The criteria include whether the preference or advantage under consideration:

(a) Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;

(b) Cannot be justified on the basis of meeting a competitor's prices;

(c) Cannot be justified on the basis of meeting other terms offered by a competitor; and

(d) Cannot be justified as a reasonable business decision.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2020–27117 Filed 12–10–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[EERE–2019–BT–NOA–0011]

RIN 1904–AE24

Test Procedure Interim Waiver Process

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (''DOE'') has adopted a streamlined approach to its test procedure waiver decision-making process that requires the Department to notify, in writing, an applicant for an interim waiver of the disposition of the request within 45 business days of receipt of the application. An interim waiver will remain in effect until a final waiver decision is published in the **Federal Register** or until DOE publishes a new or amended test procedure that addresses the issues presented in the application, whichever is earlier. DOE's regulations continue to specify that DOE will take either of these actions within 1 year of issuance of an interim waiver. This final rule addresses delays in DOE's current process for considering requests for interim waivers and waivers from the DOE test method, which in turn can result in significant delays for manufacturers in bringing new and innovative products to market. This final rule requires the Department to process interim waiver requests within the 45 business day window and clarifies the process by which interested stakeholders provide input into the development of an appropriate test procedure waiver.

DATES: The effective date of this rule is January 11, 2021.

ADDRESSES: The docket, 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 those containing information that is exempt from public disclosure, may not be publicly available.

A link to the docket web page can be found at: *http://www.regulations.gov/docket?D=EERE-2019-BT-NOA-0011.* The *http://www.regulations.gov* web page contains instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Francine Pinto, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–7432. Email: *Francine.Pinto@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Legal Authority and Background

A. Legal Authority

The Energy Policy and Conservation Act (''EPCA'' or ''the Act''),[1] Public Law 94–163 (42 U.S.C. 6291–6317) authorizes the United States Department of Energy (DOE or, in context, the Department) to regulate the energy efficiency of a number of consumer products and industrial equipment types. Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. Title III, Part C [3] of EPCA established the Energy Conservation Program for Certain Industrial Equipment. Under EPCA, DOE's energy conservation program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures.

The Federal testing requirements consist of test procedures that manufacturers of covered products and equipment must use as the basis for: (1) Certifying to DOE that their products or equipment complies with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s); 42 U.S.C. 6316(a)), and (2) making representations about the efficiency of those products or equipment (42 U.S.C. 6293(c); 42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the product or equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6316 (a))

Under 42 U.S.C. 6293 and 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE is required to follow when prescribing or amending test procedures for covered products and equipment. Specifically, test procedures must be reasonably designed to produce

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

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

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

test results that reflect energy efficiency, energy use or estimated annual operating cost of a covered product or covered equipment during a representative average use cycle or period of use, and must not be unduly burdensome to conduct (42 U.S.C. 6293(b)(3); 42 U.S.C. 6314(a)(2)). As a waiver is the issuance of a test procedure applicable to certain products, these same requirements are applicable to any alternate test procedure that DOE may specify in an interim waiver or waiver. Subsequent to issuance of an interim waiver or waiver, DOE conducts a rulemaking to amend the generally applicable test procedure to address the issue that gave rise to the creation of a new test procedure for the requesting party.

DOE's regulations provide that upon receipt of a petition, DOE will grant a waiver from the test procedure requirements if DOE determines either that the basic model for which the waiver was requested contains a design characteristic that prevents testing of the basic model according to the prescribed test procedures, or that the prescribed test procedure evaluates the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1) and 10 CFR 431.401(f)(2). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. DOE regulations also provide that in addition to the full waiver (''decision and order'') described previously, the waiver process permits parties to also file an application for interim waiver from the applicable test procedure requirements. 10 CFR 430.27(a) and 10 CFR 431.401(a). DOE will grant an interim waiver if it appears likely that the petition for waiver will be granted or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a decision on the petition for waiver. 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2).

B. Background

In May of 2019, DOE proposed to streamline its existing interim waiver process by amending its regulations to require that the Department would make a determination on an interim waiver request within 30 business days of receipt. Under that proposal, should DOE fail to notify the applicant in writing of the determination within 30 business days, the request for interim waiver would be granted based on the criteria set forth in DOE regulations. 84 FR 18414 (May 1, 2019). The petitioner would be authorized to use the alternate test procedure specified in the request for interim waiver. *Id.*

DOE specified in the 2019 notice of proposed rulemaking (''NOPR'') that an interim waiver would remain in effect until a waiver decision is published or until DOE publishes a new or amended test procedure that addresses the issues presented in the application, whichever is earlier. If the alternate test procedure ultimately required by DOE differed from what was specified in the interim waiver, manufacturers would then have a 180-day grace period to begin using the alternate test procedure specified in the decision and order. If DOE denied the waiver request, the 180-day grace period would apply to the use of the test procedure specified in DOE's regulations. The proposal was intended to address delays in DOE's current process for considering requests for interim waivers from the DOE test method that ultimately imposed costs on manufacturers because they could not certify and distribute their products while awaiting a response to their petitions. 84 FR 18414 (May 1, 2019). The NOPR provided for the submissions of comments by July 1, 2019.

During the comment period, DOE received several requests to hold a public meeting and to extend the NOPR's comment period after the meeting so that the public could engage in the rulemaking process. 84 FR 30047, 30047 (June 26, 2019). To address these requests, the Department held a webinar on July 11, 2019, and extended the comment period until July 15, 2019.[4]

DOE held the webinar to discuss the proposal and answer questions regarding the changes proposed to the existing process. (July 2019 Webinar, No. 31 at p. 5) DOE explained that the proposal was intended to improve public participation and decrease uncertainty in a long standing process, which provided manufactures of new and innovative products an alternative means of testing those products while the Department made a final adjudication on the waiver petition. (*Id.* at pp. 5–8) DOE continued that the proposal would streamline this process by removing the language ''if administratively feasible'' from the Department's regulations and thereby require the Department to issue decisions on interim waiver applications within 30-business days that would remain in effect until the waiver decision and order was published, or until DOE published a new or amended test procedure. (*Id.* at pp. 9–10) If a petition was ultimately denied or granted with a different alternative test procedure than specified in the interim waiver, then the manufacturer would have 180-days to begin using that new test procedure. DOE stated that its intent in issuing the proposal was to improve the waiver process for regulated entities by making it more transparent and participatory as well as addressing the financial burden manufacturers have experienced in the past. The proposal was intended to shift the burden of any delays in the review process onto the Department, rather than the requester. (*Id.* at p. 11; 23) Following the webinar, DOE received additional requests to extend the comment period, which DOE granted and extended the comment period until August 6, 2019. 84 FR 35040 (July 22, 2019).

II. Discussion of Amendments

In this final rule, DOE is amending its regulations to address stakeholder concerns regarding lengthy waiting times following submission of interim waiver and waiver applications, and the burden that lengthy processing time imposes on manufacturers, who are unable sell their products or equipment absent an interim waiver or waiver from DOE.[5] Specifically, this rule amends Parts 430 and 431 of Chapter II, Subchapter D, of Title 10 of the Code of Federal Regulations as set forth at the end of this document in a way that is intended to provide the public and industry with greater clarity and transparency to the existing waiver process, and to address specific administrative delays that have prevented innovative and new products from reaching the market.

In this final rule, DOE has amended the current regulations to require that the Department make a determination on an interim waiver request within 45 business days of receiving a complete petition. DOE extended this time period from the 30 business days specified in the NOPR in response to comments suggesting that the Department may need additional time to review the interim waiver prior to issuing its decision. The Department believes that 45 business days provides the Department sufficient time to review an interim waiver request and make a determination on the interim waiver based on the regulatory criteria applicable at that step of the process, *i.e.,* that the petition for waiver is likely

[4] Transcript of the webinar is available on the docket, *https://www.regulations.gov/document?D=EERE-2019-BT-NOA-0011-0031.*

[5] *See, e.g., https://energy.gov/sites/prod/files/2018/01/f46/NAFEM%20Regulatory%20Reform%20Roundtable%20Meeting%20Notes%20-%2010.31.17.pdf.*

to be granted, or it is desirable for public policy to grant immediate relief pending a decision on the waiver petition. 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2). Extending the Department's review time will still reduce manufacturers' burdens relative to the baseline and retains the certainty for manufacturers that DOE will reach a decision on the interim waiver within a specified time period. DOE emphasizes that the grant or denial of an interim waiver is an intermediate step in DOE's consideration of the waiver petition, and that DOE will continue to provide, as it does now under the current regulations, opportunity for public input and further consideration by the Department prior to issuance of a decision and order on the waiver petition.

10 CFR 430.27 and 10 CFR 431.401 are amended by revising paragraph (e), which now requires the Department to post online a petition for an interim waiver within five business days of receiving an application and, as discussed in the preceding paragraph, will provide a decision on that petition for an interim waiver within 45 business days of receipt. 10 CFR 430.27(e)(1) and 10 CFR 431.401(e)(1). DOE added the requirement for posting the interim waiver in response to comments expressing concern that interested parties will be unaware that the Department received a petition for interim waiver. While DOE currently posts waiver and interim waiver requests on its website at *https://www.energy.gov/eere/buildings/current-test-procedure-waivers,* posting upon receipt is now specified in DOE's regulations to enhance public awareness of when DOE receives a request for interim waiver for processing pursuant to these amended regulations.

The Department may reach a decision on the petition at any point during the 45 business day window. The regulations also specify that the Department will post on its website a notice of the determination regarding a petition for interim waiver within five business days and will publish a notice of the decision in the **Federal Register** as soon as possible thereafter. 10 CFR 430.27(e)(1)(ii) and 10 CFR 431.401(e)(1)(ii). The Department updated these notification provisions from the NOPR for the same reasons of increased transparency and notice that it added the posting requirement for receipt of an interim waiver.

For purposes of determining the start of the 45 business day window, DOE considers a waiver and interim test procedure waiver petition received when the application request is accepted in the email box for receipt of waiver petition or if delivered by mail, on the date the petition is stamped as received by the Department. 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii). DOE updated the NOPR to specify that failure to satisfy the criteria set forth in 10 CFR 430.27(b)(2) and 10 CFR 431.401(b)(2) would result in denial of the interim waiver. (*See* 10 CFR 430.27(e)(1)(ii) and 10 CFR 430.401(e)(1)(ii) of this final rule.) This change is consistent with the current regulatory requirements for submission of an interim waiver (identification of related petition and basic models, as well as information on the likely success of the petition and information on the economic hardship or competitive disadvantage that is likely to result absent a favorable determination and an authorized signature). This change is also consistent with the criteria for grant of an interim waiver, which require the applicant to show that the petition for waiver will likely be granted and/or that it is desirable for public policy reasons to grant immediate relief pending a decision on the petition for waiver. 10 CFR 430.27(e)(2) and 10 CFR 430.401(e)(2). DOE also considers this change consistent with the provision in its regulations, which remains unchanged by these amendments, specifying that a petitioner must submit an alternative test procedure to the extent that one is known with the waiver petition. 10 CFR 430.27(b)(1)(iii) and 10 CFR 431.401(b)(1)(iii). While DOE will not grant an interim waiver absent an alternate test procedure specified by the petitioner, and the information required by 10 CFR 430.27(b)(2) and 10 CFR 431.401(b)(2), DOE will continue to process the waiver request and work with the petitioner to develop an appropriate alternate test procedure and provide additional information as necessary to process the waiver.

Revised paragraph (h) clarifies the duration of interim waivers by stating that an interim waiver remains in effect until the Department publishes a decision and order on the petition for waiver in the **Federal Register** or, publishes in the **Federal Register** a new or amended test procedure that addresses the issue(s) covered in the waiver, whichever is earlier. 10 CFR 430.27(h)(1) and 10 CFR 431.401(h)(1). In response to comments on the NOPR, DOE retains the requirement that DOE will complete either of these actions within one year of the issuance of an interim waiver. 10 CFR 430.27(h)(2) and 10 CFR 431.401(h)(2). DOE did not amend the current regulatory requirement that a waiver or interim waiver will automatically terminate on the date by which use of an amended test procedure that addresses the issue presented in the waiver is required to demonstrate compliance. 10 CFR 430.27(h)(3) and 10 CFR 431.401(h)(3).

The Department also revised 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) to provide manufacturers with a 180-day grace period for compliance with a specified test procedure in this final rule. In the event DOE ultimately denies the petition for waiver or the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition, the affected manufacturers will have 180-days to come into compliance. The duration of this grace period mirrors the amount of time the Department provides manufactures to come into compliance when a new test procedure is prescribed under 42 U.S.C. 6293(e). This provision was specified in the 2019 NOPR regulatory text as 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii), but has been relocated to 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) in response to comments that 10 CFR 430.27(i) and 10 CFR 431.401(i) already specified the outcome if DOE denies a waiver petition after granting an interim waiver, or specifies an alternate test procedure in the waiver decision than in the interim waiver, and so the addition of the originally included 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) in the NOPR was confusing.

III. Response to Comments Received

Commenters	Affiliation	Acronym, identifier
A.O. Smith Corporation	Manufacturer	A.O. Smith.
Acuity Brands	Manufacturer	Acuity.
Air-Conditioning, Heating, and Refrigeration Institute	Manufacturer Trade Group	AHRI.
Alliance to Save Energy	Advocacy Group	ASE.
American Council for an Energy Efficient Economy	Advocacy Group	ACEEE.

Commenters	Affiliation	Acronym, identifier
American Lighting Association	Manufacturer	ALA.
American Lighting Association (ALA), the Association of Home Appliance Manufacturers (AHAM), the National Automatic Merchandising Association (NAMA), and Plumbing Manufacturers International (PMI).	Manufacturer	Joint Industry Commenters.
Anonymous Anonymous	Member of the Public	Anonymous 1.
Anonymous Anonymous	Member of the Public	Anonymous 2.
Appliance Standards Awareness Project with American Council for an Energy-Efficient Economy, Consumer Federation of America, National Consumer Law Center on behalf of its low-income clients, Northeast Energy Efficiency Partnerships, and Northwest Energy Efficiency Alliance.	Advocacy Group	ASAP, et al.
Appliance Standards Awareness Project, Alliance to Save Energy, American Council for an Energy-Efficient Economy, California Energy Commission, Consumer Federation of America, National Consumer Law Center, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, Northwest Energy Efficiency Alliance, Pacific Gas and Electric.	Advocacy Group and Utilities	ASAP, et al. 2.
Association of Home Appliance Manufacturers	Manufacturer	AHAM.
Attorneys General of California, Colorado, Connecticut, Illinois, Maine, Maryland, Michigan, Minnesota, New York, North Carolina, Oregon, Vermont, Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York..	State, Local Governments	AG Joint Commenters.
Better Climate Research and Policy Analysis	Advocacy Group	Better Climate Research and Policy Analysis.
BSH Home Appliances Corporation	Manufacturer	BSH.
California Energy Commission	State	CEC.
Carrier Corporation	Industry	Carrier.
Connecticut Department of Energy and Environmental Protection	State	DEEP.
Consumer Federation of America	Advocacy Group	CFA.
Consumer Federation of America and National Consumer Law Center	Advocacy Group	Consumer Groups.
Earthjustice	Advocacy Group	Earthjustice.
Felix Storch, Inc.	Manufacturer	FSI.
Franke, Rebecca	Member of the Public	Franke.
Goodman Manufacturing Company	Manufacturer	Goodman.
Gould, Kyle	Member of the Public	Gould.
Hamdi, Ahmed	Member of the Public	Hamdi.
Hardin-Levine, Carolyn	Member of the Public	Hardin-Levine.
Information Technology Industry Council	Industry	ITI.
Ingersoll Rand	Manufacturer	Ingersoll Rand.
Lennox International Inc.	Manufacturer	Lennox.
Lutron	Manufacturer	Lutron.
National Association of State Energy Officials	State	NASEO.
National Automatic Merchandising Association	Manufacturer	NAMA.
National Consumer Law Center	Advocacy Group	NCLC.
National Electrical Manufacturers Association	Manufacturer	NEMA.
Natural Resources Defense Council	Advocacy Group	NRDC.
Nortek Global HVAC		Nortek.
North American Association of Food Equipment Manufacturers	Manufacturer Trade Group	NAFEM.
Northeast Energy Efficiency Partnerships	Advocacy Group	NEEP.
Northwest Energy Efficiency Alliance	Advocacy Group	NEEA.
Northwest Power and Conservation Council	Interstate Compact	NPCC.
Pacific Gas and Electric	Utility	PG&E.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison.	Utilities	CA IOUs.
Plumbing Manufacturers International	Manufacturer	PMI.
Regal Beloit Corporation	Advocacy Group	RBC.
Sachs, Harvey	Member of the Public	Sachs.
San Diego Gas and Electric	Utility	SDG&E.
Sierra Club	Advocacy Group	Sierra Club.
Sierra Club & Earthjustice	Advocacy Group	Earthjustice.
Small Business Association—Office of Advocacy	Industry	SBA.
Southern California Edison	Utility	SCE.
Stewart, Jim	Member of the Public	Stewart.
Traulsen, A Division of ITW Food Equipment Group, LLC	Industry	Traulsen.
State of Washington Department of Commerce, Washington State Energy Office.	State	WA State Energy Office.
Weikel, Wendy	Member of the Public	Weikel.
Whirlpool Corporation	Manufacturer	Whirlpool.

The 2019 NOPR proposed that ''an application for interim waiver would be deemed granted, thereby permitting use of the alternate test procedure suggested by the applicant in its application, if DOE fails to notify the applicant in writing of the disposition of an application within 30 business days of receipt of the application.'' 85 FR 18414, 18415 (May 1, 2019). During the comment period several stakeholders supported DOE's proposed approach. FSI believed that the current delays in the interim waiver process lead to substantial direct and indirect costs to both businesses and to consumers by not allowing innovative and energy saving appliances to come to market in a timely manner. (FSI, No. 16 at p. 1) This commenter further stated that it is an unfair economic penalty to all manufacturers, but especially burdensome to smaller manufacturers, where the investment of time and development is held in limbo. (*Id.* at p. 2) FSI asserted that the proposal creates a reasonable incentive for DOE to respond to petitions and that the requirement for a speedy waiver process is not the equivalent of self-regulation as some commenters claimed. In addition, FSI stated that the current regulations already contained language protecting against manufacturers abusing the process, with penalties provided for doing so. (*Id.* at p. 2) Also, one commenter stated general agreement with DOE's proposal. (Hamdi, No. 34, at p. 1)

ITI agreed that DOE's proposal met the goal of addressing delays in DOE's current process for considering requests for interim waivers, which can result in significant delays for manufacturers in bringing new and innovative products to market. (ITI, No. 20 at p. 1).

In DOE's request for comments concerning the Department's prioritization of rulemakings, 85 FR 20886 (April 15, 2020) rulemaking, AHAM commented in support of amending the existing test procedure interim waiver process and prioritizing this action. AHAM agreed that the Department's efforts to streamline the waiver process would mitigate the burden for manufacturers associated with waiting for DOE to respond to interim waiver requests and allow DOE to instead focus its attention on the merits of granting a final test waiver. Based on the Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions, AHAM anticipated that the finalization of the rule would not require the expenditure of significant resources and urged DOE to finalize the rule immediately. (AHAM, EERE–2020–BT–STD–0004, No. 10 at p. 3)

NAFEM fully supported the initial 30-day review deadline before petitions for interim waivers were deemed granted. This commenter stated that the proposal would greatly reduce the uncertainty and risk associated with the waiver process. (NAFEM, No. 26 at p. 3) The Joint Industry Commenters also agreed with DOE's determination that it is desirable for public policy reasons, including burden reduction on regulated parties and administrative efficiency, to grant immediate relief on each petition for interim waiver if DOE does not notify petitioner of its interim waiver decision within the 30 business days. (No. 52 at p. 2) This commenter stated that DOE's proposal will lead to the following benefits: (1) It will allow manufacturers to more swiftly provide innovative, energy saving products to consumers; (2) It will provide certainty to regulated entities; (3) It creates a compliance pathway for innovative products being introduced on the market for which the current test procedures do not apply; and (4) DOE's proposal provides a clear, transparent process so that regulated parties and other stakeholders know how DOE will operate. (*Id.* at pp. 2–5) While supporting the DOE proposal, the Joint Industry Commenters also recommended that DOE add to the final rule a provision indicating that, in cases where interim test procedures are deemed granted by the passage of time, DOE will publish the interim test procedure waiver (and the petition for test procedure waiver) in the **Federal Register** immediately. It stated that this would be consistent with DOE's current practice to publish its decisions on interim waivers together with the notice and request for comment on the test procedure waiver petition. (*Id.* at p. 4) This commenter expects that if DOE receives a petition that is incomplete, it will notify the petitioner and that such a petition could not be considered granted by the passage of time because it is not complete. (*Id.*)

Moreover, while NEMA stated its support for DOE's ''deemed granted'' approach, it would modify the proposal to provide for some action by DOE before an interim waiver is granted. NEMA suggested that the final rule provide that DOE will publish the interim test procedure application after the application is deemed complete by the Department. Then, it suggested a short comment period of 10 days to provide stakeholders the opportunity to raise red flags. If stakeholders and DOE do not identify any significant substantive problems with the petition for waiver, then 30 days after the interim test procedure application is published in the **Federal Register** the application should be deemed granted, unless DOE informs the manufacturer otherwise in writing. NEMA also believed that if significant and substantive concerns with the interim waiver are raised during the comment period or discovered by DOE in its preliminary review of the petition, DOE should be able to take another 30 days to review the petition before determining if the interim waiver is granted as-is, granted with modifications, or denied. (No. 55 at pp. 4–5) NEMA stated that these modifications will address the possibility of competitive gamesmanship and increase transparency.

The Office of Advocacy for the Small Business Association (SBA) fully supported DOE's proposal to streamline the test procedure interim waiver process so that small manufacturers have more regulatory certainty in the interim waiver process. According to the SBA, the delays have a significant impact on small businesses that sell product at much lower volumes and that are unable to sell their product for a significant amount of time, thus reducing their income flow. Therefore, these delays have the potential to put some small manufacturers out of business. (SBA, No. 23 at p. 1, 3, 4) It stated that abuse of the process is not a concern because the proposal only eliminates a bottleneck in the process by requiring DOE to meet the 30-day decision-making requirement. Even if the interim waiver is granted, the application is still required to go through a full review as the process remains unchanged. (SBA, No. 23 at p. 4)

On the other hand, many other commenters' objected to DOE's ''deemed granted'' approach. For example, Earthjustice argued that the proposal would weaken the energy conservation standards program by allowing manufacturers to abuse the process by placing noncompliant products in the market given the 30-day ''deemed granted'' requirement and the grace period after DOE revoked such waivers. This result could occur without any notice to either competitors or stakeholders and with no opportunity to object. (Earthjustice, No. 49 at p. 1 *See also* Hardin-Levine, No. 2 at p. 1; Stewart, No. 7, at p. 1; Lennox, No. 11 at p. 1; RBC, No. 12 at 1; Gould, No. 13 at p. 1; Anonymous 1, No. 17 at p. 1; NPCC, No. 21 at p. 1; WA State Energy Office, No. 22 at p. 1; Better Climate Research and Policy Analysis, No. 24 at p. 1; Traulsen, No. 25 at pp. 2–3; Sachs,

No. 29 at p. 2; Consumer Groups, No. 33 at p. 2; DEEP, No. 35 at p. 1; Carrier, No. 36 at p. 2; CA IOUs, No. 37 at p. 1; Nortek, No. 38 at p. 3; Ingersoll Rand, No. 39 at p. 1; CEC, No. 40 at p. 1; AHRI, No. 42 at p. 2; ASE. No. 43 at p. 3; A.O. Smith, No. 44 at p. 1–2; NASEO, No. 45 at p. 1; ASAP et al., No. 46, at pp. 1, 8; NRDC, No. 47, at p. 1–2, 5–6; Lennox, No. 48 at p. 1, 4; AG Joint Commenters, No. 51 at p. 2, 5; and Goodman, No. 54 at p. 1)

Many commenters, while ultimately objecting to the proposed automatic approval as noted in the preceding paragraph, commented that DOE should nonetheless be held to a timeline when processing interim waiver requests. Various commenters proposed alternative scenarios, such as maintaining the status quo, the 30-business day time limit proposed by DOE, and increasing the time limit to 120 days, with specific milestones along the way. (Franke, No. 8 at p. 1 for maintaining 30 days; BSH, No. 41 at 5, for maintaining 30 days, with notice and comment if application is deemed granted; Acuity, No. 14 at p. 2, for maintaining the 30 days but not more than 90; Lutron, No. 53 at p. 2, with providing stakeholders a brief opportunity for comment during the 30 business day window; FSI, No. 16 at p. 2, for maintaining 30 days; Anonymous 1, No. 17 at p. 1, if the proposal is finalized, use 60 to 90 days before granting; NAFEM, No. 26 at p. 2, supporting 30-day review process; Traulsen, No. 25 at p. 3, supporting a 60 business day review process; Carrier, No. 36 at p. 2, suggesting a review process that is not more than 120 days to conduct a review of the interim waiver application, public comment period, review of comments received, and additional communication with the petitioner; AHRI, No. 42 at pp. 2–3, supports a maximum of 120 days to review and process an interim waiver application; Sachs, No. 29 at p. 2, recommends creating time limits for each step of the process; CA IOUs, No. 37 at p. 2–3, suggesting a 6-month review process; Nortek, No. 38 at pp. 2–3, suggesting a maximum of 120 days; CEC, No. 40 at p. 9–10, suggesting an additional step for completion check and comment period and providing an automatic grant only if no adverse comments are received; ASE, No. 43, at p. 4, stating that a comment period is needed; A.O. Smith, No. 44 at p. 4–5, recommending an alternative process allowing 135 days, including stakeholder comment and a full technical review; ASAP et al., No. 46 at pp. 7–8, providing for a 90-day review period, including notice and comment but not replacing comment period after publication of interim waiver; Lennox, No. 48 at pp. 2–3, suggests setting a reasonable deadline with an expedited comment period of 30 days; and Goodman, No. 54 at pp. 1–2, 4, suggesting 90-day time period with opportunity for comment)

In response to these arguments, DOE's reiterates that these changes are being adopted in response to concerns that the current system for processing interim waiver petitions is not working as it should. In DOE's view, manufacturers should not be constrained from selling their products for significant periods of time while DOE undertakes a lengthy review of a temporary measure (the interim waiver) or applies its limited resources to other priorities, such as rulemakings subject to a statutory deadline. DOE also does not believe that manufacturers should be limited in their ability to sell their products while DOE works extensively, and without the benefit of public comment, to determine what the alternate test procedure should be in response to the interim waiver request.

As DOE explained in its modernized Process Rule, DOE should be held accountable for complying with its own procedures so that the public will have confidence in the transparency, predictability, clarity, and fairness of DOE's regulatory process. Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (''Process Rule''), 85 FR 8626, 8632, 8634 (February 14, 2020). Under the procedures adopted in this final rule, DOE places the burden of delay on DOE rather than the manufacturer. If DOE does not notify the applicant in writing of the disposition of the interim waiver within 45 business days, the manufacturer would be authorized to test subject products under an interim waiver using the alternate test procedure submitted by the manufacturer while DOE processes the waiver request, including obtaining the benefit of comment from other manufacturers and stakeholders.

In consideration of the comments received suggesting a longer review period, however, DOE has determined that a 45 business day period will provide the Department with a small amount of additional time to review the interim waiver request while still providing certainty to the manufacturer that if DOE does not act within the prescribed time period, the interim waiver will be granted pursuant to DOE's existing regulatory criteria for the grant of interim waiver requests at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2).

Accordingly, after taking all comments into account concerning the adequacy of the 30 business day time period for consideration of interim waiver petitions, DOE is modifying this requirement to provide the Department 45 business days to review completed interim waiver petitions based on the criteria in its current regulations, 10 CFR 430.27(e)(2) or 10 CFR 431.401(e)(2). These are the same criteria that have been applied to every interim waiver petition acted upon by DOE and are not changed by this final rule. Because an interim waiver is meant to be a temporary measure to hold a requester harmless while a final decision on a waiver is processed, the criteria for granting an interim waiver are straightforward and intended to facilitate a quick review process. For example, if DOE has seen a particular technological issue in prior waivers that have been granted, it should quickly become apparent that it is likely that the petitions for waiver based on the same technological issue would be granted. In addition, the criterion that it is desirable for public policy reasons to grant ''immediate relief pending a determination on the petition for waiver'' in particular indicates that DOE's decision for interim waiver is intended to be a quick process to grant ''immediate'' relief rather than serve as the culmination of DOE's decision-making process on the petition for waiver. As a result, it is not intended to encompass a detailed review to determine all of the complex particulars of the alternate test procedure that may ultimately be granted as part of the decision and order on the waiver petition. DOE emphasizes that, as in the current regulations, it remains required to affirmatively make a decision as to whether to grant or deny the interim waiver petition. If DOE denies the interim waiver petition, it is required to notify the petitioner within the 45 business day time period and post the notice on the website as well as publish its determination in the **Federal Register** as soon as possible after such notification. Moreover, in DOE's past experience, the majority of interim waiver petitions were granted.[6] As a

[6] Of the 21 concluded interim waiver petitions that DOE had granted as of issuance of DOE's NOPR, the Department had granted 18 in full and granted the remaining 3 with modifications such as one was granted in part, one with minor modifications, and one with a different test procedure than proposed. 84 FR 18414, 18419 (May 1, 2019).

result, this final rule also states that if petitioner has not received notification of the disposition of the petition for interim waiver within 45 business days, the interim waiver petition is granted based on the criteria in DOE's regulations at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2)—specifically, that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver or, such as in cases where DOE has granted waivers to other manufacturers for the same technology using the same or a similar alternate test procedure, that it is likely that the petition for waiver will be granted. The manufacturer may test and certify its products using the alternative test procedure included in the petition, and compliant products may be distributed in commerce. DOE will publish the grant or denial of the interim waiver in the **Federal Register** after its determination is made and posted online. 10 CFR 430.27(e)(1)(ii) and 10 CFR 431.401(e)(1)(ii).

In response to comments suggesting that DOE provide for a ''completeness check'' or ''full technical review'', it is DOE's intent to review the interim waiver request within the 45 business day time period. DOE notes the new provision in the final rule that for an interim waiver to be granted, the petitioner must submit an alternate test procedure. DOE reiterates that unless it acts to grant or deny the interim waiver within the 45 day period, the interim waiver will be granted at the end of the 45 days according to the criteria in DOE's regulations at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2), and DOE will then publish the grant of interim waiver and alternate procedure for public comment. During this time, DOE will conduct any necessary technical review, working with the manufacturer as necessary—and with the benefit of input from the public, including other manufacturers—to ensure that the alternate test procedure ultimately adopted upon the grant of any petition for waiver is appropriate. The benefit to the new process is that when DOE publishes a decision on the interim waiver and request for comment, DOE does not expect to have made significant changes to the alternate test procedure submitted with the interim waiver. If there are significant ''red flags'', as indicated in NEMA's comment, DOE would deny the request for interim waiver and continue to process the petition for waiver. As a result, interested stakeholders will be able to provide input on the alternate test procedure as it was submitted by the petitioner, rather than an alternate test procedure to which DOE may have made substantial changes without the benefit of public input. DOE intends for the changes finalized in this rule to increase transparency and the use of stakeholder input in the waiver process. This approach is also intended to facilitate the introduction of innovative products to market and ensure that the burden to act promptly is on DOE.

NEMA recommended that the final rule should include a short comment period of 10 days to provide stakeholders the opportunity to raise red flags if necessary before DOE finalized a petition for interim waiver and DOE agrees the process needs greater transparency. (NEMA, No. 55 at p. 4) Current regulations lack the transparency to provide manufacturers and concerned stakeholders notice of DOE activities when making changes to waivers petitions submitted by a manufacturer and an opportunity to engage in the process. This final rule seeks to increase transparency and provide a means of including stakeholder input in the Department's review process. The final rule provides that members of the public will receive notice of interim waiver petitions through posting on the DOE website and publication of its decision in the **Federal Register**, 10 CFR 430.27(e)(1) and 10 CFR 431.401(e)(1). Stakeholders and other manufacturers will be made aware of the Department's ongoing review and decision through these amendments to the existing regulation and can raise concerns during the processing of the interim waiver.

DOE believes that this final rule directly addresses the concern expressed by commenters that the ''deemed granted'' language included in the proposal would result in situations where DOE did not exercise its statutory responsibility to apply the regulatory requirements to all interim waiver petitions in an affirmative manner. (CA IOUs, No. 37 at p. 7) Some commenters argued that DOE's proposed approach results in an abdication of the Department's decision-making authority and does not meet DOE's obligation to consumers nor does it promote a fair and level playing field among manufacturers. (A.O. Smith, No. 44 at p. 1–3, concerned that the automatic granting of an interim waiver is an abdication of responsibility; NRDC, No. 47 at p. 2–3, the Department must affirmatively review the request and decide that it is technically and procedurally appropriate to grant the interim waiver; Lennox, No. 48 at p. 4, pp. 5–6; and AG Joint Commenters, No. 51 at p. 5, EPCA requires that DOE must make an affirmative determination)

In response, DOE maintains that the language included in this final rule continues to require that DOE engage in a decision-making process for each interim waiver petition and provide notice of that decision to petitioners and the public. DOE will continue to fulfill its statutory obligations with respect to all waiver petitions it receives. Interim waivers to which DOE does not respond within the 45 business day period are granted pursuant to the criteria in DOE regulations at 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2)—specifically, that it is within the public interest to grant immediate relief pending a determination on the petition for waiver. The grant of an interim waiver ensures that the manufacturer subject to the interim waiver (and to any subsequent waiver) is testing and certifying its products pursuant to a DOE test procedure, as required by EPCA. DOE will then continue to review the petition for waiver and issue a decision and order on that petition after any further technical review and consideration of public input. By finalizing this rulemaking, DOE does not cede its authority to review interim waiver petitions or otherwise abdicate its decision-making responsibilities with regard to requests for waiver from the test procedure set forth in DOE's regulations.

In addition, as a result of the ''deemed granted'' language, commenters proposed revised notice and comment scenarios for consideration as part of the interim waiver process. Those commenters asserted that the proposal fails to require notice of a waiver be given to consumers and competitors, that consumers will lack the information needed to make informed decisions about appliances, and that the Department should provide prompt notice of approved petitions. (Anonymous 1, No. 17 at p. 1; Consumer Groups, No. 33 at p. 3; and DEEP, No. 35 at p. 2) Supporting the proposal, BSH recommended adding in the final rule a provision regarding interim test procedure waivers deemed granted by the passage of time that the Department shall publish the waiver in the **Federal Register** immediately to ensure adequate notice to the public is provided. (No. 41 at p. 4) Additionally, Goodman notes that the existing process under 10 CFR 430.27(c)(1), which requires that notification of an interim test procedure waiver is only given to competitors in the same product class and after publication in the **Federal Register**, should be expanded. This commenter suggests that other manufacturers of the same product class

should also receive notification and an opportunity to comment. Such action would provide manufacturers of a given product class greater certainty of notice and opportunity to respond before a product is introduced into commerce. (Goodman, No. 54 at p. 2–4).

In response to these comments, DOE agrees that public input is critical to DOE's consideration of petitions for waiver of the DOE test procedure. DOE values input from stakeholders because such comments contribute to a better work product and help to resolve complicated technical issues. In this final rule, DOE has provided that all determinations made in response to interim waiver petitions will be published in the **Federal Register** after such decisions are made, taking into account the 45 business day deadline. In addition, to promote transparency, the regulations will require DOE to continue its current practice of posting waiver petitions online when they are received, so that the public and other manufacturers are aware that a petition for waiver and interim waiver has been submitted. The regulations also add a requirement for DOE to post decisions on interim waivers when those decisions are made. Posting of both receipt of a petition for interim waiver and DOE's decision on an interim waiver will be made within 5 business days. 10 CFR 430.27(e)(1)(ii) and 10 CFR 431.401(e)(1)(ii).

DOE emphasizes that under the current regulatory requirements, the stakeholder comment period is triggered by DOE's granting of an interim waiver. 10 CFR 430.27(c) and (d) and 10 CFR 431.401(c) and (d). This final rule does not change those requirements. Accordingly, DOE is not taking away any previous opportunity stakeholders had for comment prior to the grant of an interim waiver. To the contrary, DOE is facilitating additional transparency through issuance of this final rule. Previously, DOE in many cases conducted significant discussions with the manufacturer and made changes to the alternate test procedure submitted by the manufacturer without the benefit of input from the public, including other manufacturers and stakeholders in the process, as well as any other interested parties. Under this final rule, all of these interested groups will be afforded input at the very beginning of DOE's process of considering an alternate test procedure.

This rule is intended to expedite the review process and increase the transparency of the Department's review of interim test procedure waivers. Under the amended requirements of this final rule, stakeholders will have the opportunity for comment on the waiver process as under the current regulations, with the added benefit of earlier engagement with the Department as it considers an alternate test procedure. DOE will leave in place its current comment procedure, seeking comment upon the grant or denial of any interim waiver request. DOE will continue to invite a robust discussion of technical and other issues during that comment period.

Some commenters questioned whether the Department can meet the proposed ''deemed granted'' 30 business day deadline given that DOE's data indicate that it has only met the 30-day deadline on one occasion. (NPCC, No. 21 at p. 2) Comments submitted by NRDC note that such a timeframe is unwarranted given that the Department has failed to respond to interim waiver requests in that timeline in the past. Further, commenters contend that it is unlikely DOE will meet this deadline because the NOPR does not include a rational explanation for meeting the proposed 30 business day time period. (NRDC, No. 47 at p. 4–5).

Upon further review of the proposed timeframe, DOE has decided to extend the internal review period from the 30 business days referenced in the NOPR to 45 business days in this final rule. DOE notes that its dataset includes an additional three interim waivers were granted during this 45-business day timeframe as opposed to the 30-business day timeline, further supporting that DOE is able to consider interim waivers during the 45-business day time period adopted in this final rule. As with the modernized Process Rule referred to above, DOE views its examination of the interim test procedure waiver process as an opportunity to improve how the Department administers its programs. As was mentioned earlier in this document, much of DOE's delay in responding to a request for an interim waiver involved lengthy, private technical discussions with the requester attempting to re-design an alternate test procedure before seeking public input. Under this final rule, DOE will ensure that it acts expeditiously on requests for interim waiver and that any in-depth technical review will take place with the benefit of public comment, during DOE's decision-making process on the petition for waiver. This final rule will increase the transparency of the process and ensure that the manufacturer can distribute its products in commerce under an interim waiver while DOE processes the waiver request.

Many commenters expressed their concern that if DOE codified its original proposal, the system for interim waivers would institutionalize a process that would allow for abuse. Commenters who took this position believe that the ''deemed granted'' language would allow manufacturers with ill-intent to abuse the process by submitting waiver applications with faulty alternate test procedures or perhaps no alternate test procedures at all and nevertheless have their interim waivers granted within the proposed 30-business day period. These commenters stated that manufacturers who play by the rules and are producing compliant products or equipment would be harmed. In addition, they argued that foreign importers would receive a competitive advantage to the detriment of American manufacturers. (Hardin-Levine, No. 2 at p. 1; Stewart, No. 7 at p. 1; Franke, No. 8 at p. 1; Gould, No. 13 at p. 1; Anonymous 1, No. 17 at p. 1–2; NPCC, No. 21 at pp. 1–2; Traulsen No. 25, at p. 3; Sachs, No. 29 at p. 2; Consumer Groups, No. 33 at p. 2; Carrier, No. 36 at p. 2; CA IOUs, No. 37 at pp. 1–2; Nortek, No. 38 at p. 3; CEC, No. 40 at p. 4; AHRI, No. 42 at p. 2; ASE No. 43 at p. 3; A.O. Smith, No. 44 at pp. 1–3, 5; NASEO, No. 45 at p. 1; ASAP et al., No. 46 at pg. 3, 5; Lennox, No. 48 at pp. 3–4; Earthjustice, No. 49 at p. 1, 4; and AG Joint Commenters, No. 51 at p. 2, 8). Commenters voiced their concerns that the proposal ''[c]ould open the floodgates for a deluge of substandard foreign products to enter U.S. markets to the detriment of U.S. manufacturers,'' therefore DOE should not finalize a ''deemed granted'' interim waiver approach if the Department does not act in 30 days. (Lennox, No. 48 at p. 3–4)

Other commenters did not believe that the proposed process would allow for abuse. Acuity disagreed with these arguments and counted that through stakeholder engagement conducted throughout the test procedure rulemaking process that interim waivers are likely to be used infrequently and will not become a general opt out mechanism. (No. 14 at p. 3) Some commenters argued against these concerns by highlighting that there is language in the proposal that protects against an abuse of the process and that there are penalties if a manufacturer breaks the law also in place. (FSI, No. 16 at p. 2) The SBA also commented that the concern regarding possible abuse of the process was unfounded because the proposal only eliminated a bottleneck in the review process by requiring DOE to meet a time limit and even if an interim waiver is automatically granted that the application for the full waiver will still undergo a review by the Department.

(No. 23 at p. 4) Lastly, some commenters noted that even if abuse were to happen, DOE's regulation already includes a remedy and nothing in the proposal removes this authority. Commenters cited 10 CFR 430.27(k), which provides DOE the authority to rescind or modify a waiver or interim waiver at any time if DOE determines that the underlying factual basis is incorrect or determines that the results from an alternative test procedure are unrepresentative of the true energy consumption. (Joint Industry Commenters, No. 52, at p. 5)

DOE emphasizes that if DOE has not notified the petitioner of the disposition of an interim waiver within the 45 business day period, that interim waiver is granted according to the existing criteria in 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2)—specifically, that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver or, such as in cases where DOE has granted waivers to other manufacturers for the same technology using the same or a similar alternate test procedure, that it is likely that the petition for waiver will be granted. DOE therefore no longer uses the term ''deemed granted'' in this rulemaking. DOE again notes a change to its regulatory text in response to these comments—specifically, if no alternate test procedure is submitted, DOE will not grant an interim waiver but will publish the denial of interim waiver and request for comment on the petition for public comment, so that it can process the waiver petition with the benefit of public comment on what the alternate test procedure should be.

DOE is not persuaded by commenters' concern regarding the likelihood of abuse of process by U.S. and foreign manufacturers. DOE finds the fear of speculative abuse unlikely as there is no evidence of such abuse and little reason to expect that the proposal would open the door to abuse by manufactures. (Joint Industry Commenters, No. 52 at p. 4) In DOE's experience over many years, the Department has not seen the waiver process abused as some commenters suggest. DOE believes that it is highly unlikely that a manufacturer would spend the time, effort, and funds to submit a faulty application on the hope that it might slip through and the risk that the requester might be alerting DOE to non-compliant products. As many commenters pointed out, manufacturers are incentivized to get their interim test procedure waivers right the first time. Commenters identified the following reasons as justification for why it is in the best interest of petitioners to ensure that the alternate test procedure is correct the first time around are as follows: Brand reputation, competitors will highlight any unfair procedures engaged in by others, the creation of significant marketing costs, and the fact that there are significant costs to conducting test procedures so manufacturers prefer not to retest if it can be avoided. (BSH, No. 41 at p. 4; and NEMA, No. 55 at p. 6) Commenters' concern overlooks the reality that DOE continues to review interim waiver petitions and waiver petitions and would find these abuses if they did exist.

Moreover, several commenters stated, and common sense suggests, that it is highly unlikely that stakeholders want to attract negative attention and incur the risk of DOE enforcement. While it is always possible that some stakeholder on some occasion will attempt to abuse any process, DOE believes this is a rare situation, if it were to happen at all. DOE agrees with the Joint Industry Commenters who reasonably point out that it would be ''odd that a manufacturer intent on abusing the system would notify DOE and the public by petitioning for a test procedure waiver'' using a faulty or fraudulent test procedure. (No. 52 at p. 4) Similarly, Lutron noted that the Department should not let the ''fear of a bad actor'' prevent this regulatory process from working for everyone else. (No. 53 at p. 3)

The Department does not base its decision-making process upon speculative behavior of alleged manufacturers who might act in bad faith. Further, DOE believes that if a manufacturer engaged in this behavior, it would likely be (as noted by commenters) detrimental to the reputation of the manufacturer. In addition, DOE's existing regulations already provide a remedy for abuse of the test procedure interim waiver and waiver process. 10 CFR 430.27(k) provides DOE with the authority to ''rescind or modify a waiver or interim waiver at any time upon DOE's determination that the factual basis underlying the petition for waiver or interim waiver incorrect, or upon a determination that the results from an alternative test procedure are unrepresentative of the basic model(s) true energy consumption characteristics.'' Nothing in this final rule removes this authority from the Department.

In their challenge to the NOPR as allowing for the sale of non-compliant products to enter the market, ASAP et al. remarked that incomplete interim waivers petitions would be ''deemed granted'' after 30 days. A manufacturer could circumvent the energy conservation standard by submitting a petition lacking an alternative test procedure, they argued, and therefore be able to sell a product without conducting any testing. (ASAP. et al., No. 46 at p. 3) Other commenters also expressed their concern about what DOE would do when an alternative test procedure is not included in the submission. (Lennox, No. 48 at pp. 4–5) Commenters suggested that DOE should reject all incomplete interim waiver and waiver applications, including those without a valid test method included, so that applicants can then revise and resubmit the petition. (A.O. Smith, No. 44 at p. 3)

In response to these questions concerning an interim test procedure petition submitted without the required alternate test procedure, DOE wants to make very clear that, in reality, this scenario does not happen. That is, petitions for interim waiver and waiver submitted to the Department do include an alternative test procedure. However, in the exceedingly rare case that a requestor may not include an alternate test procedure, DOE has added language to the regulatory text stating that, if a petition is submitted without an alternative test procedure, DOE will deny the petition for an interim waiver and move to consideration of the waiver request. Commenters agree that manufacturers must have a viable way to test a covered product in the situation where the current DOE test procedure is inadequate to properly test specific basic models with specific design characteristics. Because the denial of interim waiver is published for public comment, the alternate test procedure ultimately developed as part of any grant of a waiver petition will benefit from input from other manufacturers, stakeholders, and interested parties.

DOE received comments arguing that DOE had not taken the impact on consumers from this proposal into consideration. Commenters asserted that the Department's ''deemed granted'' approach would allow noncompliant products into the marketplace for an indefinite period of time thereby harming consumers who would unknowingly purchase a product that does not meet DOE energy conservation standards, thereby resulting in higher energy costs to consumers. (Stewart, No. 7 at p. 1; Anonymous 1, No. 17 at p. 1–2; NPCC, No. 21 at p. 2; WA State Energy Office, No. 22 at p. 1; Better Research Climate and Policy Analysis, No. 24 at pp. 1–2; Consumer Groups, No. 33 at p. 2–3; CA IOUs, No. 37 at p. 1; Ingersoll Rand, No. 39 at p. 2; CEC, No. 40 at p. 4–6, 8; ASE, No. 43 at pp. 2–3; A.O. Smith, No. 44 at p. 1, pp. 2–

3; NASEO, No. 45 at p. 1; ASAP et al., No. 46 at pg. 3, 5; Lennox, No. 48 at pp. 3–4; Earthjustice, No. 49 at pp. 1–2; AG Joint Commenters, No. 51 at p. 2, 8; and Goodman, No. 54 at p. 2)

This final rule requires DOE to make decisions on all interim waiver requests within 45 business days. Because DOE publishes the decision on the interim waiver (and, at the same time seeks comment on the waiver petition), during or as soon as possible after the conclusion of this time period, consumers will be situated in a better position under this final rule than under DOE's previous procedures. The alternate test procedure will be published for comment as part of the grant or denial of any interim waiver, and consumers will benefit from being able to see comments provided on the alternate test procedure, including those from other manufacturers, which will be publicly available on *http://www.regulations.gov.* Moreover, as stated previously, DOE reaffirms that it is extremely doubtful that a manufacturer would go to the time and expense of submitting a fraudulent waiver petition in the hope of getting a small period of time to sell noncompliant products that would cause adverse impacts to consumers. Instead, DOE maintains that consumers will likely benefit from this rulemaking as innovative products will be made available more quickly and expand consumer choice when selecting a product to best meets consumers' needs.

In challenging the validity of the NOPR, several commenters argued that DOE lacks the statutory authority to create and amend the waiver process. Earthjustice argued specifically that EPCA does not explicitly authorize a waiver process pursuant to which manufacturers can avoid applying DOE's test procedures to their products, but provides only an authorization to DOE to amend a test procedure in response to petitions submitted by interested persons, under 42 U.S.C. 6293(b)(2). (No. 49 at p. 2) These commenters argue the NOPR has violated the APA's requirement to reference the legal authority under which a rule is proposed. (Earthjustice, No. 49, at p. 2 citing 5 U.S.C. 553(b)(2); *see also* AG Joint Commenters, No. 51 at p. 4–5; and Lennox, No. 48 at p. 5) Stakeholders also commented that it is DOE's responsibility to provide a path to compliance for all manufacturers that sell covered product because they are legally subject to DOE standards regulation. (Joint Industry Commenters, No. 52 at p. 1).

Section 393 of EPCA (42 U.S.C. 6293) provides the Department with the authority to adopt new test procedures and to amend existing test procedures for covered products when such test procedures would more accurately or fully comply with the requirement that the test procedure be reasonably designed to produce results that measure energy efficiency, energy use, water use, or estimated annual operating costs of a representative average use cycle or period of use. DOE first adopted regulations implementing waiver procedures in 1980, and has updated the regulations three times in 1986, 1995, and most recently in 2014 with no concerns raised. 45 FR 64109 (September 26, 1980); 51 FR 42823 (November 26, 1986); 60 FR 15004 (March 21, 1995); and 79 FR 26591 (May 9, 2014). DOE emphasizes that the alternate test procedure specified in a waiver or interim waiver is a DOE test procedure, adopted by the Department. Manufacturers are authorized to use this alternate DOE test procedure through the decision and order issued by DOE upon consideration of the waiver petition. DOE further notes that alternate test procedures authorized through DOE decision and orders are used by DOE in developing appropriate test procedure amendments pursuant to 42 U.S.C. 6293. As the Department has done for decades under the existing ''waiver'' rules, the Department is simply issuing a test procedure under EPCA applicable to certain technologies not considered in the existing codified test procedure.

The waiver process, both interim and final, is the process codified in DOE's regulations by which DOE addresses new and emerging technologies as they come on the market between test procedure rulemakings. Without it, affected manufacturers would be excluded from the market and would have no recourse until DOE engages in future rulemaking. DOE does not read EPCA to prohibit manufacturers with new and innovative products from being able to test and certify their products for consumer use until DOE were to engage in a future rulemaking. DOE also does not believe that stakeholders are advocating for the elimination of the waiver process. There was overwhelming support for having such a process in place for those instances when products fall outside the scope of the applicable, codified test procedure requirements. Manufacturers, interested stakeholders, and consumers rely on DOE's ability to consider amendments to the test procedure to more fully or accurately comply with EPCA's requirement to measure the energy use of a representative average use cycle or period of use that authorizes the waiver process so that potential amendments to the test procedure can be considered in fact-specific circumstances. To read EPCA otherwise would likely place a barrier on the availability of future innovative and potentially energy conserving products.

Several commenters argued that the economic analysis included in the NOPR is based on faulty assumptions and that many of those assumptions assessing the impact of the NOPR resulted in a significant overestimation of the costs of the interim waiver process on manufacturers. (Better Climate Research and Policy Analysis, No. 24 at pp. 1–2; CEC, No. 40 at pp. 7–9; ASE, No. 43 at pp 4–5; ASAP et al., No. 46 at p. 6–7; NRDC, No. 47 at p. 5; and Goodman, No. 54 at p. 5) Some commenters stated that DOE severely underestimated the costs of allowing non-compliant products onto the marketplace through the proposed ''deemed granted'' approach. The CA IOUs argued that many of these assumptions used to assess the impact of the NOPR resulted in a significant overestimation of the monetary impacts facing manufacturers, while understating impacts to customers, competitors and the environment, including the potential abuse from allowing the introduction of noncompliant and less efficient product into the market for a period of time. These and other commenters seek additional information from DOE on the economic and environmental costs and benefits of the proposed rule and a full assessment of negative impacts of the rulemaking. (CA IOU's, No. 37 at pp. 3–7; and AG Joint Commenters, No. 51 at p. 8).

On the other hand, NAFEM commented that the proposal correctly identifies many of the real costs and impacts to companies from the current process that unreasonably delays decisions on interim waiver requests. The current process prohibits companies from bringing valuable products to the marketplace while waiver requests are reviewed and interim waiver decisions are delayed. Commenters assert that such delays are unreasonable, given the specificity of the regulatory requirements for grant of an interim waiver, and supported the changes proposed in the NOPR. (NAFEM, No. 26 at p. 3).

As discussed in section III of the NOPR, DOE reviewed the time lags between the receipt of the waiver application and issuance of an interim waiver, and considered the anticipated cost savings that could result from waivers granted following the proposal's

deemed granted approach. DOE relied on the 40 waiver applications submitted between 2016 and 2018, 33 [7] of which included interim waiver requests, to note that only one interim waiver request was granted within 30 business days of receipt of the application and one-fifth of the requests were resolved in under 100 days. On average, the Department determined, interim waiver requests received in 2016 took 162 days to resolve, those received in 2017 took 202 days, and those received in 2018 took 208 days. DOE's data illustrated that there was a need for issuance of a timely interim waiver while the full waiver was under review because the primary anticipated cost savings considered resulted by reducing the number of days by which a manufacturers revenues were delayed. 84 FR 18414, 18416–18417, 18418 (May 1, 2019). Setting mandatory timelines within the Department's review process will help prevent the financial impacts manufacturers currently experience as a result of delays in the processing of interim waiver requests.

In response to these concerns about the economic analysis conducted, DOE does not believe that the rule will allow noncompliant products onto the market for an indefinite period of time. To the contrary, the regulations allow manufacturers to test their product according to a DOE test procedure under an interim waiver while DOE considers public comment and other information in determining whether changes are warranted to the test procedure ultimately specified in the decision and order on the waiver petition. At all times, manufacturers will test and certify according to a DOE test procedure and will distribute in commerce only products that are compliant with the DOE standard.

Several commenters objected to DOE's proposal as unnecessary given that DOE already has an enforcement policy that addresses the underlying basis of the rule, that manufacturers with innovative products that cannot be tested under existing DOE test procedures will be harmed because delays in processing interim waivers prevent them from selling their product. These commenters point out that the current DOE enforcement policy addresses this issue. (ASAP et al., No. 46 at p. 5; Lennox, No. 48 at p. 10; and Earthjustice, No. 49 at p. 5–6) These commenters argue that under DOE's enforcement policy, as long as a petition for waiver has been filed, such products can be sold without fear of enforcement action. Accordingly, they state that because of the enforcement policy there is no reason that the existing interim waiver process should result in any delays concerning the introduction of innovative products. Hence, the NOPR cannot result in cost savings based on such delays and is therefore is unnecessary. (ASAP et al., No. 46 at p. 6; and A.O. Smith, No. 44 at p. 4) Some commenters noted that the Department's existing policy should remain the mechanism for dealing with the market introduction of truly innovative and ''first of its kind'' products while test procedure waiver applications are pending. (A.O. Smith, No. 44 at p. 4) Additionally, other commenters argued that DOE has failed to explain why its proposal is necessary given this non-enforcement policy. (AG Joint Commenters, No. 51 at p. 7) One commenter called the proposal a practical status quo that is consistent with the Department's 2010 enforcement policy.

NEMA supported the proposal because interim waivers provide a necessary pathway for manufactures to introduce innovative products into the market that would otherwise be barred as being noncompliant. NEMA continued that the Department's policy, in which DOE will not seek civil penalties for noncompliant products that have test procedure waiver application under review, reflects the realization that because waiver petitions require dedicated resources and significant time to evaluate that manufactures can be unfairly excluded from the market during delays. (No. 55 at pp. 3–4)

In response to commenters opposed to the proposed rule because they believe it would allow non-compliant products on the market, DOE views the non-enforcement policy as creating the same extremely low risk. As a practical matter, based on its experience, DOE believes that the enforcement policy alone is insufficient to address manufacturer concerns with the ability to sell products that they cannot test and certify pursuant to a DOE test procedure. Manufacturers argued that their business is protected from the possibility of an adverse DOE action only if DOE has granted either an interim waiver or final waiver under which they can operate. As ASE pointed out, the interim waiver process is worthy of revision to provide manufacturers with greater predictability and improve transparency so that the public can have confidence in the energy efficiency of a given product. Further, due to the long delays in making a decision on an interim waiver and publishing for comment a petition for waiver, the current practice of non-enforcement pending a decision from the Department allows manufacturers an extended period to sell into the market without competitors, consumers, or other interested stakeholders being made aware of a pending waiver decision. (ASE, No. 43 at pp. 2–3) DOE stating a position that it will not take enforcement action while a waiver request is pending also does nothing to provide the manufacturer with a means to test a product to show compliance. A non-enforcement policy is of little value if the product cannot be sold due to a manufacturer's inability to demonstrate to its customer that the product is legally compliant with the applicable energy conservation standard. A more efficient interim waiver process, as set forth in this final rule, is the best means of providing a clear, transparent path for a manufacturer to achieve compliance while their final waiver is under review or while DOE completes a rulemaking for a new or amended test procedure to address the issues raised in the waiver.

The NOPR included a provision providing that if DOE ultimately denies a petition for waiver or grants the petition with a different alternate test procedure than specified in the interim waiver, DOE would provide a grace period of 180-days for the manufacturer to use the test procedure specified in the DOE Decision and Order to make representations of energy efficiency. 84 FR 18414, 18416 (May 1, 2019). Comments identified several viewpoints on the Department's proposed revision. Some commenters voiced their support for the addition of the 180 day grace period. (AHRI, No. 42 p. 4; and Joint Industry Commenters, No. 52 at p. 5) Some commenters noted that the grace period provides manufacturers certainty and permits time to retest and recertify equipment accordingly, and recommended that this timeline should be discretionary as well. (NEMA, No. 55 at pg. 6; and Nortek, No. 38 at p. 2) Commenters also noted that without the inclusion of a grace period manufacturers would be less likely to use the waiver process, which would ultimately result in less innovative products being introduced to the market. (Lutron, No. 53 at p. 3).

Other commenters argued that the NOPR's proposed grace period was too long and should be reduced, from 30–60 days or capped at 60 days. (Anonymous 1, No. 17 at p. 1; and Carrier, No. 36, at p. 3) Reducing the compliance period to 60 days would limit the time a noncompliant product would be on the market. Some

[7] Of these, two waivers were withdrawn and one waiver was delayed pending ongoing litigation. 84 FR 18414, 18416 (May 1, 2019).

commenters believed that manufacturers who are granted waivers with a modified test procedure should receive less than 180 days, based upon the magnitude of changes between the prescribed test procedure and the one originally proposed by the manufacturer, to comply with the order. Alternatively, one commenter suggested that the final rule should include a longer grace period because product design changes and supply chain re-certifications needed to meet regulatory approvals are a complicated and lengthy process, but did not specify a specific alternative duration. (ITI, No. 20 at p. 1–2).

Still other commenters objected to the 180-day grace period and want it removed from the final rule. Generally, such commenters believe that manufacturers who are denied a waiver should be compelled to start testing immediately so they cannot sell non-compliant products for an extended period of time. (Sachs, No. 29 at p. 2; CA IOUs, No. 37 at p. 3; CEC, No. 40. at pp. 4–5; and ASE, No. 43, at p. 4) Commenters suggested that in the event information submitted by an applicant was grossly or intentionally inaccurate, unrepresentative or misleading, the grace period should be eliminated. (Lennox, No. 48 at pp. 8–9) Others argued that if DOE grants a waiver based on an alternate test procedure that DOE modified from the one proposed by the manufacturer, the existing regulations at 10 CFR 430.27(i) already provide a sufficient grace period, relieving a manufacturer of the burden of re-testing and re-rating when an alternate test procedure is directed by DOE in the final waiver. (CEC, No. 40 at p. 5).

As DOE explained in the NOPR, the grace period offers manufacturers a safe harbor in the event that a waiver is denied or revisions to an interim waiver are required. The Department recognizes that manufacturers need time to comply with a new test procedure. The 180 day duration was proposed because that time frame is consistent with the EPCA provision that provides manufacturers 180 days from issuance of a new or amended test procedure to begin using that test procedure for representation of energy efficiency. 84 FR 18414, 18416 (May 1, 2019); *See* 42 U.S.C. 6293(c)(2). The Department understands that less than 180 days may be needed if any changes to the alternate test procedure specified in an interim waiver are minor and emphasizes that nothing in DOE's waiver regulations prohibits a manufacturer from commencing use of the new alternate test procedure in less than 180 days. In the event that information submitted by the applicant was inaccurate or unrepresentative, DOE retains the ability under its regulations to rescind or modify a waiver at any time. After considering all of the many viewpoints on the 180 day grace period provision, the Department has decided that it is necessary to provide manufacturers time to comply before enforcement measures can be initiated. Because the waiver process concerns the issuance or amendment of a test procedure in light of the specific circumstances that gave rise to the need for a waiver, the waiver process is no different than the rulemaking process for the issuance or amendment of a test procedure. As a result, DOE maintains the 180 day grace period consistent with the time period provided in 42 U.S.C. 6293(c) and 42 U.S.C. 6314(d) in this final rule.

Additionally, in response to the comment indicating that the existing regulation already includes a grace period in 10 CFR 430.27(i) and 10 CFR 431.401(i) that makes the 2019 NOPR's inclusion of an grace period in the initially proposed 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) duplicative, DOE has relocated the 180-day grace period to 10 CFR 430.27(i)(1) and 10 CFR 431.401(i)(1) in this final rule.

Some commenters stated that finalizing this proposal could indirectly allow for backsliding of energy conservation standards. These commenters argued that if changes to the test procedure would impact measured efficiency, the efficiency standard must then be amended so that products minimally compliant under the original procedure will remain compliant under the new procedure. (NRDC, No. 47 at p. 3–4 referencing 42 U.S.C. 323(e)) Commenters continued by stating that if DOE amends a test procedure and that test procedure changes the measured efficiency such that the efficiency standard must be amended, DOE cannot pick a new efficiency threshold that is lower than the old efficiency standard. This proposal enables DOE to indirectly do what EPCA clearly forbids under its anti-backsliding provision, 42 U.S.C. 6295(o)(1). (NRDC, No. 47 at p. 4) Similarly, other commenters argued that the proposal amounted to a ''more tailored approach'' to rolling back test procedures and efficiency standards, which lead to the same loss of efficiency EPCA's anti-backsliding provision was intended to prevent. (AG Joint Commenters, No. 51 at p. 9).

In response to these concerns, DOE notes that the commenters' concern appears equally applicable to a grant of interim waiver or waiver pursuant to DOE's waiver regulations generally, irrespective of this final rule. DOE maintains that the issuance of a waiver or interim waiver pursuant to DOE's waiver regulations, including the amendments in this final rule, will not violate EPCA's prohibition against backsliding at 42 U.S.C. 6295(o)(1). As explained above, a test procedure waiver (decision and order) and interim waiver are a test procedure prescribed by the Department. Under 42 U.S.C. 6293 and 42 U.S.C. 6314, EPCA sets forth the criteria and procedures that DOE is required to follow when prescribing or amending test procedures. This final rule does not roll back energy conservation standards. This final rule provides clear direction on how manufacturers can test their product to determine compliance with energy conservation standards when they have manufactured a new and innovative product that cannot adequately be tested for compliance with the existing standard using the existing test procedure.

DOE also received comments challenging the Department's position in the NOPR, at Footnote 5, stating that granting an interim waiver application is not a final agency action as contemplated by the APA, which defines an ''agency action'' as including ''the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'' 84 FR 18414, 18416 (May 1, 2019) referencing 5 U.S.C. 551(13). Commenters argued that the ''deemed granted'' interim waiver would constitute final agency action and that the Department's position overlooks the reality that an interim waiver application is a separate process that is distinct from the request for a decision and order granting a test procedure waiver. Commenters continued by stating that the finality of the interim waiver ensures that DOE cannot withhold judicial review indefinitely through prolonged inaction while an interim waiver is in effect; the separate process of issuing an interim waiver from the test procedure makes it a final decision. (Earthjustice, No. 49 at p. 7–8) Commenters continued that the finality of the interim waiver ensures that DOE cannot withhold judicial review indefinitely through prolonged inaction while an interim waiver is in effect and to find otherwise would lead to an absurd result. (AG Joint Commenters, No. 51 at p. 9).

While DOE recognizes that courts are responsible for determining whether judicial review is available under the APA for a particular agency action, DOE reiterates that interim waivers do not

represent the consummation of the Department's decision-making process. As noted in the NOPR, the Supreme Court has explained to be ''final,'' an agency action must ''mark the consummation of the agency's decision-making process, and must either determine rights or obligations or occasion legal consequences.'' *Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 482 (2004) (quotation omitted); see *Bennett* v. *Spear,* 520 U.S. 154, 178 (1997). While manufacturers would be able to test and distribute their products or equipment in commerce if granted an interim waiver under the proposal, continued distribution is dependent upon DOE's decision on the petition for waiver. DOE regulations contemplate further process on the waiver request after issuance of an interim waiver decision, including publication of the interim waiver for comment, further indication that DOE's decision-making process on the waiver is not complete. DOE will consider any comments received, as well as any additional information provided by the petitioner or developed by the Department, in issuing a final decision on the associated petition for waiver, or a final rule amending the test procedure. Either of these actions could have rights or obligations, or consequences, that differ from those provided temporarily under an interim waiver. 84 FR 18414, 18416 (May 1, 2019), footnote 5.

Commenters argued that establishing a timeframe for final waiver determinations would encourage timely responses and communication during the process would ultimately provide certainty for the market. (Acuity, No. 14 at p. 2) Commenters also objected to the removal from the regulations in the proposal of the one year deadline for DOE to either grant or deny a waiver or, to complete a test procedure to address the issues raised by the waiver petition. (ITI, No. 20 at p. 1; Traulsen, No. 25 at 1; NAFEM, No. 26 at pp. 3–4; and Carrier, No. 36 at p. 2).

Lennox stated that interim waivers must not be allowed to continue indefinitely, but argued that if DOE fails to act within one year of issuing an interim waiver, the interim waiver should continue to remain in effect until DOE takes action. These commenters condition this extension by clarifying that petitioners or other stakeholders should not be able to bring judicial action to compel DOE to render a final determination. (Lennox, No. 48 at p. 8) Other commenters took a similar stance in that they supported the notice that interim waivers were to remain in effect until a decision was published in the **Federal Register** on the waiver petition or, an amended test procedure was published. (NEMA, No. 55 at p. 6).

In response, DOE understands the commenters' concerns about an interim waiver persisting indefinitely and retains the language at 10 CFR 430.27 and 10 CFR 431.401 in this final rule that DOE will issue a decision and order or amend the test procedure to address the issue(s) presented in the waiver petition within 1 year of issuance of an interim waiver.

DOE also received comments asserting that the Department's NOPR may not withstand the scrutiny of the APA because the Department has failed to provide satisfactory explanations for its proposed action and is proposing to forego independent judgment on this matter by deferring to private parties. The commenters suggest that if the Department will not withdraw the NOPR then it should consider issuing a Supplemental Notice of Proposed Rulemaking (SNOPR) to address the issues raised during the comment period. (CA IOUs, No. 37 at p. 8–9).

In response, DOE notes that the comment period was extended on multiple occasions to allow commenters to provide additional feedback on the NOPR. In both the NOPR and this final rule, DOE has provided detailed explanations regarding its decision-making process. DOE has explained its reasons for undertaking this action and considered the comments received by members of the public and industry when making the decision to move forward with this final rule. DOE has also determined that the minor changes DOE is making from the NOPR (*e.g.,* extending the time period from 30 to 45 business days) are the logical outgrowth of the issues raised in the proposed rule and the comments submitted by interested parties. As a result, DOE has determined that an SNOPR is unnecessary.

Some commenters argued that DOE has unlawfully changed its interpretation of its test procedure waiver regulations by failing to provide a reasoned explanation for allowing an interim waiver to be ''deemed granted'' if the Department fails to provide notice within 30-business days of receipt of the petition. (Earthjustice, No. 49 at p. 4 referencing *FCC* v. *Fox Television Stations,* 556 U.S. 502, 515–16 (2009); AG Joint Commenters, No. 51 at p. 6) Commenters look to the Department's 2014 amendments to the test procedure waiver regulations, noting that DOE did not in that rulemaking allow manufacturers to extend previously granted waivers to additional models with the same technology or characteristics because DOE would be unable to fulfill its responsibility to ensure that an alternative test procedure was appropriate for the new basic models. (Earthjustice, No. 49 at p. 4 referencing 79 FR 26591, 26593 (May 9, 2014)) These commenters argued that DOE failed to provide a reasoned explanation for why DOE proposed to allow manufacturers to ''write their own test procedures'' through the proposed ''deemed granted'' approach, thus removing the Department's oversight of the test procedure process.

Other commenters argued DOE failed to provide any justification for dispensing of public notice as to when an interim waiver is granted. Commenters note that under the proposal DOE need never make a formal determination before an interim waiver request is ''deemed granted,'' therefore the public notice requirement may never be triggered. These commenters asserted that the Department must also provide a reasoned explanation for this disparity otherwise the rulemaking is arbitrary and capricious. (AG Joint Commenters, No. 51 at p. 6).

Contrary to these commenters' assertions, this final rule does not change the Department's prior interpretation of its obligations under EPCA by offering manufacturers the possibility of writing their own test procedures absent DOE oversight. In the 2014 final rule, DOE responded to commenters suggesting that DOE allow manufacturers who had received a waiver for a particular basic model or group of basic models to extend that waiver to additional basic models without requesting a waiver extension from DOE. DOE determined in that case that DOE would need to make an independent waiver determination for those basic models. DOE is not changing this requirement in this final rule. This rule, as noted previously, affects DOE's process for a decision on an interim waiver, not a waiver petition. The rule specifies that if DOE does not notify a manufacturer within 45 business days of submitting an interim waiver, the interim waiver is granted and the manufacturer may test and certify its product while DOE processes the waiver petition. DOE also provides that DOE will not grant an interim waiver if the application does not include an alternative test procedure. Applicants will be made aware of the denial and can submit a petition including an alternate test procedure or work with DOE in a public process to develop an appropriate test procedure as DOE processes the petition for waiver.

DOE has also not eliminated its prior responsibility to provide public notice of granted interim waivers. Prior to the

issuance of this final rule, other manufacturers, stakeholders and interested parties were given an opportunity to comment on the interim waiver when DOE published the grant or denial of interim waiver in the **Federal Register**. That comment opportunity is unchanged by this final rule. The amended 10 CFR 430.27(e)(1)(i) and 10 CFR 431.401(e)(1)(i) provide members of the public with two specific opportunities to receive notice of a potential interim waiver. First, the Department specifies in its regulations that it will post a petition for an interim test procedure waiver on its website within five business days of receipt. While DOE currently posts waiver requests on its website, posting is now codified in DOE regulations as a requirement, and the posting is required to be done expeditiously. DOE will also provide notice of a decision regarding an interim waiver petition by posting the decision to the DOE website no later than 5 business days after the end of the 45 business day review period. Determinations regarding petitions for interim waivers will also be submitted for publication in the **Federal Register** as soon as possible after the determination is made. With this final rule, DOE continues to ensure the public remains notified and informed of waiver requests and has the ability to comment on them. The public also continues to receive timely notification of DOE's decision on any particular waiver request.

Commenters argued that by categorically excluding this proposed action from environmental review, the Department has violated the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.,* for applying an inapplicable categorical exclusion. Commenters assert that the Department has failed to meet the burden of proof for this claim by failing to determine, as required by DOE regulations, whether extraordinary circumstances exist that could ''affect the significance of the environmental effects of the proposal''. Commenters continued that DOE cannot simply conclude that the rulemaking will have no impact on environmental factors without providing an analysis into such factors. (CA IOUs, No. 37 at p. 8).

As stated in the NOPR, this rule amends existing regulations without changing the environmental effect of the regulations being amended. The Department reasonably asserted that the proposal was covered under the A5 Categorical Exclusion, 10 CFR part 1021, subpart D., and that neither an environmental assessment nor an environmental impact statement was required. 84 FR 18414, 18420 (May 1, 2019). DOE maintains that this final rule provides greater clarity and transparency throughout the interim test procedure waiver process. The rulemaking does not extend to setting energy conservation standards, but relates to the test procedures manufacturers may use to demonstrate compliance. DOE concludes in this final rule that the A5 categorical exclusion still applies. For these same reasons, because the rule only provides for manufacturers to use, on an interim basis, the test procedure specified in the interim waiver if DOE fails to act within a reasonable time period, no extraordinary circumstances exist that could affect the significance of the environmental effects of the proposal.

Commenters have also asserted that DOE should devote more resources towards reviewing test procedure waivers using the existing regulatory framework. (Earthjustice, No. 49 at p. 1, 6; and ASAP et al., No. 46 at p. 7) Commenters noted that the current delays in the test procedure waiver process are problems of efficiency and could be improved through the additional allocation of resources. (CEC, No. 40 at p. 7).

It is the Department's intent that by finalizing its test procedure waiver decision-making process in this rulemaking that it will increase response time and reduce manufacturers' burdens associated with the interim waiver application process, provide greater certainty and transparency it its administrative process, and reduce delays in manufacturers' availability to bring innovative product options to consumers. 84 FR 18414, 18415 (May 1, 2019).

Some commenters disagreed with DOE's use of public policy reasons as a basis for granting interim waivers. (CEC, No. 40 at p. 10) These commenters call DOE's action contrary to the intent of EPCA because the statute establishes clear criteria for any test procedure authorized by the Department under 42 U.S.C. 6293(b)(3). DOE, therefore, cannot permit a manufacturer to use an alternative test procedure without first finding that the alternative satisfies these statutory criteria. (Earthjustice, No. 49 at pp. 4–5).

In response, the Department is not changing the longstanding regulatory criteria for the grant of waiver that have existed since 1980, 45 FR 64109 (September 26, 1980), and were retained and extended to include interim waivers in amendments to the procedures in 1986, 51 FR 42823 (November 26, 1986). The Department's procedures were revised in 1995, 60 FR 15004 (March 21, 1995), and again in 2014, 79 FR 26591 (May 9, 2014). Under this final rule, for an interim waiver and waiver application to be granted, applicants are required to provide an application that includes an alternative test procedure. The Department's review of the application includes a review of the proposed alternative test procedure, and as noted previously, DOE is well aware of the EPCA requirements for the issuance or amendment of a test procedure at 42 U.S.C. 6293 and 42 U.S.C. 6314. If DOE does not otherwise act to affirmatively grant or deny the interim waiver within 45 business days, the waiver is granted based on the regulatory criterion that it is desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(e)(2) and 10 CFR 431.401(e)(2). DOE continues to believe that it is desirable for public policy reasons to allow manufacturers to test and certify their products using to the test procedure specified in the waiver petition, pursuant to an interim waiver, while DOE receives comment on the petition for waiver and works with the petitioner, and with the benefit of public input, to determine whether any changes to that test procedure are warranted.

Some commenters expressed confusion regarding what triggers the 30-day clock for granting an interim waiver. (ASE, No. 43 at p. 4; and Acuity, No. 14 at p. 2) Other commenters argued that the clock for review should only start once DOE has received all of the necessary information. (Earthjustice, No. 49 at p. 7).

DOE notes that the 30-day deadline of the proposed rule has been amended to 45 business days, which equates to approximately two months. To clarify when DOE considers a petition received and starts the clock, DOE notes that the 45 business day clock does not begin until an applicant submits a petition for an interim waiver that includes the information specified in 10 CFR 430.27(b)(2) or 10 CFR 431.401(b)(2) under 10 CFR 430.27(e)(1)(iii) and 10 CFR 431.401(e)(1)(iii) of this final rule. Inclusion of an alternate test procedure is necessary to allow DOE to consider the likelihood of success of the petition for waiver and is required for DOE to grant an interim waiver.

As a means of further streamlining the interim waiver process, DOE received comments suggesting the use of group waiver applications from trade associations or similar industry groups if they produce like or similar products.

Commenters asserted that this grouped approach would conserve manufacturers' compliance resources and save the Department resources from having to review repetitive applications. (Acuity, No. 14 at pp. 2–3)

Because each waiver submission is dependent on the specifics of each product that is the subject of any particular waiver request, DOE does not plan to implement such a practice through this final rule. To conserve resources, the Department suggests that manufacturers look to existing test procedure waivers for similar products as a means of identifying relevant alternative test procedures that can be included in their own, individual petitions for a waiver, *see https://www.energy.gov/eere/buildings/current-test-procedure-waivers.*

IV. Procedural Requirements

A. Review Under Executive Order 12866 and 13563

This regulatory action has been determined to be ''significant'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

DOE has also reviewed this final regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281, Jan. 21, 2011). E.O. 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE concludes that this final rule is consistent with these principles. The amendments to DOE's regulations are intended to expedite DOE's processing of test procedure interim waiver applications, thereby reducing financial and administrative burdens for all manufacturers; as such, the final rule satisfies the criteria in Executive Order 13563.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' That Order 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. The Order stated that it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. DOE considers this final rule to be an E.O. 13771 deregulatory action, resulting in expected cost savings to manufacturers.

Additionally, on February 24, 2017, the President issued Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' The Order required the head of each agency designate an agency official as its Regulatory Reform Officer (RRO). Each RRO shall oversee 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 will 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 shall attempt to identify regulations that:

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) 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

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

As noted, this final rule is deregulatory, and is expected to reduce both financial and administrative burdens on regulated parties. Specifically, the amendments to DOE's regulations discussed in this final rule should improve upon current waiver regulations, which potentially are inhibiting job creation; are ineffective in creating certainty for manufacturers with respect to business decisions; and impose costs that exceed benefits. Specifically, the length of time manufacturers have previously waited for DOE to provide notification of the disposition of applications for interim waiver (or final decisions on waiver petitions), made possible by the open-ended nature of the current regulations, will be significantly shortened. The cost savings and other benefits manufacturers should realize by waiting no more than 45 business days for an interim waiver determination should create cost savings, as manufacturers have a decision whether they could introduce their products and equipment into commerce in a timely fashion. These cost savings may lead to increased job creation, and create other potentially significant economic benefits.

i. National Cost Savings and Forgone Benefits

The primary anticipated cost saving is from reducing the number of days by which manufacturer revenues are delayed for affected products. DOE monetized this value for the NOPR using the interest that a manufacturer might have earned on product revenue if an interim waiver were approved within 45 business days. Between the proposed rule and the final rule, DOE has adjusted this time period from 30 business days to 45 business days. There are three interim waivers in this dataset that were granted after more than 30 business days but in fewer than 45 business days; however, those interim waivers did not cause any change in manufacturer revenues.[8] On average, between 2016 and 2018, DOE concluded interim waivers after 185

[8] All three interim waivers were granted for more efficient models of external power supplies, which could already test and certify compliance in the absence of the grant of interim waiver. As a result, speeding the grant of these interim waivers would not increase manufacturer revenues in either the NOPR analysis or final rule analysis.

days, or 118 days beyond the 45 business days specified in this final rule. Using a threshold of 45 business days rather than 30 business days changes the magnitude, though not the direction, of DOE's anticipated cost savings from this final rule. DOE uses 7% interest per the Office of Management and Budget's Circular A–4,[9] and calculates the forgone interest that could have accrued for each affected product during the 118 day delay period.

DOE monetized the scope of delay using average prices for products in interim waiver petitions and the proportion of affected shipments, based on the proportion of basic models listed in interim waiver petitions relative to the total number of basic models within each product category. A full list of petitions for interim waiver can be accessed at *https://www.energy.gov/eere/buildings/current-test-procedure-waivers.* This list indicates how many interim waiver petitions were received for each product category. Each petition for interim waiver also lists the number of affected basic models, which DOE used to assess the proportion of shipments affected by each petition. Total numbers of basic models per product category are accessible via the DOE's Compliance Certification Database.[10]

Between 2016 and 2018, 5,322 basic models of 12 residential and commercial products were affected by interim waiver delays, totaling 1.31 million in estimated annual shipments and $1.76 billion in annual sales. The affected products are outlined in Table IV.B.1 below.[11] While all affected shipments are represented in Table IV.B.1 below, DOE monetized the cost of delay only for those basic models for which manufacturers would be unable to test or certify absent an interim waiver. For one petition, the manufacturer was unable to test or certify half of the basic models requested absent a waiver; the estimated cost of delay is proportionate to those models. DOE calculated the interest that could have been earned on this revenue over the 118-day average delay period and multiplied the average cost of delay per petition by 11, the average number of interim waiver requests received per year, to reach an annual cost of delay. In undiscounted terms, DOE expects that this proposal will result in $14 million in annual cost savings. DOE assumes that these sales are delayed rather than forgone.

TABLE IV.B.1—SHIPMENTS AND AVERAGE PRICES OF PRODUCTS/EQUIPMENT AFFECTED BY INTERIM WAIVER DELAYS

[2016–2018]

Product/equipment	Affected shipments	Average price (2016$) [12]	Estimated product sales	Cost of delay
Residential:				
Battery Chargers	74,694	$7.92	$591,738	$13,391
Ceiling Fans	48,397	110.43	5,344,688	120,951
Central Air Conditioners & Heat Pumps	481,200	3,086.07	1,371,615,829	31,039,854
Clothes Washers	31,780	700.24	22,253,510	503,600
Dishwashers	24,912	301.92	7,521,486	170,212
Refrigerators	40,968	655.30	26,846,375	607,537
Commercial:				
Commercial Refrigeration Equipment	22,036	3,902.71	85,998,189	1,946,151
Walk-in Coolers & Freezers—Doors	190,950	585.60	111,821,271	2,503,440
Walk-in Coolers & Freezers—Systems	700	2,681.82	1,876,011	42,454
Total				36,947,591
Average Cost of Delay per Petition (29 petitions total)				1,274,055
Average Cost of Delay per Year (11 petitions/year)				14,014,604

Note that totals may not add due to rounding.

Forgone Benefits

To the extent that this policy would cause DOE to grant interim waiver requests that it would not have granted in the status quo, this proposal may result in forgone benefits to consumers or the environment. Based on historical data, these effects are anticipated to be relatively small. Of 21 concluded interim waiver petitions, DOE granted 18 in full and granted the remaining 3 with modifications. Of the modified interim waivers, one was granted in part, one was granted with minor modifications, and one was granted with a different alternative test measure than proposed. DOE estimated the forgone environmental benefits and energy savings of granting the petitions as received, rather than as modified by the Department.

All forgone benefits and savings are annual, rather than one-time, and are projected in the table below using a perpetual time horizon and discounted to 2016. DOE expects these changes to result in $359 million or $163 million in total cost savings, discounted at 3% and 7%, respectively. In annualized terms, DOE expects $10.8 million in net cost savings, discounted at 3%, or $11.4 million in net cost savings discounted at 7%.

[9] ''The 7 percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy. It is a broad measure that reflects the returns to real estate and small business capital as well as corporate capital.'' *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[10] *https://www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A*.

[11] Walk-in Coolers and Freezers (WICF) are counted as a single affected product. However, Table IV.B.1. breaks out which petitions concerned which WICF components, as their annual shipments and prices vary accordingly.

[12] Average price is generally the base case average MSP of equipment from the life-cycle cost year in the most recently published technical support document. This represents a shipment-weighted average across efficiency distribution and across all product classes.

TABLE IV.B.2—COST IMPACT OF PROPOSED INTERIM WAIVER RULE

[2016$]

	Costs or (savings)	Costs or (savings) *millions*
Annual Cost Savings of Reduced Delay	($14,014,604)	($14.01)
Annual Forgone Energy Savings	164,000	0.16
Annualized Carbon Emissions (SCC), 3% †	1,764,000	1.76
Annualized Carbon Emissions (SCC), 7% †	827,000	0.83
Net Present Value at 3%	(358,927,345)	(358.93)
Net Present Value at 7%	(163,068,216)	(163.07)
Annualized Costs or (Savings) at 3%	(10,767,820)	(10.77)
Annualized Costs or (Savings) at 7%	(11,414,775)	(11.41)

† Undiscounted annual SCC values are not available for comparison.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that a Federal agency prepare a final regulatory flexibility analysis (FRFA) for any final rule for which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

This final rule would impose a requirement on the Department that it must make a decision on interim waiver applications within 45 business days after receipt of a petition. An interim waiver would remain in effect until a waiver decision is published or until DOE publishes a new or amended test procedure that addresses the issues presented in the waiver, whichever is earlier.

The final rule does not impose any new requirements on any manufacturers, including small businesses. DOE's economic analysis, presented in section IV.B. of this final rule, analyzed interim waiver requests submitted by 21 different manufacturers. Assuming that all of these manufacturers were small entities, because the final rule does not impose any new requirements on any small entity, the economic impact on small entities will be zero. Therefore, there will be no significant economic impact to affected small entities. The final rule provides greater certainty to manufacturers applying for interim waivers that their petitions would be considered and adjudicated promptly, allowing them, upon DOE grant of an interim waiver, to distribute their products or equipment in commerce while the Department considered its final decision on the petition for waiver. This may be especially true of any small manufacturers who may only sell one or two specialty products and rely on this as their sole stream of revenue. This rulemaking would allow such manufacturers to continue selling their product while the Department considers a final decision on the petition for waiver. The potential benefits of the rule to manufacturers, including small manufacturers, are as discussed in Section IV. B. of this final rule. No additional requirements with respect to the waiver application process would be imposed. DOE did not receive comments on this certification, and no commenters provided information that the rule would impose any economic impacts on small entities.

For these reasons, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared. DOE's certification and supporting statement of factual basis has been provided to the Chief Counsel of Advocacy of the SBA pursuant to 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act

Manufacturers of covered products and equipment must certify to DOE that their products or equipment comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products and equipment according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment. 76 FR 12422 (Mar. 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. Review Under the National Environmental Policy Act

Pursuant to the National Environmental Policy Act (NEPA) of 1969, DOE has analyzed this proposed action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, Appendix A5 because it is an interruptive rulemaking that does not change the environmental effect of the rule and meets the requires for application of a categorical exclusion. See 10 CFR 1021.410. Therefore, DOE has determined that the promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

F. Review Under Executive Order 12988

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

affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b)(2) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any, to be given to the regulation; (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, to be given to the regulation; (5) defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires 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 the standards. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under Executive Order 13132

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this final rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on ''Consultation and Coordination with Indian Tribal Governments,'' DOE may not issue a discretionary rule that has ''tribal'' implications and imposes substantial direct compliance costs on Indian tribal governments. DOE has determined that the final rule would not have such effects and concluded that Executive Order 13175 does not apply to this final rule.

I. 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 regulatory actions 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 ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *http://energy.gov/gc/office-general-counsel*.) DOE examined this final rule according to UMRA and its statement of policy and has tentatively determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal government, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OIRA a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) Is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) 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 regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy, and it has not been designated by the Administrator of OIRA as a significant energy action; it therefore is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. 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 proposed rule that may affect family well-being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

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

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 guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

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

List of Subjects

10 CFR Part 430

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

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Test procedures, Incorporation by reference, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on November 6, 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.

For the reasons set forth in the preamble, the Department of Energy is amending parts 430 and 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

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

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

■ 2. Section 430.27 is amended by revising paragraphs (e)(1), (h), and (i)(1) to read as follows:

§ 430.27 Petitions for waiver and interim waiver.

* * * * *

(e) *Provisions specific to interim waiver*—(1) *Disposition of petition.* (i) Within 5 business days of receipt of a petition for an interim waiver, DOE will post that petition for an interim waiver on its website.

(ii) In those cases where DOE receives a petition for an interim waiver in conjunction with a petition for waiver, DOE will review the petition for interim waiver within 45 business days of receipt of the petition. Where the manufacturer does not specify any alternate test procedure, or otherwise fails to satisfy the other required criteria specified under paragraph (b)(2) of this section, DOE will deny the petition for interim waiver. In such case, DOE will notify the applicant of the denial within the 45-day review period and process the request for waiver in accordance with this section. If DOE does not notify the applicant of the disposition of the petition for interim waiver, in writing, within 45 business days of receipt of the petition, the interim waiver is granted utilizing the alternate test procedure requested in the petition. Notice of DOE's determination on the petition for interim waiver will be posted on the Department's website not later than 5 business days after the end of the review period. Such determination will also be submitted for publication in the **Federal Register**.

(iii) A petition submitted under this paragraph (whether for an interim waiver or waiver) is considered ''received'' on the date it is received by the Department through the Department's established email box for receipt of waiver petitions or, if delivered by mail, on the date the waiver petition is stamped as received by the Department.

* * * * *

(h) *Duration.* (1) Interim waivers remain in effect until the earlier of the following:

(i) DOE publishes a decision and order on a petition for waiver in the **Federal Register** pursuant to paragraph (f) of this section; or

(ii) DOE publishes in the **Federal Register** a new or amended test procedure that addresses the issue(s) presented in the waiver.

(2) Within one year of a determination to grant an interim waiver, DOE will complete either paragraph (h)(1)(i) or (ii) of this section as specified in this section.

(3) When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance.

(i) *Compliance certification.* (1) If the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, a manufacturer who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test and re-rate those basic models so long as: The manufacturer used that alternative procedure to certify the compliance of the basic model after DOE granted the company's interim waiver request; changes have not been made to those basic models that would cause them to use more energy or otherwise be less energy efficient; and the manufacturer does not modify the certified rating. However, if DOE ultimately denies the petition of waiver or the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, DOE will provide a period of 180 days before the manufacturer is required to use the DOE test procedure or the alternate test procedure specified in the decision and order to make representations of energy efficiency.

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 3. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 4. Section 431.401 is amended by revising paragraphs (e)(1), (h), and (i)(1) to read as follows:

§ 431.401 Petitions for waiver and interim waiver.

* * * * *

(e) *Provisions specific to interim waivers*—(1) *Disposition of petition.* (i) Within 5 business days of receipt of a petition for an interim waiver, DOE will post that petition for an interim waiver on its website.

(ii) In those cases where DOE receives a petition for an interim waiver in conjunction with a petition for waiver, DOE will review the petition for interim waiver within 45 business days of receipt of the petition. Where the manufacturer does not specify any alternate test procedure, or otherwise fails to satisfy any of the other required criteria specified under paragraph (b)(2) of this section, DOE will deny the petition for interim waiver. In such case, DOE will notify the applicant of the denial within the 45-day review period and process the request for waiver in

accordance with this section. If DOE does not notify the applicant of the disposition of the petition for interim waiver, in writing, within 45 business days of receipt of the petition, the interim waiver is granted utilizing the alternate test procedure requested in the petition. Notice of DOE's determination on the petition for interim waiver will be posted on the Department's website not later than 5 business days after the end of the review period. Such determination will also be submitted for publication in the **Federal Register**.

(iii) A petition submitted under this paragraph (whether for an interim waiver or waiver) is considered ''received'' on the date it is received by the Department through the Department's established email box for receipt of waiver petitions or, if delivered by mail, on the date the waiver petition is stamped as received by the Department.

* * * * *

(h) *Duration.* (1) Interim waivers remain in effect until the earlier of the following:

(i) DOE publishes a decision and order on a petition for waiver pursuant to paragraph (f) of this section in the **Federal Register**; or

(ii) DOE publishes in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver.

(2) Within one year of a determination to grant an interim waiver, DOE will complete either paragraph (h)(1)(i) or (ii) of this section as specified in this section.

(3) When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance.

(i) *Compliance certification.* (1) If the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order granting the petition for waiver, a manufacturer who has already certified basic models using the procedure permitted in DOE's grant of an interim test procedure waiver is not required to re-test and re-rate those basic models so long as: The manufacturer used that alternative procedure to certify the compliance of the basic model after DOE granted the company's interim waiver request; changes have not been made to those basic models that would cause them to use more energy or otherwise be less energy efficient; and the manufacturer does not modify the certified rating. However, if DOE ultimately denies the petition for waiver, or if the alternate test procedure specified in the interim waiver differs from the alternate test procedure specified by DOE in a subsequent decision and order, DOE will provide a period of 180 days before the manufacturer is required to use the DOE test procedure or the alternate test procedure specified in the decision and order to make representations of energy efficiency.

* * * * *

[FR Doc. 2020–26321 Filed 12–10–20; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1733]

RIN 7100–AG 03

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2021. The annual indexation of these amounts is required notwithstanding the Board's action in March 2020 setting all reserve requirement ratios to zero. The Regulation D amendments set the reserve requirement exemption amount for 2021 at $21.1 million of reservable liabilities (up from 16.9 million in 2020). The Regulation D amendments also set the amount of net transaction accounts at each depository institution (over the reserve requirement exemption amount) that could be subject to a reserve requirement ratio of not more than 3 percent (and which may be zero) in 2021 at $182.9 million (up from $127.5 million in 2020). This amount is known as the low reserve tranche. The adjustments to both of these amounts are derived using statutory formulas specified in the Federal Reserve Act (the ''Act''). The annual indexation of the reserve requirement exemption amount and low reserve tranche, though required by statute, will not affect depository institutions' reserve requirements, which will remain zero. The Board is also announcing changes in two other amounts, the nonexempt deposit cutoff level and the reduced reporting limit, that are used to determine the frequency at which depository institutions must submit deposit reports.

DATES: *Effective date:* January 11, 2021.

Compliance dates: The new low reserve tranche and reserve requirement exemption amount will apply to the fourteen-day reserve maintenance period that begins January 14, 2021. For depository institutions that report deposit data weekly, this maintenance period corresponds to the fourteen-day computation period that begins December 15, 2020. For depository institutions that report deposit data quarterly, this maintenance period corresponds to the seven-day computation period that begins December 15, 2020. The new values of the nonexempt deposit cutoff level, the reserve requirement exemption amount, and the reduced reporting limit will be used to determine the frequency at which a depository institution submits deposit reports effective in either June or September 2021.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Special Counsel (202–452–3565), or Justyna Bolter, Senior Attorney (202/452–2686), Legal Division, or Kristen Payne, Senior Financial Institution and Policy Analyst (202–452–2872), or Francis A. Martinez, Lead Financial Institution and Policy Analyst (202–245–4217), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202–263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

SUPPLEMENTARY INFORMATION: Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations, for the purpose of implementing monetary policy. Section 11(a)(2) of the Act (12 U.S.C. 248(a)(2)) authorizes the Board to require reports of liabilities and assets from depository institutions to enable the Board to conduct monetary policy. The Board's actions with respect to each of these provisions are discussed in turn below.

I. Reserve Requirements

Section 19(b) of the Act authorizes different ranges of reserve requirement ratios depending on the amount of transaction account balances at a depository institution. Section 19(b)(11)(A) of the Act (12 U.S.C. 461(b)(11)(A)) provides that a zero percent reserve requirement ratio shall apply at each depository institution to total reservable liabilities that do not exceed a certain amount, known as the

reserve requirement exemption amount. Section 19(b)(11)(B) provides that, before December 31 of each year, the Board shall issue a regulation adjusting the reserve requirement exemption amount for the next calendar year if total reservable liabilities held at all depository institutions increase from one year to the next. No adjustment is made to the reserve requirement exemption amount if total reservable liabilities held at all depository institutions should decrease during the applicable time period. The Act requires the percentage increase in the reserve requirement exemption amount to be 80 percent of the increase in total reservable liabilities of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Total reservable liabilities of all depository institutions increased by 31.0 percent, from $8,321 billion to $10,902 billion, between June 30, 2019, and June 30, 2020. Accordingly, the Board is amending Regulation D (12 CFR part 204) to set the reserve requirement exemption amount for 2021 at $21.1 million, an increase of $4.2 million from its level in 2020.[1]

Pursuant to Section 19(b)(2) of the Act (12 U.S.C. 461(b)(2)), transaction account balances maintained at each depository institution over the reserve requirement exemption amount and up to a certain amount, known as the low reserve tranche, may be subject to a reserve requirement ratio of not more than 3 percent (and which may be zero). Transaction account balances over the low reserve tranche may be subject to a reserve requirement ratio of not more than 14 percent (and which may be zero). Section 19(b)(2) also provides that, before December 31 of each year, the Board shall issue a regulation adjusting the low reserve tranche for the next calendar year. The Act requires the adjustment in the low reserve tranche to be 80 percent of the percentage increase or decrease in total transaction accounts of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

Net transaction accounts of all depository institutions increased 54.3 percent, from $2,505 billion to $3,866 billion, between June 30, 2019, and June 30, 2020. Accordingly, the Board is amending Regulation D to set the low reserve tranche for net transaction accounts for 2021 at $182.9 million, an increase of $55.4 million from 2020.

The new low reserve tranche and reserve requirement exemption amount will be effective for all depository institutions for the fourteen-day reserve maintenance period beginning January 14, 2021. For depository institutions that report deposit data weekly, this maintenance period corresponds to the fourteen-day computation period that begins December 15, 2020. For depository institutions that report deposit data quarterly, this maintenance period corresponds to the seven-day computation period that begins December 15, 2020.

Effective March 26, 2020, the Board reduced reserve requirement ratios on all net transaction accounts to zero percent, eliminating reserve requirements for all depository institutions. The annual indexation of the reserve requirement exemption amount and the low reserve tranche for 2021 is required by statute but will not affect depository institutions' reserve requirements, which will remain zero.

II. Deposit Reports

Section 11(b)(2) of the Act authorizes the Board to require depository institutions to file reports of their liabilities and assets as the Board may determine to be necessary or desirable to enable it to discharge its responsibility to monitor and control the monetary and credit aggregates. The Board screens depository institutions each year and assigns them to one of four deposit reporting panels (weekly reporters, quarterly reporters, annual reporters, or nonreporters). The panel assignment for annual reporters is effective in June of the screening year; the panel assignment for weekly and quarterly reporters is effective in September of the screening year.

In order to ease reporting burden, the Board permits smaller depository institutions to submit deposit reports less frequently than larger depository institutions. The Board permits depository institutions with net transaction accounts above the reserve requirement exemption amount but total transaction accounts, savings deposits, and small time deposits below a specified level (the ''nonexempt deposit cutoff'') to report deposit data quarterly. Depository institutions with net transaction accounts above the reserve requirement exemption amount and with total transaction accounts, savings deposits, and small time deposits greater than or equal to the nonexempt deposit cutoff are required to report deposit data weekly. The Board requires certain large depository institutions to report weekly regardless of the level of their net transaction accounts if the depository institution's total transaction accounts, savings deposits, and small time deposits exceeds or is equal to a specified level (the ''reduced reporting limit''). The nonexempt deposit cutoff level and the reduced reporting limit are adjusted annually, by an amount equal to 80 percent of the increase, if any, in total transaction accounts, savings deposits, and small time deposits of all depository institutions over the one-year period that ends on the June 30 prior to the adjustment.

From June 30, 2019, to June 30, 2020, total transaction accounts, savings deposits, and small time deposits at all depository institutions increased 24.0 percent, from $13,053 billion to $16,191 billion. Accordingly, the Board is increasing the nonexempt deposit cutoff level by $203.5 million to $1.262 billion for 2021 (up from $1.058 billion in 2020). The Board is also increasing the reduced reporting limit by $424.6 million to $2.633 billion for 2021 (up from $2.208 billion in 2020).[2]

Beginning in 2021, the boundaries of the four deposit reporting panels will be defined as follows. Those depository institutions with net transaction accounts over $21.1 million (the reserve requirement exemption amount) or with total transaction accounts, savings deposits, and small time deposits greater than or equal to $2.633 billion (the reduced reporting limit) are subject to detailed reporting, and must file a Report of Transaction Accounts, Other Deposits and Vault Cash (FR 2900 report) either weekly or quarterly. Of this group, those with total transaction accounts, savings deposits, and small time deposits greater than or equal to $1.262 billion (the nonexempt deposit cutoff level) are required to file the FR 2900 report each week, while those with total transaction accounts, savings deposits, and small time deposits less than $1.262 billion are required to file the FR 2900 report each quarter. Those depository institutions with net transaction accounts less than or equal to $21.1 million (the reserve requirement exemption amount) and with total transaction accounts, savings deposits, and small time deposits less than $2.633 billion (the reduced reporting limit) are eligible for reduced reporting, and must either file a deposit report annually or not at all. Of this group, those with total deposits greater than $21.1 million (but with total transaction accounts, savings deposits, and small time deposits less than $2.633 billion) are required to file the Annual

[1] Consistent with Board practice, the low reserve tranche and reserve requirement exemption amounts have been rounded to the nearest $0.1 million.

[2] Consistent with Board practice, the nonexempt deposit cutoff level and the reduced reporting limit have been rounded to the nearest $1 million.

Report of Deposits and Reservable Liabilities (FR 2910a) report annually, while those with total deposits less than or equal to $21.1 million are not required to file a deposit report. A depository institution that adjusts reported values on its FR 2910a report in order to qualify for reduced reporting will be shifted to an FR 2900 reporting panel.

III. Regulatory Analysis

Administrative Procedure Act

The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments prescribed by statute and by the Board's policy concerning reporting practices. The adjustments in the reserve requirement exemption amount, the low reserve tranche, the nonexempt deposit cutoff level, and the reduced reporting limit serve to reduce regulatory burdens on depository institutions. Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required.[3] As noted previously, the Board has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995,[4] the Board reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 461, 601, 611, and 3105.

■ 2. Section 204.4 is amended by revising paragraph (f) to read as follows:

§ 204.4 Computation of required reserves.

* * * * *

(f) For all depository institutions, Edge and Agreement corporations, and United States branches and agencies of foreign banks, required reserves are computed by applying the reserve requirement ratios in table 1 to this paragraph (f) to net transaction accounts, nonpersonal time deposits, and Eurocurrency liabilities of the institution during the computation period.

TABLE 1 TO PARAGRAPH (f)

Reservable liability	Reserve requirement
Net Transaction Accounts:.	
$0 to reserve requirement exemption amount ($21.1 million)	0 percent of amount.
Over reserve requirement exemption amount ($21.1 million) and up to low reserve tranche ($182.9 million)	0 percent of amount.
Over low reserve tranche ($182.9 million)	$0 plus 0 percent of amount over $182.9 million.
Nonpersonal time deposits	0 percent.
Eurocurrency liabilities	0 percent.

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Monetary Affairs under delegated authority.

Ann Misback,

Secretary of the Board.

[FR Doc. 2020–27083 Filed 12–10–20; 8:45 am]

BILLING CODE 6210–01–P

[3] 5 U.S.C. 603 and 604.

[4] 44 U.S.C. 3506; 5 CFR part 1320.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 1, 61, 101, 107

[Docket No. FAA–2020–1067; Amdt. Nos. 1–73, 61–148, 101–10, 107–6]

RIN 2120–AL43

Removal of the Special Rule for Model Aircraft

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

ACTION: Final rule.

SUMMARY: This action removes regulations codifying the Special Rule for Model Aircraft because of a change in applicable law. This action also makes conforming updates to FAA regulations.

DATES: This rule is effective on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Jonathan W. Cross, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202–267–7173; email: *jonathan.cross@faa.gov.*

SUPPLEMENTARY INFORMATION: The FAA Modernization and Reform Act of 2012, Public Law 112–95 (February 14, 2012) (FMRA) included a number of provisions related to unmanned aircraft systems (UAS) operating in the National Airspace System (NAS). Section 336 of the Act, titled ''Special Rule for Model Aircraft,'' defined ''model aircraft'' and specifically prohibited FAA from promulgating a rule or regulation regarding model aircraft that were operated under certain circumstances. That prohibition notwithstanding,

section 336 preserved the right of FAA to pursue enforcement action against operators of model aircraft that endanger the NAS. On June 28, 2016, FAA issued a final rule to allow the operation of small unmanned aircraft systems (UAS) in the National Airspace System (NAS), *Operation and Certification of Small Unmanned Aircraft Systems,* 81 FR 42064. That rule also included a new subpart E to 14 CFR part 101, implementing section 336.

On October 5, 2018, the President signed into law the FAA Reauthorization Act of 2018 (Pub. L. 115–254) (FAARA 2018). Section 349 of that act repealed the ''Special Rule for Model Aircraft'' in section 336 of FMRA, and replaced it with the ''Exception for limited recreational operations of unmanned aircraft,'' creating a new framework for allowing certain small unmanned aircraft operations. As a result, 14 CFR part 101, subpart E, no longer reflects current statutory law.

This final rule removes 14 CFR part 101, subpart E, to remove the inconsistency between FAA's regulations and current statutory law. It also makes conforming amendments to remove references to part 101, subpart E, in both 14 CFR 61.8 (Inapplicability of unmanned aircraft operations) and 14 CFR 107.1(b)(2) (Applicability of part 107). Lastly, the final rule removes the obsolete definition of ''model aircraft'' from 14 CFR part 1.

Good Cause for Immediate Adoption

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (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. Section 553(d) also authorizes agencies to forgo the delay in the effective date of the final rule for good cause found and published with the rule.

In this instance, FAA finds good cause to forgo notice and comment. Section 349 of FAARA 2018 repealed the statutory basis for Subpart E of part 101, putting the regulation into conflict with statutory law. Furthermore, FAA has no discretion to keep subpart E, irrespective of notice and comment. For these reasons, and the potential for public confusion resulting from regulations that are inconsistent with existing statutory law, notice and comment is unnecessary and contrary to the public interest.

In addition, FAA finds good cause to make the rule effective upon publication. FAARA 2018 superseded subpart E when the President signed the Act into law on October 5, 2018, repealing FMRA section 336. Subpart E has been ineffective since that date, eliminating any justification to delay the effective date of this final rule.

Authority for This Rulemaking

FAA's authority to issue rules on 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 pursuant to 49 U.S.C. 44809, which repealed section 336 of Public Law 112–95.

III. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this statute requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes FAA's analysis of the impacts of this rule.

In conducting these analyses, FAA has determined that this rule is not a significant regulatory action, as defined in section 3(f) of Executive Order 12866. As notice and comment under 5 U.S.C. 553 are not required for this final rule, the regulatory flexibility analyses described in 5 U.S.C. 603 and 604 regarding impacts on small entities are not required. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector, by exceeding the threshold identified previously.

A. Regulatory Evaluation

As previously discussed, Section 349 of Public Law 115–254 repealed section 336 of Public Law 112–95 and thus subpart E of part 101 titled, *Special Rule for Model Aircraft* is no longer consistent with statutory law. As a result, this rule removes subpart E of part 101 and revises certain other provisions in 14 CFR to conform them to the removal of subpart E. This action will eliminate a conflict between FAA regulations and applicable statutory authority and reduce confusion for regulated entities. This rule does not convey additional regulations and does not result in additional regulatory costs.

Furthermore, in the 2016 final rule that added regulations to allow the operation of small UAS in the National Airspace System, 81 FR 42064, FAA found subpart E of part 101 would not result in any costs or benefits since it would simply codify FAA's enforcement authority. Therefore, the removal of subpart E of part 101 will not result in a revision of the previous regulatory analysis of its implementing rule.

B. Regulatory Flexibility Determination

Section 603 of the Regulatory Flexibility Act (RFA) requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever an agency is required by 5 U.S.C. 553 to publish a general notice of proposed rulemaking for any proposed rule. Similarly, section 604 of the RFA requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553 after being required to publish a general notice of proposed rulemaking. RFA analysis requirements are limited to rulemakings for which the agency ''is required by section 553 or any other law, to publish a general notice of proposed rulemaking for any proposed rule.'' 5 U.S.C. 603(a). FAA has found good cause for implementing an immediate effective date in this case. As prior notice and comment under 5 U.S.C. 553 are not required to be provided in this situation, the analyses in 5 U.S.C. 603 and 604 likewise are similarly not required.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. FAA has assessed the potential effect of this final rule and determined that it relates to domestic operation of certain unmanned aircraft systems and is not considered an unnecessary obstacle to trade.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' FAA currently uses an inflation-adjusted value of $155 million in lieu of $100 million. This rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. FAA has determined that there are no information collections associated with this rule.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to this rule.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6 of this Order and involves no extraordinary circumstances.

VII. Executive Order Determinations

A. Executive Order 13132, Federalism

FAA has analyzed this immediately adopted final rule under the principles and criteria of Executive Order 13132, Federalism. The Agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have federalism implications.

B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a ''significant energy action'' under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, International Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

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

List of Subjects

14 CFR Part 1

Air transportation.

14 CFR Part 61

Aircraft, Airmen, Aviation safety, Recreation and recreation areas, Reporting and recordkeeping requirements.

14 CFR Part 101

Aircraft, Aviation safety.

14 CFR Part 107

Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

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

§ 1.1 [Amended]

■ 2. In § 1.1, remove the definition of ''Model aircraft''.

PART 61—CERTIFICATION: PILOTS, FLIGHT INSTRUCTORS, AND GROUND INSTRUCTORS

■ 3. The authority citation for part 61 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701–44703, 44707, 44709–44711, 44729, 44903, 45102–45103, 45301–45302; Sec. 2307 Public Law 114–190, 130 Stat. 615 (49 U.S.C. 44703 note).

■ 4. Revise § 61.8 to read as follows:

§ 61.8 Inapplicability of unmanned aircraft operations.

Any action conducted pursuant to part 107 of this chapter cannot be used to meet the requirements of this part.

PART 101—MOORED BALLOONS, KITES, AMATEUR ROCKETS, AND UNMANNED FREE BALLOONS

■ 5. The authority citation for part 101 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101 note, 40103, 40113–40114, 45302, 44502, 44514, 44701–44702, 44721, 46308.

■ 6. The heading for part 101 is revised to read as set forth above.

§ 101.1 [Amended]

■ 7. Amend § 101.1 by removing paragraph (a)(5).

Subpart E—[Removed]

■ 8. Remove subpart E.

PART 107—SMALL UNMANNED AIRCRAFT SYSTEMS

■ 9. The authority citation for part 107 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 40101 note, 40103(b), 44701(a)(5), 44807.

§ 107.1 [Amended]

■ 10. Amend § 107.1 as follows:
■ a. In paragraph (b)(1) by adding ''or'' after the semicolon;
■ b. Removing paragraph (b)(2); and
■ c. Redesignating paragraph (b)(3) as paragraph (b)(2).

Issued under the authority of 49 U.S.C. 106(f) and 44809, in Washington, DC, on November 23, 2020.

Steve Dickson,

Administrator.

[FR Doc. 2020–26726 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 27

[Docket No. FAA–2020–1102; Notice No. 27–052–SC]

Special Conditions: Garmin International, Inc., Bell Textron Canada Limited Model 505 Helicopter, Visual Flight Rules Autopilot and Stability Augmentation System

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Bell Textron Canada Limited (BTCL) Model 505 helicopter. This helicopter as modified by Garmin International, Inc. (Garmin), will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for helicopters. This design feature is associated with the installation of an autopilot and stability augmentation system (AP/SAS). The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send comments on or before January 11, 2021.

ADDRESSES: Send comments identified by Docket No. FAA–2020–1102 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail: Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.*
- *Hand Delivery or Courier: Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.*
- *Fax: Fax comments to Docket Operations at 202–493–2251.*

Privacy: 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 it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket website, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478).

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 these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, 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 these special conditions. Submissions containing CBI should be sent to Andy Shaw, Continued Operational Safety Section, AIR–682, Rotorcraft Standards Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5384. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Andy Shaw, Continued Operational Safety Section, AIR–682, Rotorcraft Standards Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 10101 Hillwood Pkwy, Fort Worth, TX 76177; telephone (817) 222–5384; email *Andy.Shaw@faa.gov.*

SUPPLEMENTARY INFORMATION:

Reason for No Prior Notice and Comment Before Adoption

The FAA has determined, in accordance with 5 U.S.C. 553(b)(3)(B) and 553(d)(3), that notice and opportunity for prior public comment hereon are unnecessary because substantially identical special conditions have been previously subject to the public comment process in several prior instances such that the FAA is satisfied that new comments are unlikely. For the same reason, the FAA finds that good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment.

Special conditions number	Company and helicopter model
No. 27–048–SC [1]	Bell Helicopter Textron Canada Limited Bell Model 505 helicopter.
No. 27–046–SC [2]	Robinson Helicopter Company Model R66 helicopter.

Special conditions number	Company and helicopter model
No. 27–043–SC [3]	Airbus Helicopters Model AS350B2 and AS350B3 helicopters.

[1] 84 FR 64233, November 21, 2019.
[2] 84 FR 30050, June 26, 2019.
[3] 82 FR 57685, December 07, 2017.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments. The FAA may change these special conditions based on the comments received.

Background

On December 18, 2019, Garmin applied for a supplemental type certificate (STC) to install an AP/SAS in the BTCL Model 505 helicopter. The BTCL Model 505 helicopter is a 14 CFR part 27 normal category, single turbine engine, conventional helicopter designed for civil operation. This helicopter model can carry up to four passengers with one pilot and has a maximum gross weight (MGW) of up to 4,475 pounds, depending on the model configuration. The major design features include a two-blade main rotor, an anti-torque tail rotor system, skid landing gear, and a visual flight rule (VFR) basic avionics configuration. Garmin proposes to modify this model helicopter by installing an AP/SAS.

The AP/SAS provides attitude stabilization in two or three axes (pitch and roll with optional yaw) and higher-level AP functions such as altitude hold, heading command, and navigation tracking. However, the possible failure conditions for this system, and their effect on the continued safe flight and landing of the helicopter, are more severe than those envisioned by the present rules.

The effect on safety is not adequately covered under 14 CFR 27.1309 for the application of new technology and the new application of standard technology. Specifically, the present provisions of § 27.1309(c) do not adequately address the safety requirements for systems whose failures could result in catastrophic or hazardous/severe-major failure conditions or complex systems whose failures could result in major failure conditions in VFR rotorcraft. The current regulations are inadequate because when § 27.1309(c) was promulgated, it was not envisioned that this type of VFR rotorcraft would use systems that are complex or whose failure could result in ''catastrophic'' or ''hazardous/severe-major'' effects on the rotorcraft. This inadequacy is particularly true with the application of new technology, a new application of standard technology, or other applications not envisioned by the rule that affect safety.

Type Certification Basis

Under 14 CFR 21.101, Garmin must show that the BTCL Model 505 helicopter, as changed, continues to meet the applicable regulations listed in Type Certificate Number R00008RD or the applicable regulation in effect on the date of application for the change. The regulations listed in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations listed in Type Certificate Number R00008RD are as follows:

For approved MGW configuration of 1670 kg (3680 lb.) internal loading and 2030 kg (4475 lbs.) external loading:

14 CFR part 27, dated October 2, 1964, amendment 27–1 through 27–47

14 CFR part 36 Amendment 36–1 through 36–30

Equivalent Level of Safety Findings issued against:

(a) FAA Cover Issue Paper CIP–01

(b) 14 CFR part 27.307(b)(5) Proof of Structure Landing Gear Drop Test

(c) 14 CFR part 27.723 Landing Gear Shock Absorption Tests

(d) 14 CFR part 27.725 Landing Gear Limit Drop Test

(e) 14 CFR part 27.727 Landing Gear Reserve Energy Absorption Drop Test

(f) 14 CFR part 27.995(d) Fuel Shut-off Valve

(g) 14 CFR part 27.1545(b)(2) Airspeed Indicator

The Administrator has determined that the applicable airworthiness regulations (*e.g.,* 14 CFR part 27) do not contain adequate or appropriate safety standards for the BTCL Model 505 helicopter type certificate number R00008RD because of a novel or unusual design feature. Therefore, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should Garmin apply for an STC to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the BTCL Model 505 helicopter must comply with the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The BTCL Model 505 helicopter will incorporate the following novel or unusual design features: An AP/SAS. An AP system is a system used to control an aircraft trajectory without constant input from the pilot. This system allows the pilot to focus on other aspects of the operation, such as weather and other flight associated systems. SAS is another type of automatic flight control system; however, instead of maintaining the aircraft on a predetermined attitude or flight path, the SAS will reduce pilot workload by dampening the rotorcraft's buffeting regardless of the attitude or flight path.

Discussion

The BTCL Model 505 helicopter's type certification basis as modified by Garmin does not contain adequate airworthiness standards for the AP/SAS. The FAA requires these special conditions to comply with airworthiness standards. The FAA requires that Garmin provide the FAA with a systems safety assessment (SSA) for the final AP/SAS installation configuration to adequately address the safety objectives established by a functional hazard assessment (FHA). This assessment will ensure that all failure conditions and their effects are adequately addressed for the installed AP/SAS. The SSA process is part of the overall safety assessment process discussed in FAA Advisory Circular 27–1B, *Certification of Normal Category Rotorcraft,* and Society of Automotive Engineers document Aerospace Recommended Practice 4761, *Guidelines and Methods for Conducting the Safety Assessment Process on Civil Airborne Systems and Equipment.*

These special conditions require that the AP/SAS installed on the BTCL Model 505 helicopter meet the requirements to adequately address the failure effects identified by the FHA, and subsequently verified by the SSA, within the defined design integrity requirements.

Failure conditions are classified according to the severity of their effects on the rotorcraft. Radio Technical

Commission for Aeronautics, Inc. (RTCA) Document DO–178C, *Software Considerations in Airborne Systems and Equipment Certification,* provides software design assurance levels most commonly used for the major, hazardous/severe-major, and catastrophic failure condition categories. The AP/SAS equipment must be qualified for the expected installation environment. The test procedures prescribed in RTCA Document DO–160G, *Environmental Conditions and Test Procedures for Airborne Equipment,* are recognized by the FAA as acceptable methodologies for finding compliance with the environmental requirements. Equivalent environment test standards may also be acceptable.

The environmental qualification provides data to show that the AP/SAS can perform its intended function under the expected operating condition. Some considerations for environmental concerns are installation locations and the resulting exposure to environmental conditions for the AP/SAS equipment, including considerations for other equipment that may be environmentally affected by the AP/SAS equipment installation. The level of environmental qualification must be related to the severity of the considered failure conditions and effects on the rotorcraft.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the BTCL Model 505 helicopter. Should Garmin apply at a later date for a STC to modify any other model included on Type Certificate Number R00008RD to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only a certain novel or unusual design feature on the BTCL Model 505 helicopter. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of this feature on the helicopter.

List of Subjects in 14 CFR Part 27

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the supplemental type certification basis for Bell Textron Canada Limited (BTCL) Model 505 helicopters, as modified by Garmin International, Inc.

Instead of the requirements of 14 CFR § 27.1309(b) and (c), the following must be met for certification of the autopilot and stability augmentation system installed on BTCL Model 505 helicopters:

(a) The equipment and systems must be designed and installed so that any equipment and systems do not adversely affect the safety of the rotorcraft or its occupants.

(b) The rotorcraft systems and associated components considered separately and in relation to other systems must be designed and installed so that:

(1) The occurrence of any catastrophic failure condition is extremely improbable;

(2) The occurrence of any hazardous failure condition is extremely remote; and

(3) The occurrence of any major failure condition is remote.

(c) Information concerning an unsafe system operating condition must be provided in a timely manner to the crew to enable them to take appropriate corrective action. An appropriate alert must be provided if immediate pilot awareness and immediate or subsequent corrective action is required. Systems and controls, including indications and annunciations, must be designed to minimize crew errors that could create additional hazards.

Issued in Fort Worth, Texas on November 19, 2020.

Jorge Castillo,

Manager, Rotorcraft Standards Branch, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2020–26047 Filed 12–9–20; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1077; Project Identifier 2018–NE–40–AD; Amendment 39–21354; AD 2020–25–12]

RIN 2120–AA64

Airworthiness Directives; Superior Air Parts, Inc. Engines and Lycoming Engines Reciprocating Engines With a Certain SAP Crankshaft Assembly

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Superior Air Parts, Inc. (SAP) Model IO–360-series and O–360-series reciprocating engines and certain Lycoming Engines (Lycoming) Model AEIO–360-, IO–360-, and O–360-series reciprocating engines with a certain SAP crankshaft assembly installed. This SAP crankshaft assembly is installed as original equipment on the affected SAP engines and as a replacement part under parts manufacturer approval (PMA) on the affected Lycoming engines. This AD was prompted by three crankshaft assembly failures that resulted in the loss of engine power and immediate or emergency landings. This AD requires the removal from service of all affected crankshaft assemblies. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 15, 2021.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1077; 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: Justin Carter, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Parkway, Fort Worth, TX 76177; phone: (817) 222–5146; fax: (817) 222–5245; email: *justin.carter@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all SAP Model IO–360-series and O–360-series reciprocating engines and certain Lycoming Model AEIO–360-, IO–360-, and O–360-series reciprocating engines with a certain SAP crankshaft assembly installed. The NPRM published in the **Federal Register** on January 29, 2020 (85 FR 5173). The NPRM was prompted by three crankshaft assembly failures that resulted in the loss of engine power and immediate or emergency landings. The FAA determined that the crankshaft assembly failures resulted from the manufacturing process at SAP's crankshaft vendor during 2012 and 2014 causing excessive residual white layer of iron nitride forming on the assemblies. This white layer is brittle and can lead to spalling or fatigue cracking of the crankshaft assembly as a result of the normal mechanical loads during engine operation. The FAA's analysis concluded that all three SAP crankshaft assembly failures were the result of this fatigue cracking. In the NPRM, the FAA proposed to require the removal from service of all affected crankshaft assemblies. The unsafe condition, if not addressed, could result in failure of the engine, in-flight shutdown, and loss of the airplane.

Discussion of Final Airworthiness Directive Comments

The FAA received comments from seven commenters. The commenters were SAP, the Aircraft Owners and Pilots Association (AOPA), and five individual commenters. Three commenters requested that the FAA extend the comment period. One commenter requested the withdrawal of the AD. Two commenters asked the FAA to release more information. One commenter asked for the status of the AD and if the crankshaft assembly is safe to fly. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Withdraw the NPRM: White Layer Does Not Contribute to Fracture

SAP stated that data from an independent laboratory test does not support the statement in the NPRM that the crankshaft failures were a result of residual white layer formation, also known as a compound layer, on certain crankshaft assemblies as a result of improper manufacturing by a third-party vendor. SAP stated that the fractured crankshafts were all within specifications. SAP found both the material and the heat treatment to be within all engineering requirements and consistent with other crankshafts in general aviation piston aircraft engines. SAP noted that these requirements were consistent with the engineering testing conducted by SAP in pursuit of FAA PMA certification. Additionally, SAP stated the fractures were not consistent with fatigue fractures due to excessive white layer, and that no manufacturing or material defect was found in independent metallurgical laboratory analysis. The FAA infers from this comment that SAP is requesting that the FAA withdraw the NPRM.

The FAA disagrees with SAP's analysis. BakerRisk Project No. 01–05929–003–17, dated August 15, 2017, for SAP crankshaft assembly S/N SP14–0202, which failed on March 6, 2017, found that there was a continuous white layer at the surface of the radius, extending up to the location of the fracture, and that the white layer may have contributed to early crack initiation.[1] The continuous white layer at the origin was 0.0007 inch. BakerRisk Project No. 01–05929–006–17, Rev. 1, dated May 8, 2018, for SAP crankshaft assembly S/N SP14–0194, which failed on August 3, 2017, found that the continuous white layer at the surface of the forward journal radius, extending up to the location of the fracture, was 0.0006 inch. According to the report, this indicates that the process being used to remove the white layer was not removing the entire white layer. Because it found that the presence of the white layer can lower fatigue resistance and result in premature fatigue crack initiation, the report included recommendations to review the material and the processes that define the crankshaft journals, especially the nitride case hardening and white layer removal process.[2]

SAP's comment cited Hurst Metallurgical Research Laboratory, Inc., (Hurst) Report No. 73900, dated February 22, 2019, for SAP crankshaft assembly S/N SP13–0150, which failed on October 31, 2018. This Hurst report found that the continuous white layer of iron nitride at the surface of the forward journal radius was 0.0001 inch. The FAA, however, disagrees with the reported thickness of the white layer. The report includes two scaled photographs (photographs No. 11 and 12), magnified 100 times and 500 times, respectively. Using the scaling bar provided in the photographs, the FAA determined that the white layer is 0.0009 inch. Although SAP stated a white layer of up to 0.001 inch is allowed, SAP based this figure on an SAE Aerospace Material specification and not on the original equipment manufacturer's (OEM) specifications. A white layer of 0.0009 inch exceeds the amount allowed by the OEM.

As supported by the reports, the FAA finds that white layer contributed to the early crack initiation and, on all failed crankshaft assemblies, exceeded OEM specifications. Based on the foregoing, the FAA finds no basis to withdraw the NPRM.

Request To Withdraw the NPRM: White Layer Does Not Increase Fatigue Resistance

SAP stated that the presence of a white layer does not reduce the fatigue resistance of material at the surface, but rather increases the fatigue resistance of that same material. SAP cited a study by Major, Jakl, and Hubálovský for the observation that the application of plasma carburizing can lead to about a 25% increase in fatigue resistance.[3] SAP stated a study by Hiraoka and Ishida[4] shows a marked increase in fatigue limit in a specimen with a 10 μm thick white layer as opposed to a specimen without a white layer, with a slight increase in the fatigue limit in a specimen with a 20 μm thick white layer as compared to the specimen with a 10 μm thick white layer. The FAA infers from this comment that SAP is requesting that the FAA withdraw the NPRM.

The FAA disagrees with the applicability of these studies to the unsafe condition identified in this AD. Although the application of plasma carburizing can lead to an increase in the fatigue resistance, the affected crankshaft assemblies were not plasma carburized. Therefore, the Major, Jakl, and Hubálovský study is not relevant here. Although the Hiraoka and Ishida study did reveal an increase in fatigue limit of gas nitrided steel with a white layer over one without a white layer, the study's test environment did not replicate the conditions applicable to an engine crankshaft as identified in Advisory Circular No. 33.19–1, ''Guidance Material for 14 CFR § 33.19, Durability, for Reciprocating Engine Redesigned Parts,'' dated September 27,

[1] See pp. 2–3 of BakerRisk Project No. 01–05929–003–17.

[2] See pp. 4–5 of BakerRisk Project No. 01–05929–006–17, Rev. 1.

[3] Štepán Major, Vladimir Jakl, & Štepán Hubálovský, *Effect of carburizing on fatigue life of high-strength steel specimen under push-pull loading,* Advances in Engineering Mechanics and Materials, 143 (2014).

[4] Yaushi Hiraoka & Akihiro Ishida, *Effect of Compound Layer Thickness Composed of γ'-Fe4N on Rotated-Bending Fatigue Strength in Gas-Nitrided JIS–SCM435 Steel,* 58 MATERIALS TRANSACTIONS 993 (2017).

2004 (AC 33.19–1). A crankshaft is a part whose primary fatigue mechanism is a forced vibratory response in combination with a resonant vibratory response that occurs at any engine speed at which the natural frequency of the part (or assembly that includes the part) coincides with the frequency of a combustion or inertia harmonic. AC 33.19–1 recommends 300 hours of engine tests, including a vibration test at peak torsional resonance conditions, to test the fatigue strength of the crankshaft.

The white layer is well-established to be problematic in that it is brittle. The OEM removes the white layer during the manufacturing process. As a PMA holder, 14 CFR 21.303 requires that SAP produce a part that is equivalent to the OEM part. Based on the foregoing, the FAA finds no basis to withdraw the NPRM.

Request To Withdraw the NPRM: Operation Outside of Normal Conditions

SAP stated the fractures of the crankshaft assemblies cited in the NPRM were due to misuse, abuse, or lack of lubrication. In support, SAP cited Hurst Report No. 73614, Rev. 1, dated December 7, 2018, for SAP crankshaft assembly S/N SP14–0202 and Hurst Report No. 73617, Rev. 1, dated December 7, 2018, for SAP crankshaft assembly S/N SP14–0194, which indicate that the fractures were likely initiated by abnormal service conditions, such as a propeller strike and a start-up of the engine in a low-temperature (below optimal performing temperature) environment. SAP also cited Hurst Report No. 73900 for SAP crankshaft assembly S/N SP13–0150, which indicates that likely contributors of the failure include rod sliding bearing failure due to insufficient lubrication, misalignment of the crankshaft, and improper engine performance from inadequate operation procedure resulting in high bending moment at the radius locations from excessive force from the piston assembly. SAP stated that all three of these crankshafts were operated in a flight school environment. The FAA infers from this comment that SAP is requesting that the FAA withdraw the NPRM.

The FAA disagrees that the fracture was initiated by the operation of the engines outside of ''normal'' conditions or parameters. With respect to Hurst Report No. 73614 for SAP crankshaft assembly S/N SP14–0202 and Hurst Report No. 73617 for SAP crankshaft assembly S/N SP14–0194, none of the engines exhibited evidence of propeller strikes, and none were started below optimal performance temperature. According to Lycoming,[5] cold weather requiring the use of pre-heat to avoid a cold engine start-up is 10 degrees Fahrenheit or below. Two of the incidents occurred in August (Canada) and October (Florida), making cold engine start-up unlikely. The third incident occurred in March (Massachusetts), which had a low of 16 degrees Fahrenheit at 6 a.m. and proceeded to a high of 41 degrees Fahrenheit in the afternoon.

With respect to Hurst Report No. 73900 for SAP crankshaft assembly S/N SP13–0150, the pilot and mechanic separately reported the engine had good oil pressure, indicating that the engine did not suffer from a lack of proper lubrication at the time of the crankshaft assembly failure. The report identifies possible contributors of single origin fatigue failure, including the misalignment of the crankshaft assembly or improper engine performance from inadequate operation procedure resulting in high bending moment at the radius locations from excessive force from the piston assembly. However, the report does not provide evidence to support these contributors. Based on the foregoing, the FAA declines to withdraw the NPRM.

Request To Review National Transportation Safety Board (NTSB) Reports

An individual commenter requested to review the NTSB reports on the accidents mentioned in the NPRM. The commenter was unable to locate anything in the NTSB database concerning engine stoppage in aircraft powered by Lycoming or SAP O–360 or IO–360 engines.

The NTSB did not generate reports for the three incidents that resulted from the crankshaft failures discussed in the NPRM. Therefore, the FAA did not rely on NTSB reports and is not in possession of any report generated as a result of the three incidents.

Request To Add Metallurgical Analyses to the Docket

An individual commenter requested that the FAA add its metallurgical analyses to the docket. The commenter stated that it was his understanding from discussions with the FAA that the FAA has shared its metallurgical analyses with SAP.

The FAA agrees and has uploaded the BakerRisk and Hurst metallurgical reports provided by SAP to the AD docket, as SAP has agreed to release these reports to the public. The FAA, however, did not perform its own metallurgical testing. The FAA instead relied on metallurgical testing performed by BakerRisk and Hurst for SAP.

Request To Release Pertinent Information

An individual commenter requested that the FAA release information it has on this issue, including the circumstances of the crankshaft assembly failures, the cost of crankshaft assembly replacement, and the scope of the proposed action.

The FAA agrees to provide additional information about the circumstances of the failures. In each incident, the crankshaft assembly broke into two pieces. The March 6, 2017, incident resulted in the crankshaft separating at journal #2 while the August 3, 2017, and October 31, 2018, incidents both resulted in a separation of the crankshaft at journal #4. All of the incidents involved flight-training aircraft. Additionally, as discussed previously, the FAA has uploaded the metallurgical reports to the AD docket.

Both the NPRM and this final rule adequately explain the scope of the AD and contain a detailed estimate of the costs of compliance within this AD, including the cost of the crankshaft assembly replacement, labor cost, and total estimated cost to U.S. operators. This final rule also discusses the net benefit of this AD.

Request To Consider Costs of Implementing This AD

An individual commenter requested that the FAA consider the financial costs and unintended consequences of this AD, such as decreased aircraft value. The commenter estimates that the value of his aircraft has been reduced by at least $15,000 since the publication of the NPRM.

The FAA disagrees. The cost analysis in AD rulemaking actions typically includes only the costs associated with complying with the AD and does not include indirect costs such as loss of aircraft value. The FAA acknowledges that the general obligation of the operator to maintain its aircraft in an airworthy condition is sometimes expensive. However, and as discussed in more detail in the Benefits section, the FAA estimates that the benefits of this AD greatly exceed its cost.

[5] Lycoming Service Instruction No. 1505, dated July 1, 2002: ''The use of pre-heat will facilitate starting during cold weather, and is required when the engine has been allowed to drop to temperatures below +10 °F/−12 °C.''

Request To Clarify Applicability

An individual commenter asked if SAP crankshaft assemblies earlier than 2012 are affected by this AD.

The first affected SAP crankshaft assembly was shipped on July 31, 2012. SAP crankshaft assemblies assembled before July 31, 2012, are not affected by this AD.

Request To Extend Comment Period

SAP and AOPA requested that the FAA extend the comment period by 60 days to enable SAP to gather more information. SAP asked for more time to research, gather, and respond appropriately to the NPRM. AOPA similarly requested an extension to review the costs and overall scope, and to gather information to respond to the NPRM. SAP, AOPA, and an individual commenter requested the FAA extend the comment period because of delays due to the COVID–19 pandemic, such as the closure of laboratories for further testing and the reduction in aircraft operations.

The FAA disagrees. At SAP's request, the FAA met with SAP and AOPA in April 2020 to discuss the NPRM. During that meeting, the participants discussed certain aspects of the NPRM, including the white layer and metallurgical reports, the three failed crankshaft assemblies, and SAP's request for a 60-day extension to the comment period. A summary of the meeting is available in the AD docket. None of the information provided by SAP or AOPA justifies an extension of the comment period. If investigations by SAP or others reveal information that changes the FAA's determination regarding the unsafe condition, the FAA will consider future rulemaking.

Request for a Status Update

An individual commenter requested information regarding the FAA's progress on issuing this AD. The commenter stated that based on feedback from SAP, the crankshaft assembly is safe and that a metallurgy company inspected one of the affected crankshaft assemblies and did not find any issues.

The FAA disagrees with the assessment from SAP. The FAA reviewed the metallurgical reports from the incidents of failed crankshaft assemblies and determined that an unsafe condition exists in other crankshaft assemblies of the same type design. In each incident, the crankshaft assembly broke into two pieces, leading to loss of engine power. The crankshaft assemblies involved in the three incidents were found to have excessive white layer. As a result, this AD requires removing all affected crankshaft assemblies from service within 25 engine operating hours after the effective date of this AD.

Conclusion

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

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354, codified as amended at 5 U.S.C. 601–612) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' Public Law 96–354, 2(b), September 19, 1980. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

The FAA published an Initial Regulatory Flexibility Analysis (IRFA) in the proposed rule to aid the public in commenting on the potential impacts to small entities. The FAA considered the public comments in developing the final rule and this Final Regulatory Flexibility Analysis (FRFA).

Benefits

The FAA found that SAP, the manufacturer of the crankshaft assemblies, sold 192 SAP crankshaft assemblies to date: 115 of these crankshaft assemblies are estimated to be installed on type certificated airplanes and the remaining 77 crankshaft assemblies are estimated to be installed on experimental aircraft. The FAA's risk analysis indicates that 100 percent of crankshaft assembly failures will destroy the engine. Using the historical incident data (2000–2014), the FAA assumes that 24.4 percent of crankshaft assembly failures will result in aircraft hull loss while 22 percent of crankshaft assembly failures will result in fatalities. There would be an average of 2.1 fatalities per each crankshaft assembly accident. Applying these probabilities to the estimated 115 crankshaft assemblies installed on type certificated airplanes, the FAA estimates that if these crankshaft assemblies are not replaced and continue to be used in these airplanes, this will result in 53 fatalities (2.1 fatalities per crankshaft accident × 22 percent probability of a crankshaft assembly failure resulting in fatalities × 115 crankshaft assemblies) and 28 aircraft losses (24.4 percent probability of a crankshaft assembly failure destroying the airplane). This AD will prevent all 53 fatalities and 28 aircraft losses.

Using an average price of $50,000 for a small single engine airplane, an average price of $30,000 for a 360-series engine and the Department of Transportation's $9.6 million estimate for the Value of Statistical Life (VSL) from the ''Revised Departmental Guidance on Valuation of a Statistical Life in Economic Analysis,'' [6] the FAA estimated this AD final rule will result in monetized benefits of $512.8 million. [7]

Costs of Compliance

The costs of compliance with this AD consist of the cost to remove and replace a crankshaft assembly. The FAA estimates that this AD will affect 115 crankshaft assemblies installed on airplanes of U.S. registry. This cost estimate does not include 77 SAP crankshaft assemblies installed on experimental engines since this AD does not apply to these engines. The estimated compliance cost per crankshaft assembly is identified below.

Labor cost = 61 hours per crankshaft assembly replacement × $85 Hourly Wage = $5,185.

Equipment costs per crankshaft assembly replacement = $9,636 (Source: Average of the two vendors).

$5,185 labor per crankshaft assembly + $9,636 equipment costs per crankshaft

[6] *https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.*

[7] 53 preventable fatalities will amount to $508.8 million in benefits of this rule. (53 × $9.6 million). The value of 28 airplane losses is $1.4 million (28 × $50,000). The remaining 75.6 percent of crankshaft failures (100 percent − 24.4 percent crankshaft failure destroying the airplane) will result in $2.6 million in engine damages. (115 × 0.756 probability of crankshaft failure damaging an airplane engine × $30,000 value of 360 engine). Therefore, the total estimated benefits are $512.8 million ($508.8 million preventable fatalities + $1.4 million avoidable airplane loss + $2.6 million preventable engine damages).

assembly replacement = $14,821 compliance cost per engine.

The total costs to U.S. operators is $1,704,415 ($14,821 × 115), or $119,309 in annualized costs in perpetuity using a 7 percent discount rate. There are no additional costs after removing and replacing the crankshaft assembly.

Therefore, the FAA estimates that the net benefit of this final rule will be $511.1 million ($512.8 million benefits −$1.7 million costs), or $35.77 million in annualized net benefits using a 7 percent discount rate in perpetuity.

Final Regulatory Flexibility Analysis

Under § 604(a) of the RFA, the final analysis must contain the following:

(1) A statement of the need for, and objectives of, the rule;

(2) A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) A description of the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record;

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

1. Need for and Objectives of the Rule

This final rule AD was prompted by three crankshaft assembly failures that resulted in the loss of engine power and immediate or emergency landings. The FAA is issuing this AD to prevent failure of the crankshaft assembly by requiring the removal of all affected crankshaft assemblies from service. Failure of a crankshaft assembly, if not addressed, could result in failure of the engine, in-flight shutdown, and loss of the airplane.

2. Significant Issues Raised in Public Comments

An individual commenter noted that some owners of affected aircraft may not be in a position to absorb the $15,000 cost of the crankshaft assembly replacement. The commenter proposed that the financial costs of this AD would exceed the FAA estimates in some cases and, therefore, the unintended consequences of this AD would destroy value out of proportion to the preservation of the safety of the national airspace system and the general public.

The FAA estimates the cost of replacing a single crankshaft assembly at $14,821. The risk of not replacing the crankshaft is not insignificant, and the crankshaft failure could cause engine loss, airplane loss, or fatality valued at $30,000, $50,000, and $9.6 million, respectively. When these potentially substantial losses and risks of fatality to each airplane owner and operator are considered, the $14,821 compliance cost per airplane is minimal. Further, the FAA estimates the benefits of this AD to be $512.8 million, which greatly exceeds its cost of $1.7 million, justifying this final rule.

Based on the risk and benefits analysis above, the FAA determined that no changes are necessary to the final rule as a result of this individual comment.

3. Response to SBA Comments

The Chief Counsel for Advocacy of the SBA did not file any comments in response to the proposed rule.

4. Small Entities to Which the Rule Will Apply

This AD applies to all SAP Model IO–360-series and O–360-series reciprocating engines and certain Lycoming Model AEIO–360-, IO–360-, and O–360-series reciprocating engines with a certain SAP crankshaft assembly installed. This SAP crankshaft assembly is installed as original equipment on the affected SAP engines and as a replacement part under PMA on the affected Lycoming engines. These engines are installed on airplanes performing various activities including, but not limited to, flight training, charter flights, and agriculture.

Under the RFA, the FAA must determine whether a final rule significantly affects a substantial number of small entities. The FAA uses the SBA criteria for determining whether an affected entity is small. For aircraft and engine manufacturers, aviation operators, and any business using an aircraft, the SBA criterion is 1,500 or fewer employees. The FAA estimates that this AD affects 115 crankshaft assemblies installed on airplanes of U.S. registry. The FAA does not have any information or data on whether these entities are small businesses according to the definition established by the SBA. Although in the NPRM the FAA requested comments and data that would allow the agency to more accurately assess the number of employees and sales revenues of the affected entities, no such comments or data was received. Accordingly, the FAA assumes for purposes of this final rule that some of the affected entities are small businesses.[8] The FAA determines that the estimated $14,821 compliance cost per aircraft due to this rule will have a significant impact on a substantial number of small entities.

5. Projected Reporting, Record-Keeping, and Other Compliance Requirements

There are no record-keeping costs or other compliance costs associated with this final rule.

6. Significant Alternatives Considered

As part of the FRFA, the FAA is required to consider regulatory alternatives that may be less burdensome. The FAA considered the following alternatives:

Do nothing: This option is not acceptable because the risk of additional failures of these crankshaft assemblies constitutes a known unsafe condition. The FAA estimates that this AD will prevent 53 fatalities and 28 aircraft losses, and monetized benefits of $512.8 million.

Periodic inspections: This option is not possible as the crankshaft assembly cannot be inspected without destroying it.

There is no direct safety alternative to the replacement of the crankshaft assembly. The replacement addresses a safety issue aimed at preventing the failure of the crankshaft assembly.

Therefore, the FAA rejected these two regulatory alternatives and determined that this rulemaking may have a significant economic impact on a substantial number of small entities.

[8] The FAA recognizes that many of these affected airplanes are recreational. The 2016 GAMA Databook shows that of 141,141 active General Aviation piston aircraft, 104,669 are used for personal or recreational purposes (74 percent), Using this distribution, only 30 of the 115 crankshaft assemblies would be installed in airplanes operated for business use.

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, 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.

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:

2020–25–12 Superior Air Parts, Inc.: Amendment 39–21354; Docket No. FAA–2018–1077; Project Identifier 2018–NE–40–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 15, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the reciprocating engine models identified in paragraphs (c)(1) and (2) of this AD with a Superior Air Parts, Inc. (SAP) crankshaft assembly, part number (P/N) SL36500–A20 or P/N SL36500–A31, with serial numbers 82976–01; 82976–02; SP12–0003 through SP12–0089, inclusive; SP13–0034 through SP13–0150, inclusive; or SP14–0151 through SP14–0202, inclusive; installed.

(1) With SAP crankshaft assembly, P/N SL36500–A20, installed:

(i) SAP Model IO–360-series and O–360-series reciprocating engines.

(ii) Lycoming Engines (Lycoming) Model IO–360–B2F, IO–360–L2A, O–360, O–360–A2A, O–360–A2D, O–360–A2E, O–360–A2F, O–360–A2G, O–360–B2A, O–360–C2A, O–360–C2C, O–360–C2D, O–360–C2E, O–360–D2A, and O–360–D2B reciprocating engines.

(2) With SAP crankshaft assembly, P/N SL36500–A31, installed:

(i) SAP Model IO–360-series and O–360-series reciprocating engines.

(ii) Lycoming Model AEIO–360–H1A, IO–360–B1A, IO–360–B1B, IO–360–B1D, IO–360–B1E, IO–360–B1F, IO–360–M1A, O–360, O–360–A1A, O–360–A1C, O–360–A1D, O–360–A2A, O–360–C1A, O–360–C1G, O–360–C1C, O–360–C1E, and O–360–C1F reciprocating engines.

Note 1 to paragraph (c): This SAP crankshaft assembly may be installed as a replacement part under parts manufacturer approval on the affected Lycoming engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 8520, Reciprocating Engine Power Section.

(e) Unsafe Condition

This AD was prompted by three crankshaft assembly failures that resulted in the loss of engine power and immediate or emergency landings. The FAA is issuing this AD to prevent failure of the crankshaft assembly. The unsafe condition, if not addressed, could result in failure of the engine, in-flight shutdown, and loss of the airplane.

(f) Compliance

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

(g) Required Action

Within 25 engine operating hours after the effective date of this AD, remove the crankshaft assembly from service.

(h) Special Flight Permit

A one-time special flight permit may be issued to fly the aircraft to a maintenance facility to perform the actions of this AD with the following limitations: No passengers, visual flight rules (VFR) day conditions only, and avoid areas of known turbulence.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Fort Worth 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 Related Information.

(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.

(j) Related Information

For more information about this AD, contact Justin Carter, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Parkway, Fort Worth, TX 76177; phone: (817) 222–5146; fax: (817) 222–5245; email: *justin.carter@faa.gov.*

(k) Material Incorporated by Reference

None.

Issued on December 3, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27149 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0726; Airspace Docket No. 20–AGL–28]

RIN 2120–AA66

Amendment of Class E Airspace; Cairo, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace extending upward from 700 feet above the surface at Cairo Regional Airport, Cairo, IL. This action is the result of an airspace review caused by the decommissioning of the Cape Girardeau very high frequency omnidirectional range (VOR) navigational aid as part of the VOR Minimum Operational Network (MON) Program. The name and geographic coordinates of the airport are updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, February 25, 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/.* 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* 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 rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace at Cairo Regional Airport, Cairo, IL, to support instrument flight rules operations in the area.

History

The FAA published a notice of prosed rulemaking in the **Federal Register** (85 FR 64422, October 13, 2020) for Docket No. FAA–2020–0726 to amend Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile (reduced from a 7-mile) radius of Cairo Regional Airport, Cairo, IL; adding an extension 2.5 miles each side of the 330° bearing from the Cairo Non-Directional Beacon (NDB) extending from the 6.5-mile radius of the Cairo Regional Airport to 7 miles northwest of the Cairo NDB; and updating the name (previously Cairo Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is the result of an airspace review caused by the decommissioning of the Cape Girardeau VOR, which provided navigation information for the instrument procedures at this airport, as part of the VOR MON Program.

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 E airspace designations are published in Paragraph 6005, 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 amends Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile (reduced from a 7-mile) radius of Cairo Regional Airport, Cairo, IL; adding an extension 2.5 miles each side of the 330° bearing from the Cairo NDB extending from the 6.5-mile radius of the Cairo Regional Airport to 7 miles northwest of the Cairo NDB; and updating the name (previously Cairo Airport) and geographic coordinates of the airport to coincide with the FAA's aeronautical database.

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

* * * * *

AGL IL E5 Cairo, IL [Amended]

Cairo Regional Airport, IL
(Lat. 37°03′51″ N, long. 89°13′10″ W)
Cairo NDB
(Lat. 37°03′40″ N, long. 89°13′23″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Cairo Regional Airport, and within 2.5 miles each side of the 330° bearing from the Cairo NDB extending from the 6.5-mile radius from the Cairo Regional Airport to 7 miles northwest of the Cairo NDB.

Issued in College Park, Georgia, on December 7, 2020.

Andreese C. Davis,

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

[FR Doc. 2020–27245 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0826; Airspace Docket No. 20–AEA–15]

RIN 2120–AA66

Amendment of Class E Airspace; Dubois, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E surface airspace and Class E airspace extending upward from 700 feet above the surface in Dubois, PA, due to the decommissioning of the Clarion Very High Frequency Omnidirectional Range Tactical Air Navigational System (VORTAC) and cancellation of the associated instrument approach procedure at Dubois Regional Airport. This action also updates the name of the airport, as well as the name and geographic coordinates of Penn Highlands Healthcare-Dubois Heliport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Effective 0901 UTC, February 25, 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/.* 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* 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 Avenue, College Park, GA 30337; Telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of prosed rulemaking in the **Federal Register** (85 FR 59465, September 22, 2020) for Docket No. FAA–2020–0826 to amend Class E surface airspace from a 4-mile radius to a 4.8-mile radius, and remove all extensions. Also, the FAA proposed the amendment of Class E airspace extending upward from 700 feet above the surface in Dubois, PA, from a 8.5-mile radius to a 9.2-mile radius. In addition, the FAA proposed to update the geographic coordinates and name of the airport, as well as Penn Highland Healthcare-Dubois Heliport to coincide with the FAA's aeronautical database.

Subsequent to publication, the FAA found the names of DuBois Regional Airport and Penn Highland Healthcare-DuBois Heliport required updating. The correct names are Dubois Regional Airport and Penn Highlands Healthcare-Dubois Heliport. This action makes the update.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. One comment supporting this action was received.

Class E airspace designations are published in Paragraph 6005 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 amends Class E surface airspace and Class E airspace extending upward from 700 feet above the surface at Dubois Regional Airport, (previously Du Bois-Jefferson County Airport), Dubois, PA, due to the decommissioning of the Clarion VORTAC and cancellation of the associated approach. In addition, the FAA updates the airport's name and the name and geographic coordinates of Penn Highlands Healthcare-Dubois Heliport, (previously Du Bois Regional Medical Center) to coincide with the FAA's aeronautical database.

Class E airspace designations are published in Paragraphs 6002 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.

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 6002 Class E Surface Airspace.

* * * * *

AEA PA E2 Dubois, PA [Amended]

Dubois Regional Airport, PA
(Lat. 41°10′42″ N, long. 78°53′55″ W)

That airspace extending upward from the surface within a 4.8-mile radius of Dubois Regional Airport. This Class E airspace is effective during the 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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA PA E5 Dubois, PA [Amended]

Dubois Regional Airport, PA
(Lat. 41°10′42″ N, long. 78°53′55″ W)
Penn Highlands Healthcare-Dubois Heliport
Point In Space Coordinates
(Lat. 41°06′52″ N, long. 78°46′26″ W)

That airspace extending upward from 700 feet or more above the surface within a 9.2-mile radius of Dubois Regional Airport and within a 6-mile radius of the Point In Space Coordinates serving Penn Highlands Healthcare-Dubois Heliport.

Issued in College Park, Georgia, on December 7, 2020.

Andreese C. Davis,

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

[FR Doc. 2020–27244 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 120

[Public Notice: 11274]

International Traffic in Arms Regulations: Notification of Temporary Suspension, Modification, or Exception to Regulations

AGENCY: Department of State.

ACTION: Extension of temporary suspensions, modifications, and exceptions.

SUMMARY: The Department of State is issuing this document to inform the public of a second extension to certain temporary suspensions, modifications, and exceptions to certain provisions of the International Traffic in Arms Regulations (ITAR) to provide for continued telework operations during the current SARS–COV2 public health emergency. This extension will terminate on June 30, 2021 unless otherwise extended in writing by the Directorate of Defense Trade Controls (DDTC). This action is taken in order to ensure continuity of operations among members of the regulated community.

DATES: This document is issued December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Engda Wubneh, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (202) 663–1809, or email *ddtccustomerservice@state.gov.* ATTN: June 2021 Extension of Suspension, Modification, and Exception.

SUPPLEMENTARY INFORMATION: In March 2020, the President declared a national emergency as a result of the COVID–19 pandemic. On May 1, 2020, the Department of State (the Department) published in the **Federal Register** a notification of certain temporary suspensions, modifications, and exceptions to the ITAR, necessary in order to ensure continuity of operations within the Directorate of Defense Trade Controls (DDTC) and among entities registered with DDTC pursuant to part 122 of the ITAR (85 FR 25287). These actions were taken pursuant to ITAR § 126.2, which allows for the temporary suspension or modification of provisions of the ITAR, and ITAR § 126.3, which allows for exceptions to provisions of the ITAR. These actions were taken in the interest of the security and foreign policy of the United States and warranted as a result of the exceptional and undue hardships and risks to safety caused by the public health emergency related to the SARS–COV2 pandemic.

Subsequently, on June 10, 2020, the Department published in the **Federal Register** a request for comment from the regulated community regarding the efficacy and termination dates of the temporary suspensions, modifications, and exceptions provided in 85 FR 25287, and requesting comment as to whether additional measures should be considered in response to the public health crisis. Of the four temporary suspensions, modifications, and exceptions to the ITAR announced in the May 1 notification referenced above, DDTC reviewed the public comments and decided to extend two measures until December 31, 2020: (1) ITAR § 120.39(a)(2) allowance for remote work; and (2) authorization to allow remote work under technical assistance agreement, manufacturing agreement, or exemption.

Based upon continued public health recommendations and as informed by responses to request for public comment in June 2020, it is apparent to DDTC that regulated entities will continue to engage in social distancing measures for the foreseeable future. Many commenters, one industry association, and several individual entities endorsed the telework provisions and requested that these measures be effective until the end of the year, if not extended indefinitely. DDTC agreed and extended the two measures until the end of 2020. DDTC is now extending these measures again until June 30, 2021 because DDTC believes that a failure to extend these temporary suspensions, modifications, and exceptions would have a negative impact on regulated entities' ability to safely engage in continued operations in the midst of the ongoing global public health emergency.

This second extension beyond December 31, 2020 is also necessary to provide time for DDTC to consider a permanent revision to the ITAR provisions relating to remote work. Although the Department is of the opinion that the notice and comment requirements of the Administrative Procedure Act are not applicable, in the coming months the Department intends to provide notice of and solicit comment related to proposed revisions to the

ITAR provisions related to remote work. The notice and comment process will require additional time, including to allow DDTC to address any potential revisions through the interagency process.

Pursuant to ITAR §§ 126.2 and 126.3, in the interest of the security and foreign policy of the United States and as warranted by the exceptional and undue hardships and risks to safety caused by the public health emergency related to the SARS–COV2 pandemic, notice is provided that the following temporary suspensions, modifications, and exceptions are being extended as follows:

1. As of March 13, 2020, a temporary suspension, modification, and exception to the requirement that a regular employee, for purposes of ITAR § 120.39(a)(2), work at the company's facilities, to allow the individual to work at a remote work location, so long as the individual is not located in Russia or a country listed in ITAR § 126.1. This suspension, modification, and exception shall terminate on June 30, 2021, unless otherwise extended in writing.

2. As of March 13, 2020, a temporary suspension, modification, and exception to authorize regular employees of licensed entities who are working remotely in a country not currently authorized by a technical assistance agreement, manufacturing license agreement, or exemption to send, receive, or access any technical data authorized for export, reexport, or retransfer to their employer via a technical assistance agreement, manufacturing license agreement, or exemption so long as the regular employee is not located in Russia or a country listed in ITAR § 126.1. This suspension, modification, and exception shall terminate on June 30, 2021, unless otherwise extended in writing.

This notification makes no other revision to the document published at 85 FR 25287, nor does it make any other temporary suspension, modification, or exception to the requirements of the ITAR.

Authority: 22 CFR 126.2 and 126.3)

Michael F. Miller,

Deputy Assistant Secretary for Defense Trade Controls, U.S. Department of State.

[FR Doc. 2020–27024 Filed 12–10–20; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9902]

RIN 1545–BP15

Guidance Under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations; correction.

SUMMARY: This document contains corrections to Treasury Decision 9902, which was published in the **Federal Register** on Thursday, July 23, 2020. Treasury Decision 9902 contained final regulations under the global intangible low-taxed income and subpart F income provisions of the Internal Revenue Code regarding the treatment of income that is subject to a high rate of foreign tax.

DATES: This correction is effective on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Jorge M. Oben or Larry R. Pounders at (202) 317–6934 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of this correction are issued under section 951A of the Code.

Need for Correction

As published, the final regulations contain errors that need to be corrected.

Correction of Publication

Accordingly, the final regulations (TD 9902) that are the subject of FR Doc. 2020–15351, beginning on page 44620 in the issue of July 23, 2020, are corrected as follows:

On page 44629, in the first column, the text of footnote 6 is corrected to read:

''Under currently applicable § 1.951A–1(e)(2), a domestic partnership can be a controlling domestic shareholder—for example, for purposes of determining which party elects the GILTI high-tax exclusion under § 1.951A–2(c)(7)(viii)(A), including potentially for taxable years beginning after December 31, 2017, under § 1.951A–7(b), as discussed in part VIII of this Summary of Comments and Explanation of Revisions.''

Crystal Pemberton,

Senior Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2020–25374 Filed 12–10–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9921]

RIN 1545–BP16

Source of Income From Certain Sales of Personal Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations modifying the rules for determining the source of income from sales of inventory produced within the United States and sold without the United States or vice versa. These final regulations also contain new rules for determining the source of income from sales of personal property (including inventory) by nonresidents that are attributable to an office or other fixed place of business that the nonresident maintains in the United States. Finally, these final regulations modify certain rules for determining whether foreign source income is effectively connected with the conduct of a trade or business within the United States.

DATES:

Effective Date: These final regulations are effective on December 11, 2020.

Applicability Dates: For dates of applicability, see §§ 1.863–1(f), 1.863–2(c), 1.863–3(g), 1.863–8(h), 1.864–5(e), 1.864–6(c)(4), and 1.865–3(g).

FOR FURTHER INFORMATION CONTACT: Brad McCormack at (202) 317–6911 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2054, 2208 (2017) (the ''Act''), enacted on December 22, 2017, amended section 863(b) of the Internal Revenue Code (''Code''). On December 30, 2019, the Department of the Treasury (''Treasury Department'') and the IRS published proposed regulations (REG–100956–19) under sections 863, 864, 865, 937, and 1502 in the **Federal Register** (84 FR 71836) (the

''proposed regulations''). A public hearing on the proposed regulations was held on June 3, 2020. All written comments received in response to the proposed regulations are available at *https://www.regulations.gov* or upon request. Terms used but not defined in this preamble have the meaning provided in these final regulations.

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the overall approach of the proposed regulations, with certain revisions. This Summary of Comments and Explanation of Revisions section discusses those revisions as well as comments received in response to the solicitation of comments in the notice of proposed rulemaking. Comments outside the scope of this rulemaking are generally not addressed but may be considered in connection with future guidance projects.

II. Comments on and Revisions to Proposed § 1.863–1—Allocation of Gross Income Under Section 863(a) and Proposed § 1.863–3—Allocation and Apportionment of Income From Certain Sales of Inventory

The Act amended section 863 of the Code, which provides special sourcing rules for determining the source of income, including income partly from within and partly from without the United States. Specifically, the Act amended section 863(b) to allocate or apportion income from the sale or exchange of inventory property produced (in whole or in part) by a taxpayer within the United States and sold or exchanged without the United States or produced (in whole or in part) by the taxpayer without the United States and sold or exchanged within the United States (collectively, ''Section 863(b)(2) Sales'') solely on the basis of production activities with respect to that inventory. Before the Act, section 863(b) provided that income from Section 863(b)(2) Sales would be treated as derived partly from sources within and partly from sources without the United States without providing the basis for such allocation or apportionment. Consistent with the Act's changes to section 863(b), the proposed regulations amended § 1.863–3 in order to properly allocate or apportion gross income from Section 863(b)(2) Sales based solely on production activity.

Under § 1.863–3(c)(1)(ii)(A) (which has been redesignated in the final regulations as § 1.863–3(c)(2)(i)), where the taxpayer's production assets are located both within and without the United States, the amount of income from sources without the United States is determined by multiplying all the income attributable to the taxpayer's production activities by a fraction, the numerator of which is the average adjusted basis of production assets that are located without the United States and the denominator of which is the average adjusted basis of all the production assets located within and without the United States.

For purposes of applying this formula, the adjusted basis of production assets is determined under section 1011, which is adjusted under section 1016 for depreciation deductions allowed. The Act also amended section 168(k) to allow an additional first-year depreciation deduction of 100 percent of the basis of certain property placed in service after September 27, 2017, and before January 1, 2023. Therefore, certain new and used production assets placed in service and used predominantly within the United States during this period may have an adjusted basis of zero. However, production assets either placed in service or used predominantly without the United States, or both, do not qualify for this accelerated depreciation and must be depreciated using the straight-line method under the alternative depreciation system (''ADS'') of section 168(g)(2). In light of the Act's change to section 168(k) to allow accelerated depreciation in some circumstances, the proposed regulations provided a new rule for computing the adjusted basis of production assets for purposes of applying the allocation formula in § 1.863–3.

A. Income Attributable to Sales Activity

Section 1.863–3, as in effect before this Treasury Decision, provided rules and corresponding methods for allocating or apportioning gross income from Section 863(b)(2) Sales between production activity and sales activity. To implement the changes to section 863(b) under the Act, the proposed regulations proposed removing § 1.863–3(c)(2) which allocates and apportions income attributable to sales activity.

One comment argued that removing § 1.863–3(c)(2) could lead to double taxation when a foreign jurisdiction imposes taxation on the sales activity. The Act amended section 863(b) to source income from the sale by a taxpayer of inventory produced by that taxpayer based only on production activity. Under the Code, sales activity is no longer a relevant factor for allocating and apportioning such income. Therefore, the final regulations remove § 1.863–3(c)(2). But see part V of this Summary of Comments and Explanation of Revisions section for a discussion of the interaction with income tax treaties.

Another comment suggested that two aspects of § 1.863–3(c)(2) have continued relevance even after the Act's changes to section 863(b)(2). First, § 1.863–3(c)(2) has a special rule modifying the rule in § 1.861–7(c) that generally sources income from the sale of personal property based on the place of sale. Under § 1.861–7(c), a sale is generally treated as consummated in the place where the rights, title, and interest of the seller in the property are transferred to the buyer. However, if a taxpayer wholly produces inventory in the United States and sells it for use, consumption, or disposition in the United States, § 1.863–3(c)(2) presumes that the place of sale is in the United States, even if title passes outside the United States. The comment recommended the final regulations include a similar rule and expand it to inventory wholly or partly produced in the United States that is acquired by a related party and resold for use, consumption, or disposition in the United States with title passing outside the United States. The comment observed that in the absence of such a rule, the sale by the related party would generate foreign source income, notwithstanding the fact that the inventory was produced wholly or partly in the United States and ultimately sold for use, consumption, or disposition in the United States.

The final regulations do not adopt this comment. The place of sale rule of § 1.861–7(c) already contains a broad anti-abuse rule that would apply to any sales transactions ''arranged in a particular manner for the primary purpose of tax avoidance,'' which may cover certain related party arrangements about which the comment is concerned. Section 482 also applies to require that compensation paid between related parties is consistent with the arm's length standard and will take into account the business functions and assets of, and risks assumed by, the related party intermediary. The Treasury Department and the IRS continue to study issues related to the distribution among related entities of the business functions, assets, and risks that generate business income, including sales income, and may address these issues in future guidance, particularly with respect to the sourcing of income from certain digital transactions.

Second, the comment observed that § 1.863–3(c)(2) treats inventory as

wholly produced in the United States for purposes of determining whether the place of sale is presumed to be in the United States if only minor assembly, packaging, repackaging, or labeling occurs outside the United States. The comment recommended including this rule as part of proposed § 1.863–3(c)(1)(i). The final regulations adopt this comment in § 1.863–3(c)(1)(i) by incorporating the ''principles of § 1.954–3(a)(4)'' (other than § 1.954–3(a)(4)(iv)). Section 1.954–3(a)(4) provides rules for determining when a corporation has manufactured, produced, or constructed personal property. Under § 1.954–3(a)(4)(iii), packaging, repackaging, labeling, or minor assembly operations do not constitute the manufacture, production, or construction of property. Accordingly, under the final regulations, these principles apply for purposes of determining whether a taxpayer's activities constitute production activity under § 1.863–3(c)(1)(i) as well. See part II.B. of this Summary of Comments and Explanation of Revisions section.

B. Definition of Production Activities

Proposed § 1.863–1(b)(2) provided the rule for sourcing gross receipts from the sale of natural resources where the taxpayer performs production activities in addition to its ownership of a farm, mine, oil or gas well, other natural deposit, or uncut timber. Section 1.863–1(b)(3)(ii) defines such ''additional production activities'' by reference to the ''principles of § 1.954–3(a)(4).''

Under section 951(a)(1)(A), a United States shareholder of a controlled foreign corporation (''CFC'') includes in gross income its pro rata share of the CFC's subpart F income for the CFC's taxable year which ends with or within the taxable year of the shareholder. Section 952(a)(2) defines the term subpart F income to include foreign base company income. Section 954(a)(2) defines foreign base company income to include foreign base company sales income (''FBCSI'') for the taxable year. Section 954(d)(1) defines FBCSI to mean income derived by a CFC in connection with certain related party transactions. Section 1.954–3(a)(4) provides an exception to FBCSI when a CFC manufactures property that it sells. One comment supported defining ''additional production activities'' by reference to ''the principles of § 1.954–3(a)(4),'' as described in § 1.863–1(b)(3)(ii), and requested that §§ 1.863–3 and 1.865–3 include a similar cross reference.

The final regulations adopt this recommendation, in part. Specifically, under the final regulations, §§ 1.863–3 and 1.865–3 incorporate the principles of § 1.954–3(a)(4), with the exception of the rules regarding a ''substantial contribution to the manufacturing of personal property'' under § 1.954–3(a)(4)(iv). See §§ 1.863–3(c)(1)(i) and 1.865–3(d)(2). The final regulations also modify § 1.863–1(b)(3)(ii) to incorporate the principles of § 1.954–3(a)(4), other than the ''substantial contribution to the manufacturing of personal property'' under § 1.954–3(a)(4)(iv). The substantial contribution rules were added to § 1.954–3(a)(4) in T.D. 9438 (December 29, 2008) after the adoption of § 1.863–1(b)(3)(ii) in T.D. 8687 (November 27, 1996). While the Treasury Department and the IRS agree with the comment that the principles of § 1.954–3(a)(4) may generally be helpful in determining the location of production activity for sourcing purposes, the substantial contribution rules of § 1.954–3(a)(4)(iv) are concerned with whether there is production activity and do not address the geographic location of that production activity, which is relevant for sourcing under sections 861, 863, and 865. Additionally, the substantial contribution rules are premised on treating a corporation as engaged in production activities even if it is not engaged in the direct use of production assets (other than oversight assets), while § 1.863–3 focuses on sourcing income based on the location of a corporation's production assets that are used for production activities. See § 1.863–3(c)(1)(ii) (which has been redesignated in the final regulations as § 1.863–3(c)(2)). In this regard, there is not a clear metric for quantifying production arising from substantial contribution activities, even if such activities are properly identified, in order to assign production activities to a particular geographic location for purposes of determining the place of production under sections 861, 863, and 865. Therefore, the final regulations provide that the principles of § 1.954–3(a)(4), other than the substantial contribution rules in § 1.954–3(a)(4)(iv), apply in determining whether production activities exist.

C. Measuring Adjusted Basis of Production Assets

For inventory produced both within and without the United States, the proposed regulations continued to allocate or apportion the gross income between U.S. and foreign sources based on the formula in § 1.863–3(c)(1)(ii)(A) (redesignated as proposed § 1.863–3(c)(2)(i)). This formula determined the amount of foreign source income by multiplying the total gross income by a fraction, the numerator of which is the average adjusted basis of production assets located outside the United States and the denominator of which is the average adjusted basis of all production assets within and without the United States. The remaining gross income is from U.S. sources.

In light of the Act's changes to section 168(k), proposed § 1.863–3(c)(2)(ii) measured the adjusted basis of the U.S. production assets for purposes of this formula based on the alternative depreciation system (''ADS'') of section 168(g)(2). The preamble to the proposed regulations observed that such rule allows the basis of both U.S. and non-U.S. production assets to be measured consistently on a straight-line method over the same recovery period, and requested comments on using ADS for this purpose or alternatives for measuring relative U.S. and non-U.S. production assets.

One comment suggested that some taxpayers such as partnerships and S corporations would face administrative burdens if they had to maintain separate ADS books that they may not otherwise maintain if section 951A(d)(3) or 250(b)(2)(B) do not apply to them. The comment observed that the Act, in contrast to those other sections, does not mandate the use of ADS in the section 863(b) context. The comment requested that the final regulations maintain the existing rule of § 1.863–3(c)(1)(ii)(B) measuring the basis under section 1011 (as adjusted by section 1016), either as the principal rule or, alternatively, at the election of the taxpayer.

The final regulations do not adopt this comment. The Treasury Department and the IRS have determined that the use of ADS for this purpose will prevent the Act's modifications to section 168(k) (resulting in accelerated depreciation) from inappropriately skewing the apportionment formula under § 1.863–3(c)(2)(i) in favor of foreign source income. While the Act does not mandate the use of ADS for this purpose, the Treasury Department and the IRS have authority to mandate the use of ADS under sections 863(a) and 7805 and have determined that the use of ADS is necessary to accurately measure the place of production using adjusted basis, as other basis measurements might inappropriately inflate foreign production activities.

III. Comments on and Revisions to Proposed § 1.865–3—Source of Gross Income From Sales of Personal Property (Including Inventory Property) by a Nonresident Attributable to an Office or Other Fixed Place of Business in the United States

Section 865 provides rules for sourcing income from sales of personal property. Section 865(e)(2) applies with respect to all sales of personal property (including inventory) by a nonresident, as that term is defined in section 865(g)(1)(B), attributable to an office or other fixed place of business in the United States. Section 865(e)(2)(A) generally provides that income from any sale of personal property attributable to such an office or other fixed place of business is sourced in the United States. An exception is provided in section 865(e)(2)(B) for a sale of inventory for use, disposition, or consumption outside the United States if a foreign office of the nonresident ''materially participated'' in the sale. Section 865(e)(3) provides that the ''principles of section 864(c)(5) shall apply'' to determine whether a nonresident has an office or other fixed place of business and whether a sale is attributable to such office or other fixed place of business. Where applicable, section 865(e)(2) applies ''[n]otwithstanding any other provisions'' of subchapter N, part I, including sections 863(b), 861(a)(6), and 862(a)(6). The proposed regulations under § 1.865–3 clarified the application of the principles of section 864(c)(5) in the context of section 865(e)(2) and provided that sales of inventory property produced outside the United States and sold through an office maintained by the nonresident in the United States must be sourced in the United States in part.

Proposed § 1.865–3(e) also included a cross-reference to the rules for allocating and apportioning expenses to gross income effectively connected with the conduct of a trade or business in the United States in §§ 1.882–4 and 1.882–5. Since those regulations apply only to foreign corporations, one comment requested that the final regulations also refer to § 1.873–1 to cover nonresident alien taxpayers subject to proposed § 1.865–3. In response to this comment, the final regulations broaden the cross-references to include sections 882(c)(1) and 873(a) for purposes of allocating and apportioning expenses. See § 1.865–3(e).

The final regulations also reorder and revise parts of § 1.865–3 in a non-substantive manner solely for purposes of improving clarity and ease of application. The revision also helps to clarify that § 1.865–3 applies only if a nonresident maintains an office or other fixed place of business in the United States to which a sale of personal property is attributable. Otherwise, the source of the income, gain, or loss from the sale will be determined under other applicable provisions of section 865, such as section 865(b) through (d).

The final regulations also retain, with certain modifications, the rules for determining the portion of gross income from sales and production activities under § 1.865–3(d). Under the proposed regulations, the ''50/50 method,'' described in § 1.865–3(d)(2)(i), was the default method because it was ''an appropriate and administrable way'' to apply section 865(e)(2), but the proposed regulations also allowed nonresidents to elect a books and records method that would ''more precisely'' reflect their gross income from both sales and production activities, if any, in the United States, provided the nonresidents met certain requirements for maintaining their books of account under proposed § 1.865–3(d)(2)(ii)(B)(*1*) through (*3*). See 84 FR 71836, 71843. Under the final regulations, the 50/50 method continues to be the default method and taxpayers continue to be permitted to elect the books and records method. However, the Treasury Department and the IRS have determined that, where taxpayers have demonstrated the ability to use their books of account to determine their U.S. source gross income under the books and records method, a limitation is appropriate to prevent a nonresident from returning to the less precise 50/50 method solely to obtain a better tax result. In addition, the Treasury Department and the IRS have determined that revising the election to provide that it remains in effect until revoked would reduce the risk to taxpayers of inadvertently failing to include the election with their Federal income tax return. Accordingly, under the final regulations, an election to apply the books and records method continues until revoked and may not be revoked, without the consent of the Commissioner, for any taxable year beginning within 48 months of the end of the taxable year in which the election was made.

The final regulations also revise § 1.864–5 to clarify the interaction with section 865(e)(2) and (3) and the promulgation of § 1.865–3. Gross income, gain, or loss from the sale of personal property treated as from sources within the United States under § 1.865–3 will generally be effectively connected with the conduct of a trade or business in the United States to the extent provided in section 864(c), other than section 864(c)(4) or (5). Gross income, gain, or loss from the sale of personal property treated as from sources without the United States under § 1.865–3 is not described in § 1.864–5(b) and thus will generally not be effectively connected with the conduct of a trade or business in the United States.

The rules of §§ 1.864–5, 1.864–6, and 1.864–7 continue to apply, however, in determining whether foreign source income of nonresident aliens and foreign corporations that does not arise from the sale of personal property described in § 1.865–3(c) is effectively connected with the conduct of a trade or business in the United States. The rules of §§ 1.864–5, 1.864–6, and 1.864–7 also continue to apply in determining whether foreign source income from the sale of inventory by nonresident aliens, who would be residents under section 865(g)(1)(A), is effectively connected with the conduct of a trade or business in the United States.

IV. Comments on the Rules for Determining the Location or Existence of Production Activity

The proposed regulations did not modify the rules in § 1.863–3 for determining the location or existence of production activity for purposes of determining the sourcing of income derived from the sale of inventory. Section 1.863–3(c)(1)(i)(A) (which has been redesignated in the final regulations as § 1.863–3(c)(1)(i)) provides the rule for sourcing of income where production occurs only within the United States or only within foreign countries. That paragraph generally limits the scope of ''production activities'' to only ''those conducted directly by the taxpayer.'' Similarly, § 1.863–3(c)(1)(i)(B) (which has been redesignated in the final regulations as § 1.863–3(c)(1)(ii)) provides that production assets are those ''owned directly by the taxpayer that are directly used by the taxpayer to produce inventory.'' Section 1.863–3(c)(1)(ii) (which has been redesignated in the final regulations as § 1.863–3(c)(2)) provides the rule for the sourcing of income where production occurs both within and without the United States, and, as discussed in part II.C of this Summary of Comments and Explanation of Revisions section, allocates gross income based on the relative adjusted basis of production assets located within and without the United States, respectively.

The final regulations clarify the determination of the adjusted basis of production assets under § 1.863–

3(c)(1)(ii)(B) (which has been redesignated in the final regulations as § 1.863–3(c)(2)(ii)(A)). Under the final regulations, the adjusted basis of production assets for a taxable year is determined by averaging the basis of the assets at the beginning and end of the year, except in the event that a change during the year would cause the average to ''materially distort'' the calculation for sourcing of income attributable to production activity under § 1.863–3(c)(1)(ii)(A) (which has been redesignated in the final regulations as § 1.863–3(c)(2)(i)). This clarification uses certain concepts from § 1.861–9(g)(2)(i)(A) to further explain when a change might ''materially distort'' the calculation. For example, the rule applies when an event such as a late-year disposition of substantially all the U.S. production assets of a corporation would cause a material distortion in the corporation's calculation of the split between U.S. and foreign production activities.

One comment provided a range of suggestions to modify the rules of proposed §§ 1.863–3(c) and 1.865–3(d). This comment suggested that the rules of proposed §§ 1.863–3(c) and 1.865–3(d) were adequate, in general, where a taxpayer independently manufactured its own inventory, but inadequate with respect to other business models that rely on limited risk contract manufacturers or where multiple members of a group each perform only limited manufacturing functions in various jurisdictions. The comment observed that apportionment of gross income using the relative adjusted basis of production assets may not reflect high value-adding core production and risk management functions and ownership of production assets by unrelated contract manufacturers.

The comment suggested expanding the scope of covered production activities and ownership of production assets to include activities conducted and assets owned by related parties and unrelated agents of the taxpayer. The comment also recommended that these rules include any activities that constitute a ''substantial contribution'' within the meaning of § 1.954–3(a)(4)(iv) to better conform to the rules under subpart F. See part II.B of this Summary of Comments and Explanation of Revisions section. In addition, the comment suggested that § 1.863–3 should not allocate and apportion gross income using only the relative adjusted basis of production assets located within and without the United States, and recommended allocation and apportionment based on other metrics, such as the location of personnel involved in the production activities or personnel costs. The comment suggested that these modifications could, alternatively, be rebuttable presumptions that a taxpayer could overcome by showing that allocating and apportioning gross income based on adjusted basis or some other approach provides a more appropriate result under the taxpayer's facts.

Another comment suggested that the existing allocation and apportionment rules that rely on the relative adjusted basis of production assets encourage businesses to move (or locate additional) production assets outside the United States. Specifically, the comment expressed concern that treating income from the sale of inventory produced, in whole or in part, in the United States as U.S. source income might result in double taxation if the income is also subject to tax in a foreign jurisdiction, since the U.S. source income would be excluded from the numerator of the section 904 limitation, reducing the section 904 limitation, and potentially limiting the U.S. taxpayer's ability to use its foreign tax credits. The comment requested replacing these rules with a more comprehensive formula, preferably one that minimizes the risk of double taxation. The comment did not suggest an alternative formula and observed that further legislation may be necessary in this regard.

The Treasury Department and the IRS appreciate the various concerns presented by these comments and suggested revisions. The final regulations do not adopt these comments, but the Treasury Department and the IRS may consider these recommendations as part of a more comprehensive review of the sourcing rules for production activity (for purposes of both § 1.863–3 and § 1.865–3) in a future notice of proposed rulemaking. Additionally, the anti-abuse rule in § 1.863–3(c)(1)(iii) (which has been redesignated in the final regulations as § 1.863–3(c)(3)) already applies to make appropriate adjustments where taxpayers enter into or structure certain transactions with a principal purpose of reducing U.S. tax liability under § 1.863–3, including by using production assets owned by a related party. To clarify the application of this rule, the final regulations provide that the anti-abuse rule applies to transactions inconsistent with the purpose of § 1.863–3(b) or (c), and adds as an example that the anti-abuse rule may cover acquisitions of domestic production assets by related partnerships (or subsidiaries thereof) with a principal purpose of reducing the transferor's U.S. tax liability by treating income from the sale of inventory property as subject to section 862(a)(6) rather than section 863(b). The Treasury Department and the IRS continue to request comments regarding potential approaches to determine the location or existence of production activity or other modifications to § 1.863–3 that may be appropriate.

V. Comments on Income Tax Treaties

The preamble to the proposed regulations included a statement about how proposed § 1.865–3 interacted with U.S. income tax treaties under which the business profits of foreign treaty residents may be taxable in the United States only if the profits are attributable to a permanent establishment in the United States. The preamble to the proposed regulations stated, ''[w]ith respect to taxpayers entitled to the benefits of an income tax treaty, the amount of profits attributable to a U.S. permanent establishment will not be affected by these regulations.'' See 84 FR 71836, 71844.

One comment supported the preamble's statement and requested that, consistent with the statement in the preamble, the final regulations not apply to Section 863(b)(2) Sales in a manner that results in double taxation to U.S. taxpayers engaged in business operations through a permanent establishment in a treaty jurisdiction, notwithstanding the Act's change to section 863(b). The comment also requested that competent authority relief be provided in this regard. These regulations do not affect the ability of a taxpayer to rely on treaty provisions to mitigate or relieve double taxation, including treaty provisions that permit a taxpayer to make a request to the competent authority for assistance pursuant to a mutual agreement procedure article of an applicable income tax treaty.

VI. Comment on Proposed Applicability Date

The proposed regulations were proposed to apply to taxable years ending on or after December 23, 2019, although taxpayers and their related parties could generally apply the rules in their entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019. One comment requested that the final regulations apply to taxable years ending after December 31, 2019, because some taxpayers have consistently relied on the existing methods of § 1.863–3(b) for many years. The final regulations do not adopt this comment. Under section 7805(b)(1)(B), a final regulation can

apply to any taxable period ending on or after the date on which the proposed regulation to which such final regulation relates was filed with the **Federal Register**, which for these final regulations was December 23, 2019. The final regulations implement the Act's statutory change to section 863(b), which was effective for taxable years beginning after December 31, 2017. To provide certainty to taxpayers and avoid a multiplicity of different interpretations of the statute, the Treasury Department and the IRS have determined that it is appropriate for the final regulations to apply as closely as possible to the effective date of the statutory change.

Applicability Date

The final regulations generally apply to taxable years ending on or after December 23, 2019. Taxpayers may choose to apply the final regulations for any taxable year beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons that are related to the taxpayer (within the meaning of section 267 or 707) apply the final regulations in their entirety and, once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply the final regulations in their entirety for all subsequent taxable years. See section 7805(b)(7). Alternatively, taxpayers may rely on the proposed regulations for any taxable year beginning after December 31, 2017, and ending on or before September 29, 2020, provided that the taxpayer and all persons that are related to the taxpayer (within the meaning of section 267 or 707) rely on the proposed regulations in their entirety and provided that the taxpayer and all persons that are related to the taxpayer (within the meaning of section 267 or 707) have not applied the final regulations to any preceding year.

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

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (''PRA'') generally requires that a federal agency obtain the approval of OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

The final regulations include a collection of information in § 1.865–3(d)(2)(ii)(B). Section 1.865–3(d)(2)(ii)(B) allows a nonresident, as defined in section 865(g)(1)(B), whose inventory sales are described in § 1.865–3(d)(2) (relating to inventory produced by the nonresident) to elect to allocate the profit from such sales to its U.S. office using a books and records method under § 1.865–3(d)(2)(ii), rather than using a default ''50/50 method'' under § 1.865–3(d)(2)(i). If the collection of information in § 1.865–3(d)(2)(ii)(B) applies to a nonresident, the nonresident must maintain detailed records of its receipts and expenditures attributable to its sales and production activities to support the allocation of its income, gain, or loss to its sales activities in the United States under the principles of section 482. See § 1.865–3(d)(2)(ii)(B)(*2*). The nonresident must also prepare an explanation of how the allocation was determined. See § 1.865–3(d)(2)(ii)(B)(*3*). The nonresident must make an election to apply the books and records method under § 1.865–3(d)(2)(ii) by attaching a statement to its original timely filed Federal income tax return (including extensions) that it elects to apply the books and records method under § 1.865–3(d)(2)(ii)(A) and has prepared the records described in § 1.865–3(d)(2)(ii)(B)(*2*) and (*3*). The nonresident must make available the explanation and records upon request of the Commissioner, within 30 days or some other time period as agreed between the Commissioner and the nonresident. See § 1.865–3(d)(2)(ii)(B)(*3*).

The reporting burdens associated with the collection of information in § 1.865–3(d)(2)(ii)(B) will be reflected in the Form 14029, Paperwork Reduction Act Submission, that the Treasury Department and the IRS will submit to OMB for tax returns in the Forms 1120–F, U.S. Income Tax Return of a Foreign Corporation, and Forms 1040–NR, U.S. Nonresident Alien Income Tax Return. In particular, the reporting burden associated with the information collection in § 1.865–3(d)(2)(ii)(B) will be included in the burden estimate for OMB control numbers 1545–0123 and 1545–0074. OMB control number 1545–0123 represents a total estimated burden time for all forms and schedules for corporations of 3.344 billion hours and total estimated monetized costs of $61.558 billion ($2019). OMB control number 1545–0074 represents a total estimated burden time, including all other related forms and schedules for individuals, of 1.717 billion hours and total estimated monetized costs of $33.267 billion ($2019). Table 1 summarizes the status of the PRA submissions of the Treasury Department and the IRS related to Forms 1120–F and 1040–NR.

The overall burden estimate provided by the Treasury Department and the IRS to OMB in the PRA submissions for OMB control numbers 1545–0123 and 1545–0074 are aggregate amounts related to the U.S. Business Income Tax Return and the U.S. Individual Income Tax Return, along with any associated forms. The burden estimates in these PRA submissions, however, do not account for any burden imposed by § 1.865–3(d)(2)(ii)(B). The Treasury Department and the IRS have not identified the estimated burden for the collections of information in § 1.865–3(d)(2)(ii)(B) because there are no burden estimates specific to § 1.865–3(d)(2)(ii)(B) currently available. The burden estimates in the PRA submissions that the Treasury Department and the IRS will submit to OMB will in the future include, but not isolate, the estimated burden related to the collection of information in § 1.865–3(d)(2)(ii)(B).

The Treasury Department and the IRS have included the burdens related to the PRA submissions for OMB control numbers 1545–0123 and 1545–0074 in the PRA analysis for other regulations issued by the Treasury Department and the IRS related to the taxation of cross-border income. The Treasury Department and the IRS encourage users of this information to take measures to avoid overestimating the burden that the collection of information in § 1.865–3(d)(2)(ii)(B), together with other international tax provisions, imposes. Moreover, the Treasury Department and the IRS also note that the Treasury Department and the IRS estimate PRA burdens on a taxpayer-type basis rather than a provision-specific basis because an estimate based on the taxpayer-type most accurately reflects taxpayers' interactions with the forms.

The Treasury Department and the IRS request comments on the forms that reflect the information collection burdens related to the final regulations, including estimates for how much time it would take to comply with the paperwork burden described above for each relevant form and ways for the IRS to minimize the paperwork burden. Proposed revisions (if any) to these forms that reflect the information collection contained in § 1.865–3(d)(2)(ii)(B) will be made available for public comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.html* and will not be finalized until after

these forms have been approved by OMB under the PRA.

TABLE 1—SUMMARY OF INFORMATION COLLECTION REQUEST SUBMISSIONS RELATED TO FORMS 1120–F AND FORMS 1040–NR

Form	Type of filer	OMB Nos.	Status
Form 1040–NR	Individual (NEW Model)	1545–0074	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201909-1545-021.*		
Form 1120–F	Business (NEW Model)	1545–0123	Approved by OIRA 1/30/2020 until 1/31/2021.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201907-1545-001.*		

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities. Although data are not readily available to assess the number of small entities potentially affected, any economic impact of these regulations is unlikely to be significant. Specifically, the regulations in §§ 1.863–1 and 1.863–3 (with conforming changes in cross-referencing regulations) implement the statutory change made to section 863(b) by the Act. This change affects sales of inventory property by any taxpayer where the taxpayer produces the inventory (in whole or in part) within the United States and sells that inventory without the United States, or vice versa. The change in sourcing for those entities is attributable to the change in section 863(b) made by the Act. Sections 1.863–1 and 1.863–3 merely implement the statutory change with limited additional guidance. The Treasury Department and the IRS do not anticipate that any differences between the changes in section 863(b) made by the Act and the changes in §§ 1.863–1 and 1.863–3 made by these regulations will have a significant economic impact on a substantial number of small entities.

The other regulations in this publication (other than changes to ensure consistency with section 863(b)) are the final regulations in §§ 1.864–5, 1.864–6, and 1.865–3. These regulations solely affect non-U.S. taxpayers, which are not subject to the Regulatory Flexibility Act.

Pursuant to section 7805(f) of the Code, the proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses. 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 regulations is Brad McCormack of the Office of Associate Chief Counsel (International). However, 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.

Adoption of 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 for § 1.865–3 in numerical order.

The addition reads in part as follows:

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

* * * * *

Section 1.865–3 also issued under 26 U.S.C. 865(j).

* * * * *

■ **Par. 2.** Section 1.863–0 is revised to read as follows:

§ 1.863–0 Table of contents.

This section lists captions contained in §§ 1.863–1 through 1.863–10.

§ 1.863–1 Allocation of gross income under section 863(a).

(a) In general.
(b) Natural resources.
(1) In general.
(2) Additional production activities.
(3) Definitions.
(i) Production activity.
(ii) Additional production activities.
(4) Determination of fair market value.
(5) Determination of gross income.
(6) Tax return disclosure.
(7) Examples.
(i) Example 1. No additional production, foreign source gross receipts.
(ii) Example 2. No additional production, U.S. source gross receipts.
(iii) Example 3. Production in United States, foreign sales.
(iv) Example 4. Production and sales in United States.
(v) Example 5. Additional production.
(c) Determination of taxable income.
(d) Scholarships, fellowship grants, grants, prizes, and awards.
(1) In general.
(2) Source of income.
(i) United States source income.
(ii) Foreign source income.
(iii) Certain activities conducted outside the United States.
(3) Definitions.
(4) Effective dates.
(i) Scholarships and fellowship grants.
(ii) Grants, prizes and awards.
(e) Residual interest in a REMIC.
(1) REMIC inducement fees.
(2) Excess inclusion income and net losses.

■ **Par. 3.** Section 1.863–0A is added to read as follows:

§ 1.863–0A Table of contents.

This section lists captions contained in §§ 1.863–3A and 1.863–3AT.

■ **Par. 4.** Section 1.863–1 is amended as follows:
■ a. In paragraph (a):
■ i. Revising the third sentence.
■ ii. Removing ''§ 1.863–3(g)'' and adding in its place ''§ 1.863–3(f).''
■ b. Revising paragraph (b)(1).
■ c. In paragraph (b)(2):
■ i. Removing ''prior to export terminal'' from the heading and adding in its place ''activities.''
■ ii. Removing ''before the relevant product is shipped from the export terminal'' from the first sentence.
■ iii. Adding ''oil or gas'' before ''well'' and ''other natural'' before ''deposit'' in the second sentence.
■ d. Removing ''§§ 1.1502–13 or 1.863–3(g)(2)'' from paragraph (b)(3)(i) and adding in its place ''§ 1.1502–13 or 1.863–3(f)(2).''
■ e. In paragraph (b)(3)(ii):
■ i. Adding ''uncut'' before ''timber'' in the first sentence.
■ ii. Adding ''(except for § 1.954–3(a)(4)(iv))'' at the end of the second sentence.
■ iii. Removing ''to or from the export terminal'' from the third sentence.
■ f. Removing paragraph (b)(3)(iii).
■ g. In paragraph (b)(6), removing ''this paragraph (b)'' from the first sentence and adding in its place ''paragraph (b)(2) of this section.''
■ h. Designating *Examples 1, 2, 3, 4,* and *5* of paragraph (b)(7) as paragraphs (b)(7)(i) through (v).
■ i. Revising newly designated paragraphs (b)(7)(i) through (v).
■ j. In paragraph (f):
■ i. Revising the heading.
■ ii. Adding three sentences at the start of the paragraph.

The revisions and additions read as follows:

§ 1.863–1 Allocation of gross income under section 863(a).

(a) * * * See also section 865(b) for rules for sourcing income from the sale of inventory property, within the meaning of section 865(i)(1) (inventory), generally, and section 865(e)(2) and § 1.865–3 for sourcing income from the sale of personal property (including inventory) by a nonresident that is attributable to the nonresident's office or other fixed place of business in the United States. * * *

(b) *Natural resources*—(1) *In general.* Notwithstanding any other provision of this part, except to the extent provided in paragraph (b)(2) of this section or § 1.865–3, gross receipts from the sale outside the United States of products derived from the ownership or operation of any farm, mine, oil or gas well, other natural deposit, or uncut timber within the United States shall be treated as from sources within the United States, and gross receipts from the sale within the United States of products derived from the ownership or operation of any farm, mine, oil or gas well, other natural deposit, or uncut timber outside the United States shall be treated as from sources without the United States.

* * * * *

(7) * * *

(i) *Example 1. No additional production, foreign source gross receipts.* U.S. Mines, a domestic corporation, operates a copper mine and mill in Country X. U.S. Mines extracts copper-bearing rocks from the ground and transports the rocks to the mill where the rocks are ground and processed to produce copper-bearing concentrate. The concentrate is transported to a port where it is dried in preparation for export, stored, and then shipped to purchasers in the United States. Because, under the facts and circumstances, none of U.S. Mines' activities constitute additional production activities, within the meaning of paragraph (b)(3)(ii) of this section, paragraph (b)(2) of this section does not apply, and under paragraph (b)(1) of this section, gross receipts from the sale of the concentrate will be treated as from sources without the United States.

(ii) *Example 2. No additional production, U.S. source gross receipts.* U.S. Gas, a domestic corporation, extracts natural gas within the United States, and transports the natural gas to a Country X port where it is liquefied in preparation for shipment. The liquefied natural gas is then transported via freighter and sold without additional production activities in a foreign country. Under paragraph (b)(3)(ii) of this section, liquefaction of natural gas is not an additional production activity because liquefaction prepares the natural gas for transportation. Therefore, under paragraph (b)(1) of this section, gross receipts from the sale of the liquefied natural gas will be treated as from sources within the United States.

(iii) *Example 3. Production in United States, foreign sales.* U.S. Gold, a domestic corporation, mines gold in Country X, produces gold jewelry using production assets located in the United States, and sells the jewelry in Country Y. Assume that the fair market value of the gold before the additional production activities in the United States is $40x and that U.S. Gold ultimately sells the gold jewelry in Country Y for $100x. Under paragraph (b)(2) of this section, $40x of U.S. Gold's gross receipts will be treated as from sources without the United States, and the remaining $60x of gross receipts will be treated as from sources within the United States under § 1.863–3.

(iv) *Example 4. Production and sales in United States.* U.S. Oil, a domestic corporation, extracts oil in Country X, transports the oil via a pipeline to the United States, refines the oil using production assets located in the United States, and sells the refined product in the United States to unrelated persons.

Assume that the fair market value of the oil before refinement in the United States is $80x and U.S. Oil ultimately sells the refined product for $100x. Under paragraph (b)(2) of this section, $80x of gross receipts will be treated as from sources without the United States, and the remaining $20x of gross receipts will be treated as from sources within the United States under § 1.863–3.

(v) *Example 5. Additional production.* The facts are the same as in paragraph (b)(7)(i) of this section (the facts in *Example 1*), except that U.S. Mines also operates a smelter in Country X. The concentrate output from the mill is transported to the smelter where it is transformed into smelted copper. The smelted copper is exported to purchasers in the United States. Under the facts and circumstances, all the processes applied to make copper concentrate are considered mining. Therefore, under paragraph (b)(2) of this section, gross receipts equal to the fair market value of the concentrate at the smelter will be treated as from sources without the United States. Under the facts and circumstances, the conversion of the concentrate into smelted copper is an additional production activity in a foreign country within the meaning of paragraph (b)(3)(ii) of this section. Therefore, the source of U.S. Mines's excess gross receipts will be determined under § 1.863–3, pursuant to paragraph (b)(2) of this section.

* * * * *

(f) *Applicability date.* Paragraph (b) of this section applies to taxable years ending on or after December 23, 2019. However, a taxpayer may apply paragraph (b) of this section in its entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) apply paragraph (b) of this section and §§ 1.863–2(b), 1.863–3, 1.863–8(b)(3)(ii), 1.864–5(a) and (b), 1.864–6(c)(2), and 1.865–3 in their entirety for the taxable year, and once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years. For regulations generally applicable to taxable years ending before December 23, 2019, see § 1.863–1 as contained in 26 CFR part 1 revised as of April 1, 2020. * * *

■ **Par. 5.** Section 1.863–2 is amended as follows:

■ a. In paragraph (a) introductory text:

■ i. Removing ''(and that is treated as derived partly from sources within and partly from sources without the United States)'' from the third sentence.

■ ii. Adding a colon after the word ''income'' at the end of the paragraph.

■ b. Revising paragraph (b).

■ c. Revising paragraph (c).

The revisions read as follows:

§ 1.863–2 Allocation and apportionment of taxable income.

* * * * *

(b) *Determination of source of taxable income.* Income treated as derived from sources partly within and partly without the United States under paragraph (a) of this section may be allocated or apportioned to sources within and without the United States pursuant to §§ 1.863–1, 1.863–3, 1.863–4, 1.863–8, and 1.863–9. To determine the source of certain types of income described in paragraph (a)(1) of this section, see § 1.863–4. To determine the source of gross income described in paragraph (a)(2) of this section, see § 1.863–1 for natural resources, § 1.863–3 for other sales of inventory property, and § 1.863–8 for source of gross income from space and ocean activity. Section 1.865–3 may apply instead of the provisions in this section to source gross income from sales of personal property (including inventory property) by nonresidents attributable to an office or other fixed place of business in the United States. To determine the source of income partly from sources within a possession of the United States, including income described in paragraph (a)(3) of this section, see § 1.863–3(e).

(c) *Applicability date.* Except as provided in this paragraph (c), this section applies to taxable years beginning after December 30, 1996. Paragraph (b) of this section applies to taxable years ending on or after December 23, 2019. However, a taxpayer may apply paragraph (b) of this section in its entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) apply paragraph (b) of this section and §§ 1.863–1(b), 1.863–3, 1.863–8(b)(3)(ii), 1.864–5(a) and (b), 1.864–6(c)(2), and 1.865–3 in their entirety for the taxable year, and once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years. For regulations generally applicable to taxable years ending before December 23, 2019, see § 1.863–2 as contained in 26 CFR part 1 revised as of April 1, 2020.

■ **Par. 6.** Section 1.863–3 is revised as follows:

§ 1.863–3 Allocation and apportionment of income from certain sales of inventory.

(a) *In general*—(1) *Scope.* Subject to the rules of § 1.865–3, paragraphs (a) through (d) of this section apply to determine the source of income derived from the sale of inventory property (inventory) that a taxpayer produces (in whole or in part) within the United States and sells without the United States, or that a taxpayer produces (in whole or in part) without the United States and sells within the United States (collectively, Section 863(b)(2) Sales). See section 865(i)(1) for the definition of inventory. Paragraph (b) of this section provides that the source of gross income from Section 863(b)(2) Sales is based solely on the production activities with respect to the inventory. Paragraph (c) of this section describes how to determine source based on production activity, including when inventory is produced partly within the United States and partly without the United States. Paragraph (d) of this section determines taxable income from Section 863(b)(2) Sales. Paragraph (e) of this section applies to determine the source of certain income derived from a possession of the United States. Paragraph (f) of this section provides special rules for partnerships for all sales subject to §§ 1.863–1 through 1.863–3. Paragraph (g) of this section provides applicability dates for the rules in this section.

(2) *Cross references.* To determine the source of income derived from the sale of personal property (including inventory) by a nonresident that is attributable to the nonresident's office or other fixed place of business in the United States under section 865(e)(2) and § 1.865–3(c), the rules of § 1.865–3 apply, and the rules of this section do not apply except to the extent provided in § 1.865–3. To determine the source of income from sales of property produced by the taxpayer, when the property is either produced in whole or in part in space, as defined in § 1.863–8(d)(1)(i), or international water, as defined in § 1.863–8(d)(1)(ii), or is sold in space or international water, the rules of § 1.863–8 apply, and the rules of this section do not apply except to the extent provided in § 1.863–8.

(b) *Sourcing based solely on production activities.* Subject to the rules of § 1.865–3, all income, gain, or loss derived from Section 863(b)(2) Sales is allocated and apportioned solely on the basis of the production activities with respect to the inventory.

(c) *Determination of the source of gross income from production activity*—(1) *Production only within the United States or only within foreign countries*—(i) *Source of income.* For purposes of this section, production activity means an activity that creates, fabricates, manufactures, extracts, processes, cures, or ages inventory. See § 1.864–1. Whether a taxpayer's activities constitute production activity is determined under the principles of § 1.954–3(a)(4) (except for § 1.954–3(a)(4)(iv)). Subject to the provisions in § 1.1502–13 or paragraph (f)(2)(ii) of this section, the only production activities that are taken into account for purposes of §§ 1.863–1, 1.863–2, and this section are those conducted directly by the taxpayer. Where the taxpayer's production assets are located only within the United States or only outside the United States, gross income is sourced where the taxpayer's production assets are located. For rules regarding the source of income when production assets are located both within the United States and without the United States, see paragraph (c)(2) of this section. For rules regarding the source of income when production takes place, in whole or in part, in space or international water, the rules of § 1.863–8 apply, and the rules of this section do not apply except to the extent provided in § 1.863–8.

(ii) *Definition of production assets.* Subject to the provisions of § 1.1502–13 and paragraph (f)(2)(ii) of this section, production assets include only tangible and intangible assets owned directly by the taxpayer that are directly used by the taxpayer to produce inventory described in paragraph (a) of this section. Production assets do not include assets that are not directly used to produce inventory described in paragraph (a) of this section. Thus, production assets do not include such assets as accounts receivables, intangibles not related to production of inventory (*e.g.,* marketing intangibles, including trademarks and customer lists), transportation assets, warehouses, the inventory itself, raw materials, or work-in-process. In addition, production assets do not include cash or other liquid assets (including working capital), investment assets, prepaid expenses, or stock of a subsidiary.

(iii) *Location of production assets.* For purposes of this section, a tangible production asset will be considered located where the asset is physically located. An intangible production asset will be considered located where the tangible production assets owned by the taxpayer to which it relates are located.

(2) *Production both within and without the United States*—(i) *Source of income.* Where the taxpayer's production assets are located both within and without the United States, income from sources without the United States will be determined by multiplying the gross income by a fraction, the numerator of which is the average adjusted basis of production assets that are located outside the United States and the denominator of which is the average adjusted basis of all production assets within and without the United States. The remaining income is treated as from sources within the United States.

(ii) *Adjusted basis of production assets*—(A) *In general.* For purposes of paragraph (c)(2)(i) of this section, the adjusted basis of an asset is determined by using the alternative depreciation system under section 168(g)(2). The adjusted basis of all production assets for purposes of paragraph (c)(2)(i) of this section is determined as though the production assets were subject to the alternative depreciation system set forth in section 168(g)(2) for the entire period that such property has been in service. The adjusted basis of the production assets is determined without regard to the election to expense certain depreciable assets under section 179 and without regard to any additional first-year depreciation provision (for example, section 168(k), (l), and (m), and former sections 1400L(b) and 1400N(d)). The average adjusted basis of assets is computed by averaging the adjusted basis at the beginning and end of the taxable year, unless by reason of changes during the taxable year, as might be the case in the event of a major acquisition or disposition of assets, the average would materially distort the calculation in paragraph (c)(2)(i) of this section. In this event, the average adjusted basis is determined upon a more appropriate basis that is weighted to reasonably reflect the period for which the assets are held by the taxpayer during the taxable year.

(B) *Production assets used to produce other property.* If a production asset is used to produce inventory sold in Section 863(b)(2) Sales and also used to produce other property during the taxable year, the portion of its adjusted basis that is included in the fraction described in paragraph (c)(2)(i) of this section will be determined under any method that reasonably reflects the portion of the asset that produces inventory sold in Section 863(b)(2) Sales. For example, the portion of such an asset that is included in the formula may be determined by multiplying the asset's average adjusted basis by a fraction, the numerator of which is the gross receipts from sales of inventory from Section 863(b)(2) Sales produced by the asset, and the denominator of which is the gross receipts from all property produced by that asset.

(3) *Anti-abuse rule.* The purpose of paragraph (b) of this section and this paragraph (c) is to attribute the source of the taxpayer's gross income from certain sales of inventory property to the location of the taxpayer's production activity. Therefore, if the taxpayer has entered into or structured one or more transactions with a principal purpose of reducing its U.S. tax liability in a manner inconsistent with the purpose of paragraph (b) of this section or this paragraph (c), the Commissioner may make appropriate adjustments so that the source of the taxpayer's gross income more clearly reflects the location of production activity. For example, a taxpayer may be subject to the rule in this paragraph (c)(3) if domestic production assets are acquired by a related partnership (or a subsidiary of a related partnership) with a principal purpose of reducing its U.S. tax liability by claiming that the taxpayer's income from sales of inventory is subject to section 862(a)(6) rather than section 863(b).

(4) *Examples.* The following examples illustrate the rules of this paragraph (c):

(i) *Example 1. Source of gross income*—(A) *Facts.* A, a U.S. corporation, produces widgets that are sold both within the United States and within a foreign country. The initial manufacture of all widgets occurs in the United States. The second stage of production of widgets that are sold within a foreign country is completed within the country of sale. A's U.S. plant and machinery which is involved in the initial manufacture of the widgets has an average adjusted basis of $200, as determined using the alternative depreciation system under section 168(g)(2). A also owns warehouses used to store work-in-process. A owns foreign equipment with an average adjusted basis of $25. A's gross receipts from all sales of widgets is $100, and its gross receipts from export sales of widgets is $25. Assume that apportioning average adjusted basis using gross receipts is reasonable. Assume A's cost of goods sold from the sale of widgets in the foreign countries is $13 and thus, its gross income from widgets sold in foreign countries is $12.

(B) *Analysis.* A determines its gross income from sources without the United States by multiplying A's $12 of gross income from sales of widgets in foreign countries by a fraction, the numerator of which is all relevant foreign production

assets, or $25, and the denominator of which is all relevant production assets, or $75 ($25 foreign assets + ($200 U.S. assets × $25 gross receipts from export sales/$100 gross receipts from all sales)). Therefore, A's gross income from sources without the United States is $4 ($12 × ($25/$75)).

(ii) *Example 2. Location of intangible property.* Assume the same facts as in paragraph (c)(4)(i)(A) of this section (the facts in *Example 1*), except that A employs a patented process that applies only to the initial production of widgets. In computing the formula used to determine the source of gross income, A's patent, if it has an average adjusted basis, would be located in the United States.

(iii) *Example 3. Anti-abuse rule*—(A) *Facts.* Assume the same facts as in paragraph (c)(4)(i)(A) of this section (the facts in *Example 1*). A sells its U.S. assets to B, an unrelated U.S. corporation, with a principal purpose of reducing its U.S. tax liability by manipulating the property fraction. A then leases these assets from B. After this transaction, under the general rule of paragraph (c)(2) of this section, all of A's gross income would be considered from sources without the United States, because all of A's relevant production assets are located within a foreign country. Since the leased property is not owned by the taxpayer, it is not included in the fraction.

(B) *Analysis.* Because A has entered into a transaction with a principal purpose of reducing its U.S. tax liability by manipulating the formula described in paragraph (c)(2)(i) of this section, A's income must be adjusted to more clearly reflect the source of that income. In this case, the Commissioner may redetermine the source of A's gross income by ignoring the sale-leaseback transactions.

(d) *Determination of source of taxable income.* Once the source of gross income has been determined under paragraph (c) of this section, the taxpayer must properly allocate and apportion its expenses, losses, and other deductions to its respective amounts of gross income from sources within and without the United States from its Section 863(b)(2) Sales. See §§ 1.861–8 through 1.861–14T and 1.861–17.

(e) *Income partly from sources within a possession of the United States*—(1) *In general.* This paragraph (e) relates to certain sales that give rise to income, gain, or loss that is treated as derived partly from sources within the United States and partly from sources within a possession of the United States (Section 863 Possession Sales). This paragraph (e) applies to determine the source of income derived from the sale of inventory produced (in whole or in part) by a taxpayer within the United States and sold within a possession of the United States, or produced (in whole or in part) by a taxpayer in a possession of the United States and sold within the United States (collectively, Possession Production Sales). It also applies to determine the source of income derived from the purchase of personal property within a possession of the United States and its sale within the United States (Possession Purchase Sales). A taxpayer subject to this paragraph (e) must apportion gross income from Section 863 Possession Sales under paragraph (e)(2) of this section (in the case of Possession Production Sales) or under paragraph (e)(3) of this section (in the case of Possession Purchase Sales). The source of taxable income from Section 863 Possession Sales is determined under paragraph (d) of this section.

(2) *Allocation or apportionment for Possession Production Sales.* The source of gross income from Possession Production Sales is determined under the rules of paragraph (c) of this section, except that the term *possession of the United States* is substituted for *foreign country* wherever it appears.

(3) *Allocation or apportionment for Possession Purchase Sales*—(i) *Determination of source of gross income from Possession Purchase Sales.* Gross income from Possession Purchase Sales is allocated in its entirety to the taxpayer's business activity, and is then apportioned between sources within the United States and sources within a possession of the United States under paragraph (e)(3)(ii) of this section.

(ii) *Determination of source of gross income from business activity*—(A) *Source of gross income.* Gross income from the taxpayer's business activity is sourced in the possession in the same proportion that the amount of the taxpayer's business activity for the taxable year within the possession bears to the amount of the taxpayer's business activity for the taxable year both within the possession and outside the possession, with respect to Possession Purchase Sales. The remaining income is sourced in the United States.

(B) *Business activity.* For purposes of this paragraph (e)(3)(ii), the taxpayer's business activity is equal to the sum of—

(*1*) The amounts for the taxable period paid for wages, salaries, and other compensation of employees, and other expenses attributable to Possession Purchase Sales (other than amounts that are nondeductible under section 263A, interest, and research and development);

(*2*) Cost of goods sold attributable to Possession Purchase Sales during the taxable period; and

(*3*) Possession Purchase Sales for the taxable period.

(C) *Location of business activity.* For purposes of determining the location of the taxpayer's business activity within a possession, the following rules apply:

(*1*) *Sales activity.* Receipts from gross sales will be attributed to a possession in accordance with the principles of § 1.861–7(c).

(*2*) *Cost of goods sold.* Payments for cost of goods sold will be properly attributable to gross receipts from sources within the possession only to the extent that the property purchased was manufactured, produced, grown, or extracted in the possession (within the meaning of section 954(d)(1)(A)).

(*3*) *Expenses.* Expenses will be attributed to a possession under the rules of §§ 1.861–8 through 1.861–14T.

(*4*) *Examples.* The following examples illustrate the rules of paragraph (e)(3)(ii) of this section relating to the determination of source of gross income from business activity:

(i) *Example 1. Purchase of goods manufactured in possession*—(A) *Facts.* U.S. Co. purchases in a possession product X for $80 from A. A manufactures X in the possession. Without further production, U.S. Co. sells X in the United States for $100. Assume U.S. Co. has sales and administrative expenses in the possession of $10.

(B) *Analysis.* To determine the source of U.S. Co.'s gross income, the $100 gross income from sales of X is allocated entirely to U.S. Co.'s business activity. Forty-seven dollars of U.S. Co.'s gross income is sourced in the possession. [Possession expenses ($10) plus possession purchases (*i.e.,* cost of goods sold) ($80) plus possessions sales ($0), divided by total expenses ($10) plus total purchases ($80) plus total sales ($100).] The remaining $53 is sourced in the United States.

(ii) *Example 2. Purchase of goods manufactured outside possession*—(A) *Facts.* Assume the same facts as in paragraph (e)(4)(i)(A) of this section (the facts in *Example 1*), except that A manufactures X outside the possession.

(B) *Analysis.* To determine the source of U.S. Co.'s gross income, the $100 gross income is allocated entirely to U.S. Co.'s business activity. Five dollars of U.S. Co.'s gross income is sourced in the possession. [Possession expenses ($10) plus possession purchases ($0) plus possession sales ($0), divided by total expenses ($10) plus total purchases ($80) plus total sales ($100).] The $80 purchase is not included in the

numerator used to determine U.S. Co.'s business activity in the possession, since product X was not manufactured in the possession. The remaining $95 is sourced in the United States.

(5) *Special rules for partnerships.* In applying the rules of this paragraph (e) to transactions involving partners and partnerships, the rules of paragraph (f) of this section apply.

(f) *Special rules for partnerships*—(1) *General rule.* For purposes of § 1.863–1 and this section, a taxpayer's production activity does not include production activities conducted by a partnership of which the taxpayer is a partner either directly or through one or more partnerships, except as otherwise provided in paragraphs (c)(3) or (f)(2) of this section.

(2) *Exceptions*—(i) *In general.* For purposes of determining the source of the partner's distributive share of partnership income or determining the source of the partner's income from the sale of inventory property which the partnership distributes to the partner in kind, the partner's production activity includes an activity conducted by the partnership. In addition, the production activity of a partnership includes the production activity of a taxpayer that is a partner either directly or through one or more partnerships, to the extent that the partner's production activity is related to inventory that the partner contributes to the partnership in a transaction described under section 721.

(ii) *Attribution of production assets to or from a partnership.* A partner will be treated as owning its proportionate share of the partnership's production assets only to the extent that, under paragraph (f)(2)(i) of this section, the partner's activity includes production activity conducted through a partnership. A partner's share of partnership assets will be determined by reference to the partner's distributive share of partnership income for the year attributable to such production assets. Similarly, to the extent a partnership's activities include the production activities of a partner, the partnership will be treated as owning the partner's production assets related to the inventory that is contributed in kind to the partnership. See paragraph (c)(2)(ii) of this section for rules apportioning the basis of assets to Section 863 Sales.

(iii) *Basis.* For purposes of this section, in those cases where the partner is treated as owning its proportionate share of the partnership's production assets, the partner's basis in production assets held through a partnership shall be determined by reference to the partnership's adjusted basis in its assets (including a partner's special basis adjustment, if any, under section 743). Similarly, a partnership's basis in a partner's production assets is determined with reference to the partner's adjusted basis in its assets.

(3) *Examples.* The following examples illustrate the rules of this paragraph (f):

(i) *Example 1. Distributive share of partnership income.* A, a U.S. corporation, forms a partnership in the United States with B, a country X corporation. A and B each have a 50 percent interest in the income, gains, losses, deductions and credits of the partnership. The partnership is engaged in the manufacture and sale of widgets. The widgets are manufactured in the partnership's plant located in the United States and are sold by the partnership outside the United States. The partnership owns the manufacturing facility and all other production assets used to produce the widgets. A's distributive share of partnership income includes 50 percent of the sales income from these sales. In applying the rules of section 863 to determine the source of its distributive share of partnership income from the export sales of widgets, A is treated as carrying on the activity of the partnership related to production of these widgets and as owning a proportionate share of the partnership's assets related to production of the widgets, based upon its distributive share of partnership income.

(ii) *Example 2. Distribution in kind.* Assume the same facts as in paragraph (f)(3)(i) of this section (the facts in *Example 1*) except that the partnership, instead of selling the widgets, distributes the widgets to A and B. A then further processes the widgets and then sells them outside the United States. In determining the source of the income earned by A on the sales outside the United States, A is treated as conducting the activities of the partnership related to production of the distributed widgets. Thus, the source of gross income on the sale of the widgets is determined under section 863 and this section. In applying paragraph (c) of this section, A is treated as owning its proportionate share of the partnership's production assets based upon its distributive share of partnership income.

(g) *Applicability dates.* This section applies to taxable years ending on or after December 23, 2019. However, a taxpayer may apply this section in its entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) apply this section and §§ 1.863–1(b), 1.863–2(b), 1.863–8(b)(3)(ii), 1.864–5(a) and (b), 1.864–6(c)(2), and 1.865–3 in their entirety for the taxable year, and once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years. For regulations generally applicable to taxable years ending before December 23, 2019, see § 1.863–3 as contained in 26 CFR part 1 revised as of April 1, 2020.

■ **Par. 7.** Section 1.863–8 is amended as follows:

■ a. Revising paragraph (b)(3)(ii)(A).

■ b. In paragraph (b)(3)(ii)(B):

■ i. Removing ''income allocable to production activity'' wherever it appears and adding in its place ''gross income''.

■ ii. Removing ''§ 1.863–3(c)(1)'' from the second sentence and adding in its place ''§ 1.863–3(c)''.

■ c. In paragraph (b)(3)(ii)(C):

■ i. Removing ''allocable to production activity'' wherever it appears.

■ ii. Removing ''allocated to production activity'' from the fifth sentence.

■ iii. Removing ''§ 1.863–3(c)(1)'' from the fifth sentence and adding in its place ''§ 1.863–3(c)''.

■ d. Removing paragraph (b)(3)(ii)(D).

■ e. In paragraph (c), removing ''(b)(3)(ii)(C)'' from the first sentence and adding in its place ''(b)(3)(ii)''.

■ f. Designating *Examples 1* through *14* of paragraph (f) as paragraphs (f)(1) through (14).

■ g. In newly designated paragraphs (f)(1) through (14), removing the period between the second and third level paragraph headings and adding an em-dash in its place.

■ h. Removing ''this *Example 4*'' from newly designated paragraph (f)(4)(i) wherever it appears and adding in its place ''paragraph (f)(4)(i) (*Example 4*)''.

■ i. Removing ''*Example 4*'' from newly designated paragraph (f)(5)(i) and adding in its place ''paragraph (f)(4)(i) of this section (the facts in *Example 4*)''.

■ j. Revising newly designated paragraph (f)(6)(ii).

■ k. Removing ''*Example 8*'' from newly designated paragraph (f)(9)(i) and adding in its place ''in paragraph (f)(8)(i) of this section (the facts in *Example 8*)''.

■ l. Removing ''*Example 8*'' from newly designated paragraph (f)(9)(ii) and adding in its place ''paragraph (f)(8)(ii) of this section (the analysis in *Example 8*)''.

■ m. Revising newly designated paragraph (f)(11)(ii).

■ n. In paragraph (g)(1), removing ''(b)(3)(ii)(C)'' from the first sentence and adding in its place ''(b)(3)(ii)''.

■ o. In paragraph (g)(4) introductory text, removing ''(b)(3)(ii)(C)'' from the first sentence and adding in its place ''(b)(3)(ii)''.

■ p. In paragraph (h), adding three sentences at the end of the paragraph.

The revisions and additions read as follows:

§ 1.863–8 Source of income derived from space and ocean activity under section 863(d).

* * * * *

(b) * * *

(3) * * *

(ii) *Sales of property produced by the taxpayer*—(A) *General.* If the taxpayer both produces property and sells such property and either the production (in whole or in part) or the sale takes place in space or international water, the taxpayer must allocate and apportion all income, gain, or loss derived from sales of such property solely on the basis of the production activities with respect to such property, and the source of that income will be determined under paragraph (b)(3)(ii)(B) or (C) of this section. To determine the source of income derived from the sale of personal property (including inventory) by a nonresident that is attributable to the nonresident's office or other fixed place of business in the United States under section 865(e)(2), the rules of § 1.865–3 apply, and the rules of this section do not apply.

* * * * *

(f) * * *

(6) * * *

(ii) *Analysis.* The collection of data and creation of images in space is characterized as the creation of property in space. Because S both produces and sells the data, the source of the gross income from the sale of the data is determined under paragraph (b)(3)(ii) of this section solely on the basis of the production activities. The source of S's gross income is determined under paragraph (b)(3)(ii)(C) of this section because production activities occur both in space and on land.

* * * * *

(11) * * *

(ii) *Analysis.* Because S's rights, title, and interest in the satellite pass to the customer in space, the sale takes place in space under § 1.861–7(c), and the sale transaction is space activity under paragraph (d)(1)(i) of this section. The source of income derived from the sale of the satellite manufactured in the United States and sold in space is determined under paragraph (b)(3)(ii) of this section solely on the basis of the production activities with respect to the satellite.

* * * * *

(h) * * * Paragraph (b)(3)(ii) of this section applies to taxable years ending on or after December 23, 2019. However, a taxpayer may apply paragraph (b)(3)(ii) of this section in its entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) apply paragraph (b)(3)(ii) of this section and §§ 1.863–1(b), 1.863–2(b), 1.863–3, 1.864–5(a) and (b), 1.864–6(c)(2), and 1.865–3 in their entirety for the taxable year, and once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years. For regulations generally applicable to taxable years ending before December 23, 2019, see § 1.863–8 as contained in 26 CFR part 1 revised as of April 1, 2020.

■ **Par. 8.** Section 1.864–5 is amended as follows:

■ a. Adding a sentence to the end of paragraph (a);

■ b. Revising the first sentence of paragraph (b) introductory text; and

■ c. Adding paragraph (e).

The additions read as follows:

§ 1.864–5 Foreign source income effectively connected with U.S. business.

(a) * * * To determine the source of income, gain or loss from the sale of personal property (including inventory property) attributable to an office or other fixed place of business in the United States by nonresidents, as defined in section 865(g)(1)(B), see § 1.865–3.

(b) * * * Income, gain, or loss from sources without the United States other than income described in paragraph (c) of this section or income from section 865(e)(2) sales, as defined in § 1.865–3(c), shall be taken into account pursuant to paragraph (a) of this section in applying §§ 1.864–6 and 1.864–7 only if it consists of—

* * * * *

(e) *Applicability dates.* Paragraphs (a) and (b) of this section apply to taxable years ending on or after December 23, 2019. However, a taxpayer may apply paragraphs (a) and (b) of this section in their entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) apply paragraphs (a) and (b) of this section and §§ 1.863–1(b), 1.863–2(b), 1.863–3, 1.863–8(b)(3)(ii), 1.864–6(c)(2), and 1.865–3 in their entirety for the taxable year, and once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years. For regulations generally applicable to taxable years ending before December 23, 2019, see § 1.864–5 as contained in 26 CFR part 1 revised as of April 1, 2020.

■ **Par. 9.** Section 1.864–6 is amended as follows:

■ a. Revising paragraph (c)(2).

■ b. Revising paragraph (c)(3).

■ c. Adding paragraph (c)(4).

The revisions and additions read as follows:

§ 1.864–6 Income, gain, or loss attributable to an office or other fixed place of business in the United States.

* * * * *

(c) * * *

(2) *Special limitation in case of sales of goods or merchandise through U.S. office.* Notwithstanding paragraph (c)(1) of this section, the special rules described in this paragraph (c)(2) apply with respect to a sale of goods or merchandise specified in § 1.864–5(b)(3), to which paragraph (b)(3)(i) of this section does not apply. In the case of a nonresident alien with a tax home within the United States, as defined in section 911(d)(3), the amount of income from the sale of goods or merchandise that is properly allocable to the individual's U.S. office is determined under § 1.865–3(d).

(3) *Examples.* The application of this paragraph (c) may be illustrated by the following examples—

(i) *Example 1. Sales of produced inventory through a U.S. sales office.* Individual A, who is a nonresident alien within the meaning of section 7701(b)(1)(B) and has a tax home in the United States, manufactures machinery in a foreign country and sells the machinery outside the United States through A's sales office in the United States for use in foreign countries. A is not a nonresident within the meaning of section 865(g)(1)(B). Therefore, § 1.865–3 does not apply to A's sale of the machinery, except to the extent provided in paragraph (c)(2) of this section. Title to the property sold is transferred to the foreign purchaser outside the United States, but no office or other fixed place of business of A in a foreign country materially participates in the sale made through A's U.S. office. By reason of its sales activities in the United States, A is engaged in business in the United States during the taxable year. During the taxable year, A derives a total income of $250,000x from these sales. Under paragraph (c)(2) of this

section, the amount of income that is allocable to A's U.S. office is determined under § 1.865–3(d)(2). The taxpayer does not allocate income from the sale under the books and records method described in § 1.865–3(d)(2)(ii). Thus, 50 percent of A's foreign source income of $250,000x, plus any additional income allocable based on the location of production activities under §§ 1.865–3(d)(2)(i) and 1.863–3 (in this case, $0x), is effectively connected for the taxable year with the conduct of A's U.S. trade or business, or $125,000x.

(ii) *Example 2. Sales of inventory purchased and resold through a U.S. sales office by a nonresident alien with a tax home in the United States.* Individual B, who is a nonresident alien within the meaning of section 7701(b)(1)(B) and has a tax home in the United States, has an office in a foreign country that purchases merchandise and sells it through B's sales office in the United States for use in various foreign countries, with title to the property passing outside the United States. B is not a nonresident within the meaning of section 865(g)(1)(B). Therefore, § 1.865–3 does not apply to B's sale of the merchandise, except to the extent provided in paragraph (c)(2) of this section. No other office of B materially participates in these sales made through its U.S. office. By reason of its sales activities in the United States, B is engaged in business in the United States during the taxable year. During the taxable year, B derives income of $300,000x from these sales made through its U.S. sales office. All of B's income from these sales is foreign source as B purchases the merchandise outside the United States and title to the merchandise also passes outside the United States. The amount of income properly allocable to B's U.S. office determined under § 1.865–3(d)(3) is $300,000x, and thus $300,000x is effectively connected for the taxable year with the conduct of B's U.S. trade or business.

(iii) *Example 3. Foreign sales office also materially participates in sale.* The facts are the same as in paragraph (c)(3)(ii) of this section (the facts in *Example 2*), except that B also has an office in a foreign country that is a material factor in the realization of income from the sales made through B's U.S. office. No income from the sale of merchandise is allocable to B's U.S. sales office for the taxable year, by reason of paragraph (b)(3)(i) of this section, and thus none of the $300,000x is effectively connected for the taxable year with the conduct of B's U.S. trade or business.

(iv) *Example 4. Sales of inventory purchased and resold through a U.S. sales office by a foreign corporation.* The facts are the same as in paragraph (c)(3)(ii) of this section (the facts in *Example 2*), except that B is a foreign corporation. B is a nonresident within the meaning of section 865(g)(1)(B). The income from such sales will be sourced in accordance with § 1.865–3(a) and (d)(3).

(4) *Applicability date.* Paragraph (c)(2) of this section applies to taxable years ending on or after December 23, 2019. However, a taxpayer may apply paragraph (c)(2) of this section in its entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) apply paragraph (c)(2) of this section and §§ 1.863–1(b), 1.863–2(b), 1.863–3, 1.863–8(b)(3)(ii), 1.864–5(a) and (b), and 1.865–3 in their entirety for the taxable year, and once applied, the taxpayer and all persons related to the taxpayer (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years. For regulations generally applicable to taxable years ending before December 23, 2019, see § 1.864–6 as contained in 26 CFR part 1 revised as of April 1, 2020.

■ **Par. 10.** Section 1.865–3 is added to read as follows:

§ 1.865–3 Source of gross income from sales of personal property (including inventory property) by a nonresident attributable to an office or other fixed place of business in the United States.

(a) *In general.* Notwithstanding any provision of section 861 through 865 or other regulations in this part, this section provides the sole sourcing rules for gross income, gain, or loss from section 865(e)(2) sales. Gross income, gain, or loss from a section 865(e)(2) sale is U.S. source income to the extent that the gross income, gain, or loss is properly allocable to an office or other fixed place of business in the United States under paragraph (d) of this section.

(b) *Exception for certain inventory sales for use, disposition or consumption outside the United States.* A section 865(e)(2) sale does not include any sale of inventory property that is sold for use, disposition, or consumption outside the United States if an office or other fixed place of business of the nonresident in a foreign country materially participates in the sale. See § 1.864–6(b)(3) to determine whether a foreign office materially participates in the sale and whether the property was destined for foreign use.

(c) *Section 865(e)(2) sales.* For purposes of this section, a ''section 865(e)(2) sale'' is a sale of personal property by a nonresident, including inventory property, other than a sale described in paragraph (b) of this section, that is attributable to an office or other fixed place of business in the United States under the principles of section 864(c)(5)(B) as prescribed in § 1.864–6(b)(1) and (2). In determining whether a nonresident maintains an office or other fixed place of business in the United States, the principles of section 864(c)(5)(A) as prescribed in § 1.864–7 apply, including the rules of paragraph (d) of that section regarding the office or other fixed place of business of a dependent agent of the nonresident. For purposes of this section, ''inventory property'' has the meaning provided in section 865(i)(1), and ''nonresident'' has the meaning provided in section 865(g)(1)(B).

(d) *Amount of gross income, gain, or loss on sale of personal property properly allocable to a U.S. office*—(1) *In general.* Except as otherwise provided in paragraphs (d)(2) through (4) of this section, the amount of gross income, gain, or loss from a section 865(e)(2) sale that is properly allocable to an office or other fixed place of business in the United States is determined under the principles of § 1.864–6(c)(1).

(2) *Produced inventory property.* Gross income, gain, or loss from a section 865(e)(2) sale of inventory property that is produced by the nonresident seller is properly allocable to an office or other fixed place of business in the United States or to production activities in accordance with the ''50/50 method'' described in paragraph (d)(2)(i) of this section. However, in lieu of the 50/50 method, the nonresident seller may elect to allocate the gross income, gain, or loss under the ''books and records method'' described in paragraph (d)(2)(ii)(A) of this section, provided that the nonresident satisfies all of the requirements described in paragraph (d)(2)(ii)(B) of this section to the satisfaction of the Commissioner. Gross income allocable to production activities under this paragraph (d)(2) is sourced in accordance with § 1.863–3. For purposes of this paragraph (d)(2), the term ''produced'' includes created, fabricated, manufactured, extracted, processed, cured, and aged, as determined under the principles of § 1.954–3(a)(4) (except for § 1.954–3(a)(4)(iv)). See section 864(a) and § 1.864–1.

(i) *The 50/50 method.* Fifty percent of the gross income, gain, or loss from a section 865(e)(2) sale of inventory property that is produced by the nonresident seller is properly allocable to an office or other fixed place of business in the United States, and the remaining 50 percent of the gross income, gain, or loss is properly allocable to production activities (the ''50/50 method'').

(ii) *Books and records method*—(A) *Method.* Subject to paragraph (d)(2)(ii)(B) of this section, a nonresident may elect to determine the amount of its gross income, gain, or loss from the sale of inventory property produced by the nonresident seller that is properly allocable to production activities and sales activities for the taxable year based upon its books of account (the ''books and records method''). The gross income, gain, or loss allocable to sales activities under this method is treated as properly allocable to an office or other fixed place of business in the United States and the remaining gross income, gain, or loss is treated as properly allocable to production activities.

(B) *Election and reporting rules*—(*1*) *In general.* A nonresident may not make the election described in paragraph (d)(2)(ii)(A) of this section unless the requirements of paragraphs (d)(2)(ii)(B)(*2*) through (*4*) of this section are satisfied. Once the election is made, the nonresident must continue to satisfy the requirements of paragraphs (d)(2)(ii)(B)(*2*) through (*4*) of this section until the election is revoked. If the nonresident fails to satisfy the requirements in paragraphs (d)(2)(ii)(B)(*2*) through (*4*) of this section to the satisfaction of the Commissioner, the Commissioner may, in its sole discretion, apply the 50/50 method described in paragraph (d)(2)(i) of this section.

(*2*) *Books of account.* The nonresident must establish that it, in good faith and unaffected by considerations of tax liability, regularly employs in its books of account a detailed allocation of receipts and expenditures that, under the principles of section 482, clearly reflects both the amount of the nonresident's gross income, gain, or loss from its inventory sales that are attributable to its sales activities, and the amount of its gross income, gain, or loss from its inventory sales that are attributable to its production activities. For purposes of this paragraph (d)(2)(ii)(B)(*2*), section 482 principles apply as if the office or other fixed place of business in the United States were a separate organization, trade, or business (and, thus, a separate controlled taxpayer) from the nonresident (whether or not payments are made between the United States office or other fixed place of business and the nonresident's other offices, and whether or not the nonresident itself would otherwise constitute an organization, trade, or business).

(*3*) *Required records.* The nonresident must prepare and maintain the records described in paragraph (d)(2)(ii)(B)(*2*) of this section, which must be in existence when its return is filed. The nonresident must also prepare an explanation of how the allocation clearly reflects the nonresident's gross income, gain, or loss from production and sales activities under the principles of section 482. The nonresident must make available the explanation and records of the nonresident (including for the office or other fixed place of business in the United States and the offices or branches that perform the production activities) upon request of the Commissioner, within 30 days, unless some other period is agreed upon between the Commissioner and the nonresident.

(*4*) *Making and revoking the books and records method election; disclosure of election.* Except as otherwise provided in publications, forms, instructions, or other guidance, a nonresident makes or revokes the election to apply the books and records method by attaching a statement to its original timely filed Federal income tax return (including extensions) providing that it elects, or revokes the election, to apply the books and records method described in paragraph (d)(2)(ii)(A) of this section. For nonresidents making the election, the statement must provide that the nonresident has prepared the records described in paragraph (d)(2)(ii)(B)(*2*) and (*3*) of this section.

(*5*) *Limitation on revoking the books and records method election.* Once made, the books and records method election continues until revoked. An election cannot be revoked, without the consent of the Commissioner, for any taxable year beginning within 48 months of the last day of the taxable year for which the election was made.

(3) *Purchased inventory property.* All gross income, gain, or loss from a section 865(e)(2) sale of inventory property that is both purchased and sold by a nonresident is properly allocable to an office or other fixed place of business in the United States.

(4) *Depreciable personal property.* Gain from a section 865(e)(2) sale of depreciable personal property (as defined in section 865(c)(4)) is allocated under paragraphs (d)(4)(i) and (ii) of this section.

(i) The gain not in excess of the depreciation adjustments, if any, is properly allocable to an office or other fixed place of business in the United States to the same extent that the gain would be allocated to sources within the United States under the rules of section 865(c)(1). The remaining gain not in excess of the depreciation adjustments, if any, is allocated to sources without the United States in accordance with section 865(c)(1). However, notwithstanding the preceding sentences, if the property was predominantly used in the United States, within the meaning of section 865(c)(3)(B)(i), for a particular taxable year, all of the gain not in excess of depreciation for that year is properly allocable to the office or other fixed place of business in the United States.

(ii) The gain in excess of the depreciation adjustments, if any, is treated as if such gain was from the sale of inventory and the amount allocable to an office or fixed place of business in the United States is determined under paragraph (d)(2) or (3) of this section, as applicable.

(e) *Determination of source of taxable income.* For rules allocating and apportioning expenses to gross income effectively connected with the conduct of a trade or business of a foreign corporation in the United States (including gross income, gain, or loss sourced under this section), see section 882(c)(1). For rules allocating and apportioning expenses to gross income, gain, or loss effectively connected with the conduct of a trade or business of a nonresident alien in the United States (including gross income, gain, or loss sourced under this section), see section 873(a).

(f) *Export trade corporations.* This section does not apply for purposes of defining an export trade corporation under section 971(a).

(g) *Applicability date.* This section applies to taxable years ending on or after December 23, 2019. However, a nonresident may apply this section in its entirety for taxable years beginning after December 31, 2017, and ending before December 23, 2019, provided that the nonresident and all persons related to the nonresident (within the meaning of section 267 or 707) apply this section and §§ 1.863–1(b), 1.863–2(b), 1.863–3, 1.863–8(b)(3)(ii), 1.864–5(a) and (b), and 1.864–6(c)(2) in their entirety for the taxable year, and once applied, the nonresident and all persons related to the nonresident (within the meaning of section 267 or 707) continue to apply these regulations in their entirety for all subsequent taxable years.

§ 1.937–2 [Amended]

■ **Par. 11.** In § 1.937–2 amend paragraph (d) by removing ''§ 1.863–3(f)'' and adding in its place ''§ 1.863–3(e)''.

§ 1.937–3 [Amended]

■ **Par. 12.** In § 1.937–3 amend paragraph (d) by removing ''§ 1.863–3(f)'' and adding in its place ''§ 1.863–3(e)''.

■ **Par. 13.** Section 1.1502–13 is amended by revising paragraph (c)(7)(ii)(N) to read as follows:

§ 1.1502–13 Intercompany transactions.

* * * * *

(c) * * *

(7) * * *

(ii) * * *

(N) *Example (14): Source of income under section 863*—(*1*) *Intercompany sale*—(*i*) *Facts.* S manufactures inventory property solely in the United States and recognizes $75x of income on sales to B in Year 1. B conducts further production activity on the inventory property solely in Country Y and then sells the inventory property to X in Country Y and recognizes $25x of income on the sale to X, also in Year 1. Title passes from S to B, and from B to X, in Country Y. Assume that applying § 1.863–3 on a single entity basis, including the formula for apportionment of multi-country production activities by reference to the basis of production assets, $10x would be treated as foreign source income and $90x would be treated as U.S. source income (that is, 10 percent of the production occurred outside the United States and 90 percent occurred within the United States, as measured by the basis of assets used in production activities with respect to the property). Assume further that, on a separate entity basis, S would have $0x of foreign source income and $75x of U.S. source income and all of B's $25x of income would be foreign source income.

(*ii*) *Analysis.* Under the matching rule, both S's $75x intercompany item and B's $25x corresponding item are taken into account in Year 1. In determining the source of S and B's income from the inventory property sales, the attributes of S's intercompany item and B's corresponding item are redetermined to the extent necessary to produce the same effect on consolidated taxable income (and consolidated tax liability) as if S and B were divisions of a single corporation. See paragraph (c)(1)(i) of this section. On a single entity basis, S and B would have $10x that would be treated as foreign source income and $90x that would be treated as U.S. source income, but without application of this section (that is, on a separate entity basis), S would have $75x of U.S. source income and B would have $25x of foreign source income. Under paragraph (c)(4)(ii) of this section, a redetermined attribute must be allocated between S and B using a reasonable method. On a separate entity basis B would have only foreign source income and S would have only U.S. source income. Accordingly, under paragraph (c)(1)(i) of this section, $15x of B's $25x sales income that would be treated as foreign source income on a separate entity basis is redetermined to be U.S. source income.

(*2*) *Sale of property reflecting intercompany services or intangibles*—(*i*) *Facts.* S earns $10x of income performing services in the United States for B. B capitalizes S's fees into the basis of inventory property that it manufactures in the United States and sells to an unrelated person in Year 1 at a $90x profit, with title passing in Country Y. Assume that on a single entity basis, $100x is treated as U.S. source income and $0x is treated as foreign source income. Further assume that on a separate entity basis, S would have $10x of U.S. source income, and B would have $90x of U.S. source income, with neither having any foreign source income.

(*ii*) *Analysis.* Under the matching rule, S's $10x income and B's $90x income are taken into account in Year 1. In determining the source of S and B's income, the attributes of S's intercompany item and B's corresponding item are redetermined to the extent necessary to produce the same effect on consolidated taxable income (and consolidated tax liability) as if S and B were divisions of a single corporation. Because the results are the same on a single entity basis and a separate entity basis ($100x of U.S. source income and $0x of foreign source income), the attributes are not redetermined under paragraph (c)(1)(i) of this section.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: September 21, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–21817 Filed 12–10–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9902]

RIN 1545–BP15

Guidance Under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax; Correcting Amendment

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to Treasury Decision 9902, which was published in the **Federal Register** on Thursday, July 23, 2020. Treasury Decision 9902 contained final regulations under the global intangible low-taxed income and subpart F income provisions of the Internal Revenue Code regarding the treatment of income that is subject to a high rate of foreign tax.

DATES: This correction is effective on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Jorge M. Oben or Larry R. Pounders at (202) 317–6934 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9902) that are the subject of this correction are issued under section 951A of the Code.

Need for Correction

As published on July 23, 2020 (85 FR 44620) the final regulations (TD 9902) contain errors that need to be corrected.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

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

■ a. Revising the third sentence of paragraph (c)(3)(ii)(B).

■ b. Revising paragraphs (c)(7)(iii)(B)(*2*) and (c)(7)(viii)(A)(*2*)(*ii*).

■ c. Revising the first sentence of paragraph (c)(7)(viii)(A)(*4*) introductory text.

■ d. Revising paragraph (c)(7)(viii)(A)(*4*)(*i*).
■ e. Redesignating paragraph (c)(8)(iii)(C)(*2*)(vii) as paragraph (c)(8)(iii)(C)(*2*)(*vii*).
■ f. Removing ''DE1Y'' in paragraph (c)(8)(iii)(D)(*6*)(*i*) and adding in its place ''FDE1Y''.
■ g. Removing ''CFC1X'' in paragraph (c)(8)(iii)(D)(*6*)(*iii*) and adding in its place ''CFC2X''.

The revisions read as follows:

§ 1.951A–2 Tested income and tested loss.

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(B) * * * Therefore, for example, interest expense that is apportioned under the modified gross income method to a tentative gross tested income item of a lower-tier corporation under paragraph (c)(7)(iii)(A) of this section may be allocated and apportioned to the tested income of the upper-tier corporation or to the residual grouping, depending on whether the lower-tier corporation's tentative gross tested income item is an item of gross tested income or is excluded from gross tested income under the high-tax exclusion. * * *

* * * * *

(7) * * *

(iii) * * *

(B) * * *

(*2*) In the case of payments to a tested unit that is treated as a foreign branch under paragraph (c)(7)(iii)(B)(*1*) of this section, applying the principles of § 1.904–6(a)(2)(ii) and (iii) as if the tested unit receiving the payment were a foreign branch owner (and as if the tested unit making the payment were a foreign branch); and

* * * * *

(viii) * * *

(A) * * *

(*2*) * * *

(*ii*) Each United States shareholder that owns within the meaning of section 958(a) (including both domestic partnerships that are United States shareholders that own stock within the meaning of section 958(a) without regard to § 1.951A–1(e)(1) and partners of a domestic partnership that are United States shareholders that are treated as owning stock withing the meaning of section 958(a) by reason of § 1.951A–1(e)(1)) stock of the controlled foreign corporation as of the end of the CFC's taxable year to which the election relates must file amended Federal income tax returns (or timely original federal income tax returns if a return has not yet been filed) reflecting the effect of such election (or revocation) for the U.S. shareholder inclusion year with or within which the CFC inclusion year ends as well as for any other taxable year in which the U.S. tax liability of the United States shareholder would be increased by reason of the election (or revocation) (or in the case of a partnership if any item reported by the partnership or any partnership-related item would change as a result of the election (or revocation)) within a single period no greater than six months within the 24-month period described in paragraph (c)(7)(viii)(A)(*2*)(*i*) of this section; and

* * * * *

(*4*) A United States shareholder that is a partner in a partnership that is also a United States shareholder in the controlled foreign corporation must generally file an amended return, as required under paragraph (c)(7)(viii)(A)(*2*)(*ii*) of this section, and must generally pay any additional tax owed as required under paragraph (c)(7)(viii)(A)(*2*)(*iii*) of this section.

* * *

(*i*) The partnership timely files an administrative adjustment request described in paragraph (c)(7)(viii)(A)(*2*)(*i*) or (*ii*) of this section, as applicable; and,

* * * * *

Crystal Pemberton,

Senior Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2020–25371 Filed 12–10–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0641]

RIN 1625–AA08

Safety Zone; Lower Mississippi River, Natchez, MS

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters of the Lower Mississippi River between Mile Marker (MM) 364.5 and MM 365.5. This action is necessary to provide for the safety of persons, vessels, and the marine environment during a fireworks display. Entry of persons or vessels into this zone is prohibited unless authorized by the Captain of the Port Sector Lower Mississippi River or a designated representative.

DATES: This rule is effective from 4 p.m. through 7 p.m. on December 31, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2020–0641 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Lindsey Swindle, Sector Lower Mississippi River, U.S. Coast Guard; telephone 901–521–4813, email *Lindsey.M.Swindle@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
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish this safety zone by December 31, 2020, and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay the establishment of the safety zone until after the date of the event and compromise public safety

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is necessary to protect persons and property from the potential hazards associated with the fireworks display.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Sector Lower Mississippi River (COTP) has determined that potential hazards associated with the fireworks display located at mile marker (MM) 365.0 on the Lower Mississippi River and scheduled for 4 p.m. on December 31, 2020, would be a safety concern for all persons and vessels on the Lower Mississippi River between MM 364.5 and MM 365.5 from 4 p.m. through 7 p.m. on December 31, 2020. Hazards associated with the firework displays include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. This rule is necessary to ensure the safety of persons, vessels, and the marine environment on these navigable waters before, during, and after the fireworks.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 4 p.m. through 7 p.m. on December 31, 2020. The safety zone will cover all navigable waters of the Lower Mississippi River from MM 364.5 to MM 365.5. The duration of this safety zone is intended to ensure the safety of waterway users on these navigable waters before, during, and after the scheduled fireworks display.

Entry of persons or vessels into this safety zone is prohibited unless authorized by the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of USCG Sector Lower Mississippi River. Persons or vessels seeking to enter the safety zones must request permission from the COTP or a designated representative on VHF–FM channel 16 or by telephone at 901–521–4822. If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative. The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, and duration of the safety zone. Vessel traffic will be prohibited from entering this safety zone, which will impact a one-mile stretch of Lower Mississippi River for three hours on one evening. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the safety zone, and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry on a one-mile stretch of the Lower Mississippi River for three hours on one evening. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of UDHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS.

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1; 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0641 to read as follows:

§ 165.T08–0641 Safety Zone; Lower Mississippi River, Natchez, MS.

(a) *Location.* The following area is a safety zone: All navigable waters of the Lower Mississippi River from Mile Marker (MM) 364.5 through MM 365.5.

(b) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the Captain of the Port Sector Lower Mississippi River (COTP) or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative via VHF–FM channel 16 or by telephone at 901–521–4822. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced 4 p.m. through 7 p.m. on December 31, 2020. Periods of activation will be promulgated by Broadcast Notice to Mariners.

Dated: December 2, 2020.

R.S. Rhodes,

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

[FR Doc. 2020–26866 Filed 12–10–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR parts 600, 602, 668, 673, 674, 682, and 685

Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Updated waivers and modifications of statutory and regulatory provisions.

SUMMARY: The Secretary is issuing updated waivers and modifications of statutory and regulatory provisions governing the Federal student financial aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act). The HEROES Act requires the Secretary to publish, in a document in the **Federal Register**, the waivers or modifications of statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA), to assist individuals who are performing qualifying military service, and individuals who are affected by a disaster, war, or other military operation or national emergency, as described in the **SUPPLEMENTARY INFORMATION** section of this document. On March 13, 2020, President Trump declared a national emergency based on the COVID–19 outbreak. (Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, available at *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/*).

DATES: Effective December 11, 2020. The waivers and modifications in this document expire as noted within each of the provisions below, unless extended by the Secretary in a document published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Barbara Hoblitzell, by telephone: (202) 453–7583 or by email: *Barbara.Hoblitzell@ed.gov,* or Gregory Martin, by telephone: (202) 453–7535 or by email: *Gregory.Martin@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

The Secretary is issuing these waivers and modifications under the authority of the HEROES Act, as codified at 20 U.S.C. 1098bb(a)(2), which authorizes the Secretary to waive or modify any statutory or regulatory provision applicable to the Federal student financial assistance programs under title IV of the HEA, 20 U.S.C. 1070 *et seq.,* as the Secretary deems necessary in connection with a war or other military operation or national emergency to affected individuals who are recipients of Federal student financial assistance under title IV of the HEA, institutions of higher education (IHEs), eligible lenders, guaranty agencies, and other entities participating in the Federal student assistance programs under title IV of the HEA that are located in areas that are declared disaster areas by any Federal, State, or local official in connection with a national emergency, or whose operations are significantly affected by such a disaster. These entities may be granted temporary relief from requirements that are rendered infeasible or unreasonable by a national emergency, including due diligence requirements and reporting deadlines.

In 20 U.S.C. 1098bb(b)(1), the HEROES Act further provides that section 437 of the General Education Provisions Act (20 U.S.C. 1232) and section 553 of the Administrative Procedure Act (5 U.S.C. 553) do not apply to the contents of this document.

The terms ''institution of higher education'' and ''institution of higher education for purposes of title IV programs'' (IHE) used in this document are defined in sections 101 and 102 of the HEA.

In 20 U.S.C. 1098ee, the HEROES Act provides definitions critical to determining whether a person is an ''affected individual'' under the Act and, if so, which waivers and modifications apply to the affected individual. However, because these definitions do not include the specific circumstances under which these waivers and modifications are provided under the HEROES Act, we provide these definitions below.

For purposes of this document, ''affected individual'' means a student enrolled in a postsecondary institution. An ''affected borrower'' is one whose Federal student loans provided under title IV are in repayment. These definitions are in keeping with 20 U.S.C. 1098bb(a)(2) that establishes that statutory and regulatory provisions can be waived or modified ''as necessary to ensure that recipients of student financial assistance under title IV of the [HEA□ who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals''. The statute also provides that administrative requirements placed on affected individuals who are recipients of student financial assistance are minimized, to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such students and avoid inadvertent, technical violations, or defaults.

In accordance with the HEROES Act, the Secretary is providing the following waivers and modifications of statutory and regulatory provisions applicable to the student assistance general provisions and student financial assistance programs under title IV of the HEA that the Secretary believes are necessary to ensure that, during and in response to the COVID–19 pandemic—

- Accrediting agencies and associations are permitted to conduct virtual site visits of institutions or programs currently under review, scheduled for initial or renewal of accreditation, or in a show-cause or probationary status;
- IHEs may ensure continuity of instruction and learning by employing distance education to protect the health of their students, faculty, and staff;
- IHEs that are undergoing a change of ownership are provided additional time to gather the records, data, financial information, and approvals necessary to support their change of ownership application, and their temporary program participation agreements are extended while the application is pending;
- Foreign graduate medical schools that participate in the Federal Direct Loan Program are not required to obtain and report test results from the Medical College Admission Test (MCAT) from applicants during admission years in which the COVID–19 national emergency is in effect;
- Entities not submitting single audits in accordance with the audit requirements of 2 CFR 200, subpart F, are provided an additional six months to submit their annual compliance and financial statement audits;
- IHEs that resume offering educational programs after temporarily closing or suspending their educational programs due to COVID–19 are not considered to have ended their participation in the title IV, HEA programs;
- IHEs that offer existing short-term programs that qualify for Federal Direct Loans, or began offering a short-term program prior to the COVID emergency, are given some flexibility for programs affected by COVID–19;
- IHEs are provided additional flexibility to approve leaves of absence for students whose coursework is suspended due to the COVID–19 pandemic;
- IHEs are provided additional time to comply with deadlines for campus security, fire safety, and equity in athletics disclosures;
- IHEs are permitted to waive the requirement for a parental signature in the event that it cannot be obtained, or accept a document signed and photographed and sent by email or text message attachment, on any verification documentation required to validate a student's title IV eligibility;
- IHEs that participate in the Federal student financial aid programs under the heightened cash monitoring one (HCM1) status are provided flexibility to pay student credit balances after drawing down title IV funds;
- IHEs are provided alternative methods for disbursing title IV, HEA credit balance funds to students;
- IHEs that were experiencing challenges accessing data and preparing their cohort default rate (CDR) appeals during the national emergency were permitted to submit appeals to the draft fiscal year (FY) 2017 CDRs on or before June 30, 2020;
- IHEs are provided additional time to complete and submit their Fiscal Operations Report and Application to Participate (FISAP);
- IHEs that participate in the Federal Work-Study (FWS) programs are not subject to the FWS community service requirements during the national emergency;
- Perkins Loan and HEAL borrowers whose loans are held by the Department of Education (Department) are afforded the same benefits extended to Direct Loan borrowers in the Coronavirus Aid, Relief, and Economic Security (CARES) Act; [1]
- Borrowers with loans under the Federal Family Education Loan (FFEL), Federal Perkins Loan, HEAL, and Direct Loan programs that are held by the Department, did not accrue interest on those loans from March 13, 2020 to March 27, 2020. Borrowers were also permitted to suspend payment on their loans without any penalties during this period. The automatic suspension of payment and the application of a zero percent interest rate on loans held by the Department was extended to October 1, 2020, under the CARES Act. Those benefits were further extended through December 31, 2020, by the President through the Presidential Memorandum issued on August 8, 2020; [2]
- Borrowers who, prior to July 1, 2020, submitted an application for borrower defense to repayment (BD) relief that included a FFEL or Perkins loan and who would need to consolidate those loans into a Direct Consolidation Loan (DCL) to receive BD relief will have their eligibility for relief be adjudicated under the standards for Direct Loans disbursed between July 1, 2017, and July 1, 2020.
- Borrowers participating in income-driven repayment plans are not required to recertify their income or family size until after the administrative forbearance period extended by the August 8, 2020, Presidential Memorandum expires, and will be notified of a new certification deadline thereafter;
- Borrowers participating in income-contingent repayment plans who do not make payments during the COVID–19 emergency will generally not have any interest capitalized upon the conclusion of the COVID–19-related administrative forbearance period; and
- IHEs are provided academic calendar flexibility to address scheduling complications that have

[1] *https://www.congress.gov/bill/116th-congress/house-bill/748/text.*

[2] *https://www.whitehouse.gov/presidential-actions/memorandum-continued-student-loan-payment-relief-covid-19-pandemic/.*

arisen as a result of the COVID–19 national emergency.

Prior waivers granted by the Secretary under this Act remain in effect for affected individuals, as defined in those waivers.

Statutory Waiver Granted Under the Heroes Act in Response to the Covid–19 Pandemic

Recognition of Accrediting Agency or Association (HEA § 496, 20 U.S.C. 1099b)

HEA § 496(c)(1) (20 U.S.C. 1099b(c)(1)) provides that a recognized accrediting agency or association must perform, at regularly established intervals, on-site inspections and reviews of IHEs (which may include unannounced site visits) with particular focus on educational quality and program effectiveness, and ensures that accreditation team members are well-trained and knowledgeable with respect to their responsibilities, including those regarding distance education.

HEA § 496(c)(1) (20 U.S.C. 1099b(c)(5)) provides that an accrediting agency or association must agree to conduct, as soon as practicable, but within a period of not more than six months of the establishment of a new branch campus or a change of ownership of an IHE, an on-site visit of that branch campus or of the institution after a change of ownership.

The Secretary is waiving these requirements, for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, to provide accrediting agencies and associations the flexibility to develop, adopt, modify, and implement temporary virtual site visit policies. Virtual site visits should rely on an engaged, interactive format (*e.g.,* telephonic meetings, video conference calls), rather than solely relying upon document reviews or exchanges of emails.

However, if a site visit within six months after a change of ownership is conducted virtually, a follow up in-person visit must be conducted within 90 days following the date on which the COVID–19 national emergency declaration is rescinded.

Regulatory Waivers Granted Under the Heroes Act in Response to the Covid–19 Pandemic Distance Education (34 CFR 600.9, 602.16, 602.18, 602.19, and 602.27)

Section 600.9(c) requires IHEs to obtain State authorization to provide postsecondary educational programs through distance education. The Secretary is waiving this requirement for payment periods that overlap March 5, 2020, or begin after March 5, 2020, through the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded.

This waiver applies only to the Department's requirements; IHEs will need to determine whether the distance education being provided meets the applicable State requirements.

The Secretary is providing this waiver so that IHEs may provide programs using distance education to accommodate students without requiring such institutions to obtain Department approval to provide the program through distance education. If an IHE chooses to continue offering a program or use distance education in a manner requiring the Department's approval after the waiver period ends, it must obtain approval under the Department's normal process.

Section 602.16 provides that an accrediting agency or association that has within its scope of recognition the evaluation of the quality of institutions or programs offering distance education, correspondence courses, or direct assessment education, must have standards that effectively address the quality of an institution's distance education, correspondence courses, or direct assessment education. The Secretary is waiving, for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, this requirement so that accreditors may waive their distance education review requirements for institutions working to accommodate students whose enrollment is otherwise interrupted as a result of COVID–19. This waiver is limited to distance learning opportunities developed specifically for the purpose of serving students who were already in attendance, and whose attendance was interrupted by COVID–19.

Section 602.16(a)(2)(ii) limits to five years the duration of preaccreditation status that can be granted by an accrediting agency before a final determination can be made. The Secretary is waiving, for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, this requirement to enable accrediting agencies sufficient opportunity to complete their assessment of a preaccredited institution for a final accreditation determination.

Section 602.19(a) requires accrediting agencies to reevaluate, at regularly established intervals, the institutions or programs it has accredited or preaccredited. The Secretary is waiving this requirement, for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, to provide accrediting agencies the flexibility to develop, adopt, modify, and implement temporary virtual site visit policies. With the approval of the accrediting agency's board, or other decision-making body, during a telephonic or video conference meeting, accrediting agencies may adopt or modify temporary virtual site visit policies without a public comment period. Because these policies would be temporary and arise from the unique set of circumstances and challenges presented by the COVID–19 pandemic, this approval would not require a vote of the full membership of the accrediting agency. Should an accrediting agency desire to make a temporary virtual site visit policy or policy modification permanent after the COVID–19 national emergency declaration is rescinded, it must adhere to applicable statutory and regulatory requirements.

The Secretary is also waiving the requirements under § 602.21(c), for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, to enable accrediting agencies to expedite the development of temporary standards to approve distance learning programs or courses, including agencies that did not previously have distance learning in their scope and for institutions that did not previously offer distance learning opportunities. However, in accrediting clock-hour programs for which licensure boards approved the use of distance learning to meet the ''clock-hour of instruction'' requirements, agencies must continue to meet the requirements under § 602.21(c).

On September 2, 2020, the Secretary amended the Department's regulations to permanently permit the use of synchronous and asynchronous distance learning in the delivery of clock-hour programs by distance learning if the relevant licensure body will accept distance learning hours to meet licensure requirements. Institutions are permitted to implement this new regulation immediately; otherwise, the new regulation goes into effect on July 1, 2021.

The Secretary is also waiving the requirement in § 602.27(a)(4) that an

accrediting agency must expand its scope of recognition by notifying the Secretary prior to accrediting programs and institutions that provide education through distance learning. During the COVID–19 national emergency, an accrediting agency need not expand its scope of recognition to include distance learning in order to approve its member programs or institutions to offer distance learning.

Notice and Application Procedures for Establishing, Reestablishing, Maintaining, or Expanding Institutional Eligibility and Certification (34 CFR 600.20)

Section 600.20(h)(3)(iii) provides that the Secretary will extend an institution's provisional Program Participation Agreement (PPA) on a month-to-month basis after the expiration date if, prior to that expiration date, the institution provides the Secretary with approval of the change of ownership from the institution's accrediting agency.

In keeping with the waivers provided in § 600.31, the Secretary is waiving, through the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded, the requirement to provide approval of the change of ownership from the institution's accrediting agency within the time period set forth in 600.20(h)(3)(iii).

Institutional Eligibility—Change of Ownership (34 CFR 600.31)

The Secretary is waiving § 600.31(a)(2) and providing an additional six months for IHEs to provide the approvals from the institution's accrediting agency and State, and the same-day balance sheet or statement of financial position prepared under required financial standards pursuant to § 600.20(h)(3), that is ordinarily due by the end of the month following the change of ownership. The Secretary will accept unaudited financial statements for the IHE's and new owner's most recently completed fiscal year within the time frame established under § 600.20(g)(1), provided that the submission includes the engagement letters for the audited financial statements under § 600.20(g)(2) to be completed for submission to the Department the earlier of six months after the change in ownership or 30 days after the date of the auditor's report with the financial statements. This waiver is in effect for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded.

Medical College Admissions Test (MCAT) (34 CFR 600.55)

Section 600.55(c) requires a foreign graduate medical school having a post-baccalaureate or equivalent medical program that participates in the Federal Direct Loan program to require students accepted for admission who are U.S. citizens, nationals, or permanent residents to have taken the MCAT and to have reported their scores to the foreign graduate medical school.

The Secretary is waiving, for the duration of admissions years in which the COVID–19 national emergency declaration is in effect, the requirement that to participate in the Federal Direct Loan program, a foreign medical school must require students to take the MCAT.

Application of Standards in Reaching an Accrediting Decision (34 CFR 602.17)

As a result of travel restrictions, State-mandated campus closures, and administrative decisions to move instruction to distance learning, accrediting agencies may need to perform required site visits virtually. Therefore, beginning on March 13, 2020, for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, the Secretary is waiving the provisions of § 602.17(c) that require accrediting agencies to conduct at least one on-site review of the institution or program during which it obtains sufficient information to determine if the institution or program complies with the agency's standards. Accrediting agencies may conduct required site visits for monitoring performance virtually at regularly scheduled intervals or renewal of accreditation.

The Secretary continues to require that in the case such a site visit is associated with making an award of accreditation or preaccreditation, the agency must perform a limited in-person site visit as soon as practicable. This limited in-person site visit need not replicate the virtual visit, or elements thereof, and need not include the full team that participated in the virtual site visit, but could be conducted through a limited visit performed by agency staff or a single site visitor.

Virtual site visits should rely on an engaged, interactive format (*e.g.,* telephonic meetings, video conference calls), rather than solely relying upon document reviews or exchanges of emails.

Substantive Changes and Other Reporting Requirements (34 CFR 602.22)

Section 602.22(d) requires accrediting agencies to have an effective mechanism for conducting, at reasonable intervals, visits to a representative sample of additional locations they have approved.

Section 602.22(f)(1) requires an accrediting agency to conduct a site visit, within six months, to each additional location an institution establishes (when the total number of additional locations, where at least 50 percent of an educational program is offered, is three or fewer and the locations are not considered to be branch campuses).

Section 602.22(f)(2) requires an accrediting agency to have a mechanism for conducting, at reasonable intervals, visits to a representative sample of additional locations an institution establishes (when the total number of additional locations, where at least 50 percent of an educational program is offered, is more than three and the locations are not considered to be branch campuses).

The Secretary is waiving these requirements for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded and permitting accrediting agencies to conduct these visits virtually. Virtual site visits should rely on an engaged, interactive format (*e.g.,* telephonic meetings, video conference calls), rather than solely relying upon document reviews or exchanges of emails.

Additional Procedures Certain Institutional Agencies Must Have (34 CFR 602.24)

Section 602.24(b) provides that an accrediting agency must undertake a site visit to a new branch campus, or following a change of ownership or control, as soon as practicable, but no later than six months, after the establishment of that campus or the change of ownership or control.

The Secretary is waiving these requirements, for the duration of the national emergency declaration and 180 days following the date on which the COVID–19 national emergency declaration is rescinded, to permit accrediting agencies to conduct these visits virtually. Virtual site visits should rely on an engaged, interactive format (*e.g.,* telephonic meetings, video conference calls), rather than solely relying upon document reviews or exchanges of emails.

However, if a site visit within six months after a change of ownership is

conducted virtually, a follow up in-person visit must be conducted within 90 days following the date on which the COVID–19 national emergency declaration is rescinded.

Program Eligibility (34 CFR 668.8)

Short-Term Programs

Sections 668.8(d)(3) and (e) provide that proprietary IHEs and postsecondary vocational institutions that offer short-term programs must demonstrate in their annual compliance audits that students enrolled in the programs had completion and job placement rates of at least 70 percent before those programs qualify, or continue to qualify, as eligible programs for Federal Direct Loans (the ''70/70 qualifying requirements'').

The Secretary waives the 70/70 qualifying requirements for any award year in which the COVID–19 national emergency declaration was in place for at least one day during the award year. Institutions must continue to report completion and placement rates for short-term programs for such award years in compliance audits, but the programs will remain eligible even if they do not meet the 70/70 requirements. Short-term programs will once again be required to meet the 70/70 qualifying requirements for any future award year in which the COVID–19 national emergency declaration is not in effect.

New Distance Education Programs

Section 668.8(m) provides that an otherwise eligible program that is offered in whole or in part through telecommunications is eligible for title IV, HEA program purposes if the program is offered by an institution, other than a foreign institution, that has been evaluated and is accredited for its effective delivery of distance education programs by an accrediting agency or association that is recognized by the Secretary under subpart 2 of part H of the HEA, and has accreditation of distance education within the scope of its recognition.

In recognition that many postsecondary institutions needed to implement distance learning solutions to continue educating students in response to campus interruptions or the unexpected return of students from travel abroad experiences, the Secretary is waiving, through the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded, the requirement that these IHEs must have obtained accreditation to offer distance education programs.

Approved Leaves of Absence (34 CFR 668.22)

Under § 668.22(d), an IHE is not permitted to place students on a leave of absence during the suspension of coursework, including clinicals or internships/externships. However, if the coursework suspension results from a COVID–19 related circumstance, IHEs may grant an approved leave of absence to affected students. Approved leaves of absence granted due to COVID–19-related concerns or limitations are considered to fall under the exception provided in § 668.22(d)(3)(iii)(B) permitting, in the case of unforeseen circumstances, an IHE to grant such leave prior to the student's request. A written request for leave of absence for that period must subsequently be obtained from the student. These flexibilities apply to all leaves of absence granted through the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded.

Section 668.22(d)(1)(vi) provides that the maximum number of days in an approved leave of absence, when added to the number of days in all other approved leaves of absence, may not exceed 180 in any 12-month period. The Secretary modifies this requirement and extends the maximum number of days from 180 (in any 12-month period) to allow a leave of absence to be extended to December 31, 2020.

Treatment of Direct Loan Funds if a Student Does Not Begin Attendance (34 CFR 668.21(a)(2)(ii))

The Secretary is waiving the requirement in § 668.21(a)(2)(ii) that an institution notify the Direct Loan Servicer when a borrower who has received a credit balance payment composed of Federal Direct Loan funds will not or has not begun attendance, so that the servicer will issue a final demand letter. Under this waiver, in such circumstances, the institution should not notify the servicer. The amount of the Direct Loan credit balance will be the borrower's responsibility to repay under the terms of the promissory note. This waiver expires at the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded.

Annual Compliance and Financial Statement Audit Submission Deadlines (34 CFR 668.23)

For IHEs and other entities subject to the Single Audit Act and the implementing regulations at 2 CFR Subpart F that submit an audit under the Single Audit Act, the Department will consider the audit submission of the IHE or other entity timely if it is submitted to the Department through eZ-Audit or as directed by the Department at the same time it is timely submitted to the Federal Audit Clearing House under Office of Management and Budget guidance M 20–26 for COVID–19 audit submissions and any future extensions provided by the Office of Management and Budget.

IHEs and other entities that do not submit audits under the Single Audit Act are required under § 668.23 to submit their annual compliance audit and financial statements no later than six months after the last day of their fiscal year. For any such audits that are due to be submitted to the Department no later than March 1, 2020, through December 31, 2020, or other periods specified by the Secretary, the Secretary is extending the submission deadline up to an additional six months t and other entities to provide more time for the IHE auditors to complete those audits. For IHEs and other entities choosing to submit their audits after the normal due date, the Department will consider the audits to be submitted timely if they are submitted to eZ-audit or as directed by the Department no later than 30 calendar days after the date of the audit report. If date of the audit report is prior to the date of this notice, IHEs and other entities have 30 calendar days from the date of this notice to submit their required audits.

End of an Institution's Participation in the Title IV, HEA Programs (34 CFR 668.26(a)(1) and (2))

Section 668.26 provides that an IHE's participation in a title IV, HEA program ends on the date that the IHE closes or stops providing educational programs for a reason other than a normal vacation period or a natural disaster that directly affects the IHE or the IHE's students, or on the date it loses its institutional eligibility under part 600. The Secretary is waiving this requirement in recognition that some IHEs are unable to convert their programs to an alternative instructional modality during the COVID–19 pandemic. IHEs that have interrupted their on-campus instruction without converting to an alternative instructional modality, either on-ground

or online, must resume instruction by the start of the institution's scheduled payment period, as published in the institution's academic calendar, one payment period after the payment period in which the COVID–19 national emergency is lifted to continue their participation in the title IV, HEA programs.

The Department retains the discretion to determine that an institution has closed based on its assessment of the institution's capacity to reopen at the end of the COVID–19 national emergency.

Campus Security, Fire Safety, and Equity in Athletics Disclosures (34 CFR 668.41)

The Secretary extends the October 1 deadline in § 668.41(e)(1) for IHEs to distribute their Annual Security Reports and Annual Fire Safety Reports (required under § 668.46(b) and § 668.49(b), respectively) to required recipients to December 31, 2020. Likewise, the October 15 deadline established in § 668.41(g)(1) for IHEs to distribute their annual Equity in Athletics Disclosure Act (EADA) disclosures (required under § 668.47(c)) to required recipients is extended to December 31, 2020.

Acceptable Documentation (34 CFR 668.57(b), (c), and (d))

Sections 668.57(b) and (c) require a statement signed by both the applicant and one of the applicant's parents if the applicant is a dependent student, or only the applicant if the applicant is an independent student, to verify the number of family members in the household and the number of family members enrolled in IHEs. Pursuant to § 668.57(d), an applicant may also be required to verify other information specified in the annual **Federal Register** document that announces the Free Application for Federal Student Aid (FAFSA) information as well as the acceptable documentation for verifying that FAFSA information. IHEs are permitted to waive the requirement for a parental signature in the event that it cannot be obtained, or accept a document signed and photographed and sent by email or text message attachment, on any verification documentation required to validate a student's title IV eligibility;. This waiver expires at the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded.

Cash Management Regulations (34 CFR 668.161 and 162)

Payment Methods

Under § 668.161(a)(2)(iv), an IHE may disburse title IV, HEA program funds by electronic funds transfer (EFT) if the EFT is an automated clearing house transaction, meaning that the EFT must be a direct deposit transaction. The Secretary waives the requirement that the EFT be a direct deposit transaction to allow IHEs and third-party servicers to use any type of EFT under the Treasury Department regulations in 31 CFR 208.2, including person-to-person payment methods such as Zelle and PayPal, or to enable an IHE to use a student's debit card number to transfer a title IV credit balance to the student's checking account using an original credit transaction. This waiver expires at the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded.

An IHE or third-party servicer must ensure that any payment method used complies with the disbursement requirements in the Cash Management regulations, and that the institution notifies its auditor of the alternative method used as part of its annual compliance audit for any fiscal year that alternative is used. We note that regardless of whether any audit deficiencies are identified, the IHE or servicer must disclose in the compliance audit the alternative method used and how it was used to make title IV disbursements.

Credit Balances

For IHEs that are on HCM1 under § 668.162(d)(1), the Secretary is temporarily modifying the cash management requirements to permit those institutions to submit a request for funds without first paying the credit balances due to the students for whom those funds were requested. For requests submitted between March 2020 and the end of the payment period that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded, IHEs must pay the credit balances no later than three calendar days after receiving the funds for those students.

Cohort Default Rate (CDR) Appeals (34 CFR 668.204)

Section 668.204(b) provides that an IHE may challenge the accuracy of the data included on the loan record detail report by sending a challenge to the relevant data manager, or data managers, within 45 days after receiving the data.

On February 24, 2020, the Department posted an Electronic Announcement that draft CDRs for FY 2017 had been distributed to institutions and that included information about the process for appealing those draft rates.

In recognition that IHEs have encountered many difficulties and interruptions in day-to-day operations during the COVID–19 pandemic, the Secretary extended to June 30, 2020, the deadline for IHEs to appeal the draft CDRs that were distributed on or about February 24, 2020.

Deadline for Submission of Fiscal Operations Report and Application To Participate (34 CFR 673.7)

The Secretary extended until November 1, 2020, the October 1, 2020, deadline established in the **Federal Register** on January 3, 2020 (85 FR 303) for submission of the 2020–2021 Fiscal Operations Report and Application to Participate (FISAP).

Federal Work–Study (34 CFR 673.7)

The Secretary is waiving the Federal Work-Study (FWS) community service requirements in § 675.18(g) for all FWS-participating schools for at least the 2019–20 and 2020–21 award years. Schools do not need to apply for the waiver for either award year. The Department will administratively grant waivers to all schools. This waiver expires at the end of the award year that begins after the date on which the Federally-declared national emergency related to COVID–19 is rescinded.

Perkins Loans (34 CFR 674.2(b))

Under sections 428F(b) and 464(h)(2) of the HEA and under the definition of ''satisfactory repayment arrangement'', a defaulted Perkins Loan borrower may make six consecutive, on-time, voluntary, full, monthly payments to reestablish eligibility for title IV Federal student financial assistance. To assist Perkins Loan borrowers who are affected by the COVID–19 pandemic, the Secretary is waiving, through December 31, 2020, the statutory and regulatory provisions that require the borrower to make consecutive payments to reestablish eligibility. Loan holders are encouraged not to treat any payment missed during the time that a borrower is an affected individual in this category as an interruption in the six consecutive, on-time, voluntary, full, monthly payments required for reestablishing title IV eligibility. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment during this period, the loan holder must treat the payment as an eligible payment

in the required series of payments even if the borrower did not make additional payments during this period. At the conclusion of this waiver period, the required sequence of qualifying payments may resume at the point they were discontinued because of the borrower's status as an affected individual. The Secretary will apply the waivers described in this paragraph to loans held by the Department.

Loan Rehabilitation (34 CFR 674.39)

Federal Perkins Loan borrowers must make nine consecutive, on-time monthly payments to rehabilitate a defaulted Federal Perkins Loan in accordance with § 464(h)(1)(A) of the HEA and § 674.39. To assist title IV borrowers who are affected by the COVID–19 pandemic, the Secretary is waiving, through December 31, 2020, the statutory and regulatory loan rehabilitation requirements that eligible payments must be made over no more than 10 consecutive months, as follows. Loan holders other than the Department are encouraged to treat any payment missed during the time that a borrower is an affected individual in this category as a payment that counts toward a rehabilitation agreement. If there is an arrangement or agreement in place between the borrower and loan holder and the borrower makes a payment or payments during this period, the loan holder must treat the payment as an eligible payment in the required series of payments. When the borrower is no longer an affected individual in this category, the required sequence of qualifying payments may resume at the point they were discontinued because of the borrower's status as an affected individual to successfully rehabilitate a Perkins Loan. The Department will apply the waivers described in this paragraph to loans held by the Department.

Repayment of a Loan (34 CFR 682.209)

Section 682.209 provides that interest accrues on an FFEL loan during the interval between scheduled payments. On March 13, 2020, the President announced [3] that the interest on all FFEL loans held by the Department and on all Direct Loans would be waived amid the coronavirus outbreak. On March 20, 2020, the Secretary announced [4] that interest rates for such loans would be set to zero percent (0%) for a period of at least 60 days, during which time borrowers would have the option to suspend their monthly loan payments. On March 27th, 2020, the CARES Act was signed into law and provided that interest would not be charged on Perkins, HEAL, FFEL, or Direct Loans held by the Department through September 30, 2020. Following the President's Memorandum of August 8, 2020, the Secretary is further extending until December 31, 2020, in accordance with the prior announcement, the waivers of the regulatory provisions in §§ 682.202 and 682.209 that require that interest be charged on FFEL loans held by the Department from March 13, 2020, through March 27, 2020, and from October 1, 2020 through December 31, 2020. The affected loans include FFEL Program Loans that the Department acquired pursuant to the Ensuring Continued Access to Student Loans Act of 2008 (ECASLA), through the assignment of defaulted loans under § 682.409, and rehabilitated loans for which a guaranty agency could not secure a purchaser and assigned to the Department under § 682.405(a)(2)(ii). This does not apply to defaulted FFEL Program Loans for which a guaranty agency has paid a claim to the FFEL Program lender and on which the guaranty agency is pursuing the borrower for collection. However, the guaranty agencies may voluntarily provide interest or payment waivers, for the duration of the COVID–19 national emergency, to borrowers of loans on which collection activity continues.

Obligation To Repay (34 CFR 685.207)

Section 685.207 provides that a borrower is required to pay any interest not subsidized by the Secretary unless the borrower is relieved of the obligation to repay. On March 13, 2020, the President announced that the interest on all student loans held by the Department would be waived amid the coronavirus outbreak. On March 20, 2020, the Secretary announced that interest rates for such loans would be set to zero percent for a period of at least 60 days, during which time borrowers would have the option to suspend their monthly loan payments. On March 27th, 2020, the CARES Act was signed into law and extended this same benefit through September 30, 2020. The period of this benefit was further extended to December 31, 2020 by the President's Memorandum of August 8, 2020. Accordingly, Direct Loans are automatically placed in an administrative forbearance status that is currently scheduled to be in effect from March 13, 2020, through December 31, 2020.

Borrower Defense to Repayment (34 CFR 685.206 & 685.222)

When the Department expanded the utilization of the Borrower Defense to Repayment (BD) provision to provide potential loan forgiveness to borrowers who had enrolled in certain programs, during certain periods of time, it offered to review BD applications submitted by students who had FFEL or Perkins loans, and other loans that were not Direct Loans (non-Direct Loans), and notify the borrower of their eligibility for full or partial loan relief in the event that such students elected to consolidate those loans into a Direct Consolidation Loan. If the Department determined that the borrower had successfully established a defense to repayment, the borrower could apply for a Direct Consolidation Loan to receive the discharge. On July 1, 2020, new regulations regarding BD went into effect. In the months prior to July 1, 2020, BD applicants were not specifically notified that they would need to take action to consolidate the non-Direct loans included in their borrower defense applications into a Direct Consolidation Loan prior to July 1, 2020, to ensure that the Direct Consolidation Loan would be adjudicated under the 2016 BD regulations, which includes the standards under which the Department would make the determination of eligibility for BD relief on FFEL or Perkins loans, or other non-Direct Loans, in the event that the borrower chose to consolidate his or her eligible loans into a Direct Consolidation Loan. Applications for relief on Direct Consolidation Loans that include FFEL or Perkins loans originally included in BD applications received by the Department prior to July 1, 2020, will therefore be adjudicated under the standards for Direct Loans, including Direct Consolidation loans, disbursed between July 1, 2017, and July 1, 2020.

Recertification of Income-Driven Repayment Plans (34 CFR 685.209 & 685.221)

Sections 685.209 and 685.221 provide that a borrower participating in an income-driven repayment plan is required to provide documentation, acceptable to the Secretary, that enables the annual calculation of the borrower's payment amount for each year that the borrower remains on the plan. The Secretary is waiving §§ 685.209(a)(5)(i) and 685.221(e)(1) for one calendar year from the date on which a borrower would have been required to provide

[3] /*www.whitehouse.gov/presidential-actions/memorandum-continued-student-loan-payment-relief-covid-19-pandemic/*.

[4] *www.ed.gov/news/press-releases/delivering-president-trumps-promise-secretary-devos-suspends-federal-student-loan-payments-waives-interest-during-national-emergency*.

recertification documentation in 2020. Borrowers will be notified by their loan servicer of their new recertification date, in advance of the deadline on which such documentation is required.

Capitalization of Interest Under the Income-Contingent Repayment Plan (34 CFR 685.209)

Section 685.209(a)(2)(iv)(A) provides that interest is capitalized on a borrower's loans that are being repaid under the income-contingent repayment plan when a borrower is determined to no longer have a partial financial hardship or at the time a borrower chooses to leave the Pay As You Earn repayment plan. As noted above, all Direct Loans in repayment or default have been placed in an administrative forbearance status and interest has been suspended. If the borrower's loan payments were current before the administrative forbearance period began, interest accrued prior to March 13, 2020, will not capitalize at the end of the coronavirus-related administrative forbearance period.

However, if the borrower's loans were in the type of deferment or forbearance in which interest would normally capitalize before the coronavirus-related administrative forbearance period began, interest accrued prior to March 13, 2020, will capitalize when the borrower's original deferment or forbearance ends, or on January 1, 2021, whichever is later.

For borrowers whose loans were in a grace period before the coronavirus-related administrative forbearance period began, any outstanding or unpaid interest on a borrower's account will capitalize as it usually does when the loan(s) enter repayment.

This waiver expires on December 31, 2020.

Academic Calendar Flexibility (34 CFR 690.63)

Section 690.63(a)(3) requires, as a condition of calculating Pell grant eligibility under Formula 1,[5] that students not be allowed ''to be enrolled simultaneously in overlapping terms . . .''. The Secretary is waiving this requirement for academic years that include the latter of December 31, 2020, or the last date of the COVID–19 national emergency. All standard terms will be permitted to overlap with an adjacent term without the program being considered non-term. Additionally, a standard semester or trimester may consist of as few as 13 weeks of instructional time and a standard quarter as few as nine weeks of instructional time without the program being considered a non-standard term program.

The Secretary is waiving the provisions of § 690.63(a)(1)(ii)(B)(3) and permitting IHEs to treat as standard term any academic calendar comprised of semesters, trimesters, or quarters that overlap. For all academic years that include the later of December 31, 2020, or the end date for the COVID–19 Federally declared emergency, the existence of overlapping standard terms will not result in a program being considered non-term.

Section 3513 of the CARES Act

Section 3513 of the CARES Act directs the Secretary to: (1) Suspend all payments due, (2) cease interest accrual, and (3) suspend involuntary collections for loans made under part D and part B (that are held by the Department) of title IV of the HEA through September 30, 2020. The section also directs the Secretary to deem each month for which a loan payment was suspended as if the borrower of the loan had made a payment for the purpose of any loan forgiveness program or loan rehabilitation program authorized under part D or B for which the borrower would have otherwise qualified. Lastly, this section directs the Secretary to ensure that, for the purpose of reporting information about the loan to a consumer reporting agency, any payment that has been suspended is treated as if it were a regularly scheduled payment made by a borrower.

On August 8, 2020, the President issued a memorandum directing the Secretary to continue to waive interest and payments on such loans until December 31, 2020. Therefore, in accordance with the prior announcement, the Secretary is using her authority under the HEROES Act to modify the terms of the benefits provided under section 3513 of the CARES Act such that they will continue to be provided to borrowers until December 31, 2020.

Accessible Format: On request to Mr. Jean-Didier Gaina, by telephone: (202) 502–7526 or by email: *Jean-Didier.Gaina@ed.gov,* individuals with disabilities can obtain this document in an accessible format (such as braille, large print, audiotape, or compact disc), to the extent reasonably practicable.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Family Education Loan Program; 84.032 Federal PLUS Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; and 84.268 William D. Ford Federal Direct Loan Program.)

Program Authority: 20 U.S.C. 1071, 1082, 1087a, 1087aa, Part F–1.

Robert King,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2020–27042 Filed 12–10–20; 8:45 am]

BILLING CODE 4000–01–P

[5] *https://ifap.ed.gov/sites/default/files/attachments/2019-09/1920FSAHbkVol3Master.pdf.*

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2003–0118; FRL–10016–19–OAR]

RIN 2060–AG12

Protection of Stratospheric Ozone: Determination 36 for Significant New Alternatives Policy Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Determination of acceptability.

SUMMARY: This determination of acceptability expands the list of acceptable substitutes pursuant to the U.S. Environmental Protection Agency's (EPA) Significant New Alternatives Policy (SNAP) program. This action lists as acceptable additional substitutes for use in the refrigeration and air conditioning, foam blowing, and fire suppression sectors.

DATES: This determination is applicable on December 11, 2020.

ADDRESSES: The EPA established a docket for this action under Docket ID No. EPA–HQ–OAR–2003–0118 (continuation of Air Docket A–91–42). All electronic documents in the docket

are listed in the index at *www.regulations.gov.* Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the EPA Air Docket (Nos. A–91–42 and EPA–HQ–OAR–2003–0118), EPA Docket Center (EPA/DC), William J. Clinton West, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20460. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to public visitors, 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.

FOR FURTHER INFORMATION CONTACT: Chenise Farquharson by telephone at (202) 564–7768, by email at *Farquharson.chenise@epa.gov,* or by mail at U.S. Environmental Protection Agency, Mail Code 6205T, 1200 Pennsylvania Avenue NW, Washington, DC 20460. Overnight or courier deliveries should be sent to the office location at 1201 Constitution Avenue NW, Washington, DC 20004.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Listing of New Acceptable Substitutes

This action is listing as acceptable additional substitutes for use in the refrigeration and air conditioning, foam blowing, and fire suppression sectors. This action presents EPA's most recent decision to list as acceptable several substitutes in different SNAP end-uses. New substitutes are:

- Hydrochlorofluoroolefin (HCFO)-1233zd(E) in industrial process refrigeration (new and retrofit equipment);
- R–515B in centrifugal and positive displacement chillers and industrial process air conditioning (new equipment);
- Blends of 10 to 99 percent by weight hydrofluoroolefin (HFO)-1336mzz(Z) and the remainder hydrofluorocarbon (HFC)-152a in polystyrene: Extruded boardstock and billet;
- HFO–1336mzz(E) in a number of foam blowing end-uses;
- Methylal in rigid polyurethane (PU) spray foam (high-pressure two-component, low-pressure two-component, and one-component foam sealants); and
- HCFO–1233zd(E)/C6-perfluoroketone blend in total flooding fire suppression (normally occupied and unoccupied spaces).

EPA's review of certain substitutes listed in this document is pending for other uses. Listing decisions in the end-uses and applications in this document do not prejudge EPA's listings of these substitutes for other end-uses. The substitutes being added through this action to the acceptable lists for specific end-uses have a similar or lower risk than other substitutes already listed as acceptable in those end-uses. However, certain substitutes may have a higher overall risk than certain other substitutes already listed as acceptable or acceptable subject to restrictions. In such cases, those already-listed alternatives have not yet proved feasible in those specific end-uses to date.

For additional information on SNAP, visit the SNAP portion of EPA's Ozone Layer Protection website at: *www.epa.gov/snap.* Copies of the full lists of acceptable substitutes for ozone-depleting substances (ODS) in all industrial sectors are available at *www.epa.gov/snap/substitutes-sector.* For more information on the Agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the initial SNAP rulemaking published March 18, 1994 (59 FR 13044), and the regulations codified at 40 CFR part 82, subpart G. SNAP decisions and the appropriate **Federal Register** citations are found at: *www.epa.gov/snap/snap-regulations.* Substitutes listed as unacceptable; acceptable, subject to narrowed use limits; or acceptable, subject to use conditions are also listed in the appendices to 40 CFR part 82, subpart G.

The sections below discuss each substitute listing in detail. Appendix A contains tables summarizing each listing decision in this action. The statements in the ''Further Information'' column in the tables provide additional information but these are not legally binding under section 612 of the Clean Air Act (CAA). Although you are not required to follow recommendations in the ''Further Information'' column of the table to use a substitute consistent with section 612 of the CAA, some of these statements may refer to obligations that are enforceable or binding under federal or state programs other than the SNAP program. The identification of other enforceable or binding requirements should not be construed as a comprehensive list of such obligations. In many instances, the information simply refers to standard operating practices in existing industry standards and/or building codes. When using these substitutes in the identified end-use, EPA strongly encourages you to apply the information in the ''Further Information'' column. Many of these recommendations, if adopted, would not require significant changes to existing operating practices.

You can find submissions to EPA for the substitutes listed in this document, as well as other materials supporting the decisions in this action, in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov.*

A. Refrigeration and Air Conditioning

1. HCFO–1233zd(E)

EPA's decision: EPA finds HCFO–1233zd(E) acceptable as a substitute for use in:

- Industrial Process Refrigeration (new and retrofit equipment)

HCFO–1233zd(E), marketed under the trade name Solstice™ N12 Refrigerant, is also known as *trans*-1-chloro-3,3,3-trifluoroprop-1-ene (Chemical Abstracts Service Registry Number [CAS Reg. No.] 102687–65–0).

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''Supporting Materials for Notice 36 Listing of HCFO–1233zd(E) in Refrigeration and Air Conditioning. SNAP Submission Received June 6, 2019.'' EPA performed an assessment to examine the health and environmental risks of this substitute. This assessment is available in Docket EPA–HQ–OAR–2003–0118: ''Risk Screen on Substitutes in Industrial Process Refrigeration. Substitute: HCFO–1233zd(E).''

EPA previously listed HCFO–1233zd(E) as acceptable for use in several refrigeration and air conditioning and foam blowing end-uses (August 10, 2012, 77 FR 47768; October 21, 2014, 79 FR 62863).

Environmental information: HCFO–1233zd(E) has an ozone depletion potential (ODP) of less than 0.0004 and a global warming potential (GWP) of

3.7.[1] HCFO–1233zd(E) is excluded from the definition of volatile organic compounds (VOC) under CAA regulations (see 40 CFR 51.100(s)) addressing the development of state implementation plans (SIPs) to attain and maintain the National Ambient Air Quality Standards (NAAQS). Knowingly venting or releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified at 40 CFR 82.154(a)(1).

Flammability information: HCFO–1233zd(E) is not flammable.

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. The substitute may also irritate the skin or eyes or cause frostbite. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

The American Industrial Hygiene Association (AIHA) has established a Workplace Environmental Exposure Limit (WEEL) of 800 ppm on an eight-hour time-weighted average (8-hr TWA) for HCFO–1233zd(E). EPA anticipates that users will be able to meet the WEEL and address potential health risks by following requirements and recommendations in the manufacturer's safety data sheet (SDS), American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: HCFO–1233zd(E) has an ODP of less than 0.0004, comparable to or less than other listed substitutes in this end-use with ODPs ranging from zero to 0.098.

For industrial process refrigeration, HCFO–1233zd(E)'s GWP of about 3.7 is comparable to or lower than that of other acceptable substitutes such as ammonia absorption for new equipment and carbon dioxide (CO_2), R–450A, R–513A and hydrofluorocarbon (HFC)-23 for new and retrofit equipment, with GWPs [2] ranging from zero to 14,800.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with the AIHA WEEL, ASHRAE 15, and other industry standards, recommendations in the manufacturer's SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds HCFO–1233zd(E) acceptable in the industrial process refrigeration (new and retrofit equipment) end-use because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-use.

2. R–515B

EPA's decision: EPA finds R–515B acceptable as a substitute for use in:

- Centrifugal chillers (new equipment)
- Positive displacement chillers (new equipment)
- Industrial process air conditioning (new equipment)

R–515B is a weighted blend of 91.1 percent HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and 8.9 percent HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0).

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in these end-uses in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''Supporting Materials for Notice 36 Listing of R–515B in Refrigeration and Air Conditioning. SNAP Submission Received September 6, 2019.'' EPA performed an assessment to examine the health and environmental risks of this substitute. This assessment is available in Docket EPA–HQ–OAR–2003–0118: ''Risk Screen on Substitutes in Centrifugal and Positive Displacement Chillers and Industrial Process Air Conditioning. Substitute: R–515B.''

Environmental information: R–515B has an ODP of zero. Its components, HFO–1234ze(E) and HFC–227ea, have a GWP of less than one [3] and 3,220, respectively. If these values are weighted by mass percentage, then R–515B has a GWP of about 287. The components of R–515B are excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified at 40 CFR 82.154(a)(1).

Flammability information: R–515B is not flammable.

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. The substitute may also irritate the skin or eyes or cause frostbite. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many refrigerants.

For the components of R–515B, the AIHA has established WEELs of 800 ppm and 1000 ppm as an 8-hr TWA for HFO–1234ze(E) and HFC–227ea, respectively. The manufacturer of R–515B recommends an acceptable exposure limit (AEL) for the blend of 810 ppm as an 8-hr TWA. EPA anticipates that users will be able to meet each of the WEELs, the manufacturer's AEL, and address potential health risks by following requirements and recommendations in the manufacturer's SDS, in ASHRAE Standard 15, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: R–515B has an ODP of zero, comparable to or less than other listed substitutes in these end-uses, with ODPs ranging from zero to 0.055.

For centrifugal and positive displacement chillers, R–515B's GWP of about 287 is comparable to or lower than that of other acceptable substitutes for new equipment, such as ammonia absorption, CO_2, HFO–1336mzz(Z), and R–513A, with GWPs ranging from zero to 630.

For industrial process air conditioning, R–515B's GWP of about 287 is comparable to or lower than that of other acceptable substitutes for new equipment, such as ammonia absorption, CO_2, HFO–1336mzz(Z), R–134a, and R–507A, with GWPs ranging from zero to 3,985.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-uses. Toxicity risks can be minimized by use consistent with the AIHA WEEL, manufacturer's AEL, ASHRAE 15, and other industry standards,

[1] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.* In this action, the 100-year GWP values are used.

[2] Unless otherwise stated, all GWPs in this document are 100-year values from: IPCC, 2007: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., Qin, D., Manning, M., Chen, Z., Marquis, M., Averyt, K.B., Tignor M., and Miller, H.L. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. This document is accessible at *www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.*

[3] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.*

recommendations in the manufacturer's SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds R–515B acceptable in the centrifugal chillers, positive displacement chillers, and industrial process air conditioning end-uses because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-uses.

B. Foam Blowing

1. Blends of 10 to 99 percent by weight HFO–1336mzz(Z) and the remainder HFC–152a

EPA's decision: EPA finds blends of 10 to 99 percent by weight HFO–1336mzz(Z) andthe remainder HFC–152a (''HFO–1336mzz(Z)/HFC–152a blends'') acceptable as a substitute for use as a blowing agent in:

- *Polystyrene:* Extruded boardstock and billet

These blends range in composition from 10 percent HFO–1336mzz(Z) and 90 percent HFC–152a to 99 percent HFO–1336mzz(Z) and 1 percent HFC–152a. Accordingly, these blends are also referred to as blends of 10 to 99 percent by weight HFO–1336mzz(Z) and the remainder HFC–152a in this action. HFO–1336mzz(Z) is an HFO and is also called (Z)-1,1,1,4,4,4-hexafluorobut-2-ene or *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (CAS Reg. No. 692–49–9); it also goes by the trade names of FEA–1100 or Formacel® 1100. HFC–152a is an HFC and is also called ethane, 1,1-difluoro (CAS Reg. No. 75–37–6).

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''SNAP Information Notice for Blends of 10 to 99 percent by Weight HFO–1336mzz(Z) and the Remainder HFC–152a as a Foam Blowing Agent. SNAP Submission Received October 10, 2019.'' EPA has performed an assessment to examine the health and environmental risks of this substitute. This assessment is available in docket EPA–HQ–OAR–2003–0118 under the name ''Risk Screen on Substitutes for Use in Extruded Polystyrene Boardstock and Billet Foam Substitute: HFO–1336mzz(Z) and HFC–152a Blends .''

Environmental information: These HFO–1336mzz(Z)/HFC–152a blends have an ODP of zero. Their components, HFO–1336mzz(Z) and HFC–152a, have GWPs of about two [4] and 124, respectively. If these values are weighted by mass percentage, then the blends range in GWP from about three to about 110. Both components of the blends are excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS.

Flammability information: The component HFC–152a is moderately flammable. HFO–1336mzz(Z) is not flammable at standard temperature and pressure using the standard test method ASTM E681. Certain of these HFO–1336mzz(Z)/HFC–152a blends are flammable, depending on the specific composition. For example, blends containing less than 91.5 percent HFO–1336mzz(Z) and more than 8.5 percent HFC–152a by weight are flammable.

Toxicity and exposure data: Potential health effects of this substitute include skin or eye irritation or frostbite. At sufficiently high concentrations, the substitute may cause irregular heartbeat. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many foam blowing agents. The EPA anticipates that these HFO–1336mzz(Z)/HFC–152a blends will be used consistent with the recommendations specified in the SDS.

The AIHA has established a WEEL of 1,000 ppm as an 8-hr TWA for HFC–152a, and the WEEL committee of the Occupational Alliance for Risk Science (OARS) has established a WEEL of 500 ppm for HFO–1336mzz(Z). EPA anticipates that users will be able to meet the AIHA and OARS WEELs and will address potential health risks by following requirements and recommendations in the manufacturer's SDSs and other safety precautions common to the foam blowing industry.

Comparison to other foam blowing agents: These HFO–1336mzz(Z)/HFC–152a blends have an ODP of zero, comparable to all other acceptable substitutes in this end-use, such as HFC–152a, HFO–1234ze(E), methyl formate, and CO_2. These HFO–1336mzz(Z)/HFC–152a blends' GWPs from about three to 110 is lower than or comparable to those of other acceptable substitutes in the same end-use for which we are finding it acceptable, such as HFC–152a, HFO–1234ze(E), light saturated hydrocarbons C3–C6 and methyl formate, with respective GWPs of 124, one, [5] less than one,[6] and 11.[7] Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with the AIHA's and OARS's WEELs, recommendations in the SDS, and other safety precautions common in the foam blowing industry.

EPA finds blends of 10 to 99 percent by weight HFO–1336mzz(Z) and the remainder HFC–152a acceptable in the polystyrene: extruded boardstock and billet end-use because they do not pose greater overall environmental and human health risk than other available substitutes in the same end-use.

2. HFO–1336mzz(E)

EPA's decision: EPA finds HFO–1336mzz(E) acceptable as a substitute for use in:

- Flexible Polyurethane (PU)
- Integral skin PU
- Rigid PU: Appliance
- Rigid PU: Commercial refrigeration
- Rigid PU and polyisocyanurate laminated boardstock
- Rigid PU: Sandwich panels
- Rigid PU: Slabstock and other
- Rigid PU: Spray—high-pressure two-component
- Rigid PU: Spray—low-pressure two-component
- Rigid PU: Spray—one-component foam sealants

HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). It is marketed under the trade names Opteon™ 1150 and Formacel™ 1150.

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in these end-uses in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''Supporting Documentation for Notice 36 Listing of HFO–1336mzz(E) in Foam Blowing. SNAP Submission Received December 5, 2018.'' EPA performed assessments to examine the health and environmental risks of this substitute. These assessments are available in Docket EPA–HQ–OAR–2003–0118 under the following names:

- ''Foam Blowing Sector—Risk Screen on Substitutes in Rigid Polyurethane

[4] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.*

[5] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.*

[6] Ibid.

[7] Ibid.

Appliance; Rigid Polyurethane Commercial Refrigeration; Rigid Polyurethane Sandwich Panels; Rigid Polyurethane & Polyisocyanurate Laminate Boardstock; Rigid Polyurethane Slabstock and Other; Flexible Polyurethane; Integral Skin Polyurethane—Substitute: HFO–1336mzz(E)''

- ''Foam Blowing Sector—Risk Screen on Substitutes in Rigid Polyurethane Spray Foam—Substitute: HFO–1336mzz(E)''

Environmental information: HFO–1336mzz(E) has an ODP of zero. It has a GWP of about 16.[8] Under CAA regulations (see 40 CFR 51.100(s)) defining VOC for the purpose of addressing the development of SIPs to attain and maintain the NAAQS, HFO–1336mzz(E) would be considered a VOC. That definition provides that ''any compound of carbon'' which ''participates in atmospheric photochemical reactions'' is considered a VOC unless expressly excluded in that provision based on a determination of ''negligible photochemical reactivity.'' The manufacturer has petitioned the EPA to exclude HFO–1336mzz(E) from the definition of VOC under those regulations based on its claim that the chemical exhibits low photochemical reactivity. EPA has not yet taken action on that petition. EPA notes for informational purposes that this substitute is subject to a Toxic Substances Control Act (TSCA) section 5(e) Consent Order and a TSCA section 5(a)(2) Significant New Use Rule (SNUR).

EPA anticipates that HFO–1336mzz(E) will be used consistent with the recommendations specified in the SDS. The OARS WEEL committee recommends a WEEL for the workplace of 400 ppm on an 8-hour TWA. EPA anticipates that users will be able to meet the WEEL and address potential health risks by following requirements and recommendations in the SDS and other safety precautions common to the foam blowing industry.

Comparison to other substitutes in these end-uses: HFO–1336mzz(E) has an ODP of zero, comparable to or lower than that for other listed substitutes in these end-uses, with ODPs ranging from zero to 0.02.

HFO–1336mzz(E)'s GWP of about 16 is lower than that of other acceptable substitutes in the listed end-uses, such as HFC–152a with a GWP of 124. HFO–1336mzz(E)'s GWP is higher than or comparable to the GWPs of other acceptable substitutes for these end-uses, such as HFO–1336mzz(Z), methyl formate, saturated light hydrocarbons C3–C6,[9] and *trans*-1-chloro-3,3,3-trifluoroprop-1-ene with GWPs ranging from less than one to approximately 11.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with the OARS WEEL, recommendations in the manufacturer's SDS, and other safety precautions common in the foam blowing industry; moreover, those risks are common to many foam blowing agents, including many of those already listed as acceptable under SNAP for these end-uses.

EPA finds HFO–1336mzz(E) acceptable in the end-uses listed above in section 1.B.2 because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-uses.

3. Methylal

EPA's decision: EPA finds methylal acceptable as a substitute for use in:

- Rigid PU: Spray—high-pressure two-component
- Rigid PU: Spray—low-pressure two-component
- Rigid PU: Spray—one-component foam sealants

Methylal is also called dimethoxymethane (CAS Reg. No. 109–87–5) and belongs to a class of chemicals referred to as acetals; it also goes by the trade name Novicell™.

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in these end-uses in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''Supporting Materials for Notice 36 Listing of Methylal in Foam Blowing. SNAP Submission Received April 18, 2014.'' EPA performed an assessment to examine the health and environmental risks of this substitute. This assessment is available in Docket EPA–HQ–OAR–2003–0118 under the following name: ''Risk Screen on Substitutes for Use in Rigid Polyurethane Spray Foam Substitute: Methylal.''

EPA previously listed methylal as acceptable for use as a foam-blowing agent in a variety of foam blowing end-uses (October 21, 2014; 79 FR 62863).

Environmental information: Methylal has an ODP of zero and a GWP less than one.[10] Under CAA regulations (see 40 CFR 51.100(s)) defining VOC for the purpose of addressing the development of SIPs to attain and maintain the NAAQS, methylal would be considered a VOC. That definition provides that ''any compound of carbon'' which ''participates in atmospheric photochemical reactions'' is considered a VOC unless expressly excluded in that provision based on a determination of ''negligible photochemical reactivity.''

Flammability information: Methylal is flammable. Under the Globally

[8] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://www.esrl.noaa.gov/csl/assessments/ozone/2018/.*

[9] That is, hydrocarbons with single bonds with three to six carbons, such as propane, isobutane, pentane, isopentane, cyclopentane, and hexane.

[9] That is, hydrocarbons with single bonds with three to six carbons, such as propane, isobutane, pentane, isopentane, cyclopentane, and hexane.

[10] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.*

Harmonized System of Classification and Labelling of Chemicals, it is classified as a Class II flammable liquid and under the Occupational Safety and Health Administration's (OSHA's) regulations at 29 CFR 1910.106, it is classified as a Class IB flammable liquid. Some specific blends of methylal with other blowing agents are flammable as formulated and should be handled with proper precautions, as specified by the manufacturer. EPA recommends that users follow all requirements and recommendations specified in the SDS and other safety precautions for use of flammable blowing agents used in the foam blowing industry. Use of methylal will require safe handling and shipping as prescribed by OSHA and the Department of Transportation (for example, using personal protective equipment (PPE) and following requirements for shipping hazardous materials at 49 CFR parts 170 through 173).

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. Higher concentrations may cause central nervous system depression and loss of consciousness. The substitute may also irritate the skin or eyes. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. These potential health effects are common to many foam-blowing agents.

For methylal, the American Conference of Governmental Industrial Hygienists (ACGIH) has established a threshold limit value (TLV) of 1,000 ppm on an 8-hr TWA. The National Institute of Occupational Safety and Health (NIOSH) has established a recommended exposure limit (REL) of 1,000 ppm for methylal on a 10-hour TWA. EPA anticipates that users will be able to meet workplace exposure limits (TLV and REL) and address potential health risks by following requirements and recommendations in the manufacturer's SDS and other safety precautions common to the foam-blowing industry.

Comparison to other substitutes in these end-uses: Methylal has an ODP of zero, comparable to other listed substitutes in these end-uses, with ODPs ranging from zero to 0.012.

Methylal's GWP of less than one is less than or comparable to the GWPs of other acceptable substitutes in the listed end-uses, including CO_2, Exxsol™ blowing agents, HFC–152a, HFO–1336mzz(Z), methyl formate,[11] and *trans*-1-chloro-3,3,3-trifluoroprop-1-ene, with GWPs ranging from less than 1 to approximately 124.[12]

Methylal's flammability risks are comparable to or lower than flammability risks of other available substitutes in the same end-uses, including Exxsol™ blowing agents and methyl formate. Other acceptable substitutes in these end-uses are nonflammable (*e.g.,* CO_2, HFO–1336mzz(Z), and *trans*-1-chloro-3,3,3-trifluoroprop-1-ene.

Toxicity risks are comparable to or lower than toxicity risks of other available substitutes in the same end-use. Toxicity risks can be minimized by use consistent with the ACGIH TLV, recommendations in the manufacturer's SDS, and other safety precautions common in the foam-blowing industry.

EPA finds methylal acceptable in the end-uses listed above in section I.B.3 because it does not pose greater overall environmental and human health risk than other available substitutes in the same end-use.

C. Fire Suppression and Explosion Protection

HCFO-1233zd(E)/C6-perfluoroketone blend

EPA's decision: EPA finds HCFO-1233zd(E)/C6-perfluoroketone blend acceptable as a substitute for:

- Total flooding (normally occupied and unoccupied spaces)

HCFO-1233zd(E)/C6-perfluoroketone blend is a weighted blend of 50 percent (E)-1-chloro-3,3,3-trifluoroprop-1-ene or HCFO-1233zd(E) (CAS Reg. No. 102687–65–0) and 50 percent C6-perfluoroketone (CAS Reg. No. 756–13–8), also known as 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-3-pentanone or FK-5-1-12. Both components are currently listed as acceptable under SNAP for use in this end-use. The blend is sold under the trade name Solstice™ Quench 55.

You may find a copy of the applicant's submission, with CBI redacted, providing the required health and environmental information for this substitute in this end-use in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, ''Supporting Documentation for Notice 36 Listing of HCFO-1233zd(E)/C6-perfluoroketone blend in Fire Suppression. SNAP Submission Received August 1, 2018.'' EPA performed an assessment to examine the health and environmental risks of this substitute. This assessment is available in Docket EPA–HQ–OAR–2003–0118: ''Risk Screen on Substitutes for Total Flooding Systems in Normally Occupied and Unoccupied Spaces. Substitute: HCFO-1233zd(E)/C6-perfluoroketone blend (Solstice™ Quench 55).''

Environmental information: The HCFO-1233zd(E) component of the blend has an ODP less than 0.0004 and a GWP of 3.7.[13] The C6-perfluoroketone component has no ODP and a GWP of less than one.[14] The blend has an average ODP of less than 0.0002 and an average GWP of less than two. The HCFO-1233zd(E) component is excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS; the C6-perfluoroketone component falls within the definition of VOC in those regulations.

Flammability information: HCFO-1233zd(E)/C6-perfluoroketone blend is not flammable.

Toxicity and exposure data: Potential health effects of this substitute include serious eye and skin irritation. If eye or skin contact occurs, end users should flush the affected area with large amounts of water. If inhaled, end users should be removed and exposed to fresh air. The potential health effects of HCFO-1233zd(E)/C6-perfluoroketone blend are unlikely to occur when following good industrial hygiene practices and the PPE and engineering control (*e.g.,* ventilation) recommendations outlined in the SDSs for HCFO-1233zd(E)/C6-perfluoroketone blend.

The OARS has established a WEEL as an 8-hr TWA of 800 ppm for HCFO-1233zd(E). The manufacturer of C6-perfluoroketone recommends an AEL of 150 ppm on an 8-hr TWA. During installation or servicing of HCFO-1233zd(E)/C6-perfluoroketone blend total flooding systems, exposure to the substitute is not likely if the instructions on system installation and servicing are adhered to; these instructions are included in manuals for the HCFO-

[11] Originally listed under the trade name ''ecomate™'' in these end-uses. 69 FR 5803, October 4, 2004.

[12] Except for HFC–152a, all the GWPs in this sentence are from WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.*

[13] WMO (World Meteorological Organization), *Scientific Assessment of Ozone Depletion: 2018,* Global Ozone Research and Monitoring Project—Report No. 58, 588 pp., Geneva, Switzerland, 2018. Available at: *https://ozone.unep.org/sites/default/files/2019-05/SAP-2018-Assessment-report.pdf.*

[14] Ibid.

1233zd(E)/C6-perfluoroketone blend systems and the relevant industry standards (*i.e.,* latest edition of the National Fire Protection Association [NFPA] 2001 Standard for Clean Agent Fire Extinguishing Systems and Underwriters' Laboratories [UL] 2166 Standard for Halocarbon Clean Agent Extinguishing System Units). In the event of an accidental release of the substitute from the total flooding system, potential acute exposures may be of concern. The design concentration is less than the cardiotoxic No Observed Adverse Effect Level of 8.66 percent (86,600 ppm) for the blend. Appropriate protective measures should be taken, and proper training administered for the manufacture, clean-up and disposal of this product and for the installation and maintenance of the total flooding systems using this product.

NFPA 2001 provides that in the case of accidental release in normally occupied spaces, required engineering controls as specified in NFPA 2001 should be employed to limit personnel exposure to clean agent discharges. Specifically, audible and visual pre-discharge alarms and a 30–60 second time delay should be employed within the protected space to indicate the operation of the system and pending discharge to ensure egress for all personnel prior to activation. EPA's evaluation indicates that the use of HCFO-1233zd(E)/C6-perfluoroketone blend is not expected to pose a significant toxicity risk to personnel or the general population. In addition, the risks it may pose after exposure are common to many total flooding agents, including those already listed as acceptable under SNAP for this same end-use. EPA's review of the human health impacts of HCFO-1233zd(E)/C6-perfluoroketone blend, including the summary of available toxicity studies, is in the risk screen mentioned above in the docket for this action (EPA–HQ–OAR–2003–0118).

Protective gloves and tightly sealed goggles should be worn for installation and servicing activities to protect workers in any event of potential discharge of the substitute, accidental or otherwise. Filling or servicing operations should be performed in well-ventilated areas. Toxicity risks can be minimized by use consistent with NFPA 2001 standard, recommendations in the SDS, and other safety precautions common in the fire suppression industry. EPA provides additional information on safe use of this substitute in the ''Further Information'' column of the table summarizing this listing for total flooding agents (see Appendix A).

Comparison to other substitutes in this end-use: HCFO–1233zd(E)/C6-perfluoroketone blend has an average ODP of less than 0.0002, comparable to or less than that for other listed substitutes in this end-use, with ODPs ranging from zero to 0.048.

For total flooding agents, HCFO–1233zd(E)/C6-perfluoroketone blend's average GWP of less than two is lower than that of other acceptable substitutes, such as HFC–227ea and other HFCs, with GWPs which range from about 1,430 to 14,800. Other acceptable substitutes in this end-use, such as water, inert gases, and a number of powdered aerosol fire suppressants, have lower or comparable GWPs ranging from zero to seven.

Toxicity risks can be minimized by use consistent with the NFPA 2001 standard, recommendations in the SDS, and other safety precautions common in the fire suppression industry. The potential toxicity risks due to inhalation exposure are common to many total flooding agents, including those already listed as acceptable under SNAP for this same end-use. HCFO–1233zd(E)/C6-perfluoroketone blend is nonflammable, as are all other available total flooding agents.

EPA finds HCFO–1233zd(E)/C6-perfluoroketone blend acceptable in the total flooding end-use because it does not pose greater overall environmental and human health risk than other available substitutes in this end-use.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Hans Christopher Grundler,

Director, Office of Atmospheric Programs.

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

APPENDIX A: SUMMARY OF DECISIONS FOR NEW ACCEPTABLE SUBSTITUTES

REFRIGERATION AND AIR CONDITIONING

End-use	Substitute	Decision	Further information [1]
Centrifugal chillers *(new equipment).*	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (Chemical Abstracts Service Registry Number [CAS Reg. No.] 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a 100-year global warming potential (GWP) of 287. The blend is not flammable. The American Industrial Hygiene Association (AIHA) has established Workplace Environmental Exposure Limits (WEELs) of 800 ppm and 1000 ppm on an eight-hour Time-Weighted Average (8-hr TWA), respectively, for HFO–1234ze(E) and for HFC–227ea. The manufacturer has established an Acceptable Exposure Limit (AEL) of 810 ppm, on an 8-hr TWA for R–515B.
Industrial process air conditioning *(new equipment).*	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. The AIHA has established WEELs of 800 ppm and 1000 ppm on an 8-hr TWA, respectively, for HFO–1234ze(E) and for HFC–227ea. The manufacturer has established an AEL of 810 ppm on an 8-hr TWA for R–515B.

REFRIGERATION AND AIR CONDITIONING—Continued

End-use	Substitute	Decision	Further information [1]
Industrial process refrigeration *(new and retrofit equipment)*.	HCFO–1233zd(E).	Acceptable	HCFO–1233zd(E) is also known as *trans*-1-chloro-3,3,3-trifluoroprop-1-ene (CAS Reg. No 102687–65–0). HCFO–1233zd(E) has an ozone-depleting potential (ODP) of less than 0.0004 and a GWP of about 3.7. HCFO–1233zd(E) is nonflammable. The AIHA has established a WEEL of 800 ppm on an 8-hr TWA for HCFO–1233zd(E).
Positive displacement chillers *(new equipment)*.	R–515B	Acceptable	This substitute is a blend of HFO–1234ze(E), which is also known as *trans*-1,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 29118–24–9) and HFC–227ea, also known as 1,1,1,2,3,3,3-heptafluoropropane (CAS Reg. No. 431–89–0). R–515B has a GWP of 287. The blend is not flammable. The AIHA has established WEELs of 800 ppm and 1000 ppm on an 8-hr TWA, respectively, for HFO–1234ze(E) and for HFC–227ea. The manufacturer has established an AEL of 810 ppm on an 8-hr TWA for R–515B.

[1] Observe recommendations in the manufacturer's SDS and guidance for all listed refrigerants.

FOAM BLOWING AGENTS

End-use	Substitute	Decision	Further information [1]
Extruded Polystyrene: Boardstock and Billet.	Blends of 10 to 99 percent by weight HFO–1336mzz(Z) and the remainder HFC–152a.	Acceptable	HFO–1336mzz(Z) is also known as (2Z)-1,1,1,4,4,4-hexafluoro-2-butene and *cis*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 692–49–9). HFC–152a is also known as ethane, 1,1-difluoro (CAS Reg. No. 75–37–6). The blends range in composition from 10 percent HFO–1336mzz(Z) and 90 percent HFC–152a to 99 percent HFO–1336mzz(Z) and 1 percent HFC–152a. These blends have 100-year global warming potentials (GWPs) from about three to about 110, depending on the specific composition. Certain blends of these compounds are flammable, depending on the specific composition. The American Industrial Hygiene Association (AIHA) has established a Workplace Environmental Exposure Limit (WEEL) of 1,000 ppm as an 8-hour Time-Weighted Average (8-hr TWA) for HFC–152a and Occupational Alliance for Risk Science (OARS) has established a WEEL of 500 ppm for HFO–1336mzz(Z).
Flexible Polyurethane (PU).	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a Toxic Substances Control Act (TSCA) section 5(e) Consent Order and a TSCA section 5(a)(2) Significant New Use Rule (SNUR).
Integral skin PU	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Appliance	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Commercial refrigeration.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.

FOAM BLOWING AGENTS—Continued

End-use	Substitute	Decision	Further information [1]
Rigid PU and polyisocyanurate laminated boardstock.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Sandwich panels.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Slabstock and other.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: spray-high-pressure two-component.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Spray-high-pressure two-component.	Methylal	Acceptable	Methylal is also known as dimethoxymethane and belongs to a class of chemicals referred to as acetals (CAS Reg. No. 109–87–5). Methylal has a GWP of less than one. Methylal is flammable. The American Conference of Governmental Industrial Hygienists (ACGIH) has established a threshold limit value (TLV) of 1,000 ppm, on an 8-hr TWA for methylal. The National Institute of Occupational Safety and Health (NIOSH) has established a recommended exposure limit (REL) of 1,000 ppm for methylal on a 10-hour TWA.
Rigid PU: Spray-low-pressure two-component.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Spray-low-pressure two-component.	Methylal	Acceptable	Methylal is also known as dimethoxymethane and belongs to a class of chemicals referred to as acetals (CAS Reg. No. 109–87–5). Methylal has a GWP of approximately less than one. Methylal is flammable. ACGIH has established a TLV of 1,000 ppm on an 8-hr TWA for methylal. The NIOSH has established a REL of 1,000 ppm for methylal on a 10-hour TWA.
Rigid PU: Spray-one-component foam sealants.	HFO–1336mzz(E) ..	Acceptable	HFO–1336mzz(E) is also known as (2E)-1,1,1,4,4,4-hexafluoro-2-butene and *trans*-1,1,1,4,4,4-hexafluoro-2-butene (CAS Reg. No. 66711–86–2). HFO–1336mzz(E) has a GWP of approximately 16. HFO–1336mzz(E) is nonflammable. The OARS recommends a WEEL for the workplace of 400 ppm on an 8-hr TWA. This substitute is subject to a TSCA section 5(e) Consent Order and a TSCA section 5(a)(2) SNUR.
Rigid PU: Spray-one-component foam sealants.	Methylal	Acceptable	Methylal is also known as dimethoxymethane and belongs to a class of chemicals referred to as acetals (CAS Reg. No. 109–87–5). Methylal has a GWP of less than one. Methylal is flammable. ACGIH has established a TLV of 1,000 ppm on an 8-hr TWA for methylal. NIOSH has established a REL of 1,000 ppm for methylal on a 10-hour TWA.

[1] Observe recommendations in the manufacturer's SDS and guidance for all listed foam blowing agents.

FIRE SUPPRESSION AND EXPLOSION PROTECTION

End-use	Substitute	Decision	Further information
Total flooding (normally occupied and unoccupied spaces).	HCFO–1233zd(E)/C6-perfluoroketone blend.	Acceptable	HCFO–1233zd(E)/C6-perfluoroketone blend is a blend of (E)-1-chloro-3,3,3-trifluoroprop-1-ene or HCFO–1233zd(E) (CAS Reg. No. 102687–65–0) and C6-perfluoroketone (CAS Reg. No. 756–13–8), also known as 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-3-pentanone or FK–5–1–12. This blend has an average ozone depletion potential (ODP) of <0.0002 and an average 100-year global warming potential (GWP) of less than two. The blend is nonflammable. The Occupational Alliance for Risk Science (OARS) has established a Workplace Environmental Exposure Limit (WEEL) as an 8-hour Time-Weighted Average (8-hr TWA) of 800 ppm for HCFO–1233zd(E). The manufacturer of C6-perfluoroketone recommends an Acceptable Exposure Limit (AEL) of 150 ppm on an 8-hr TWA. The cardiotoxic No Observed Adverse Effect Level (NOAEL) is 8.66 percent for the blend. Use of this agent should be in accordance with the safety guidelines in the latest edition of the National Fire Protection Association (NFPA) 2001 Standard on Clean Agent Fire Extinguishing Systems. Safety features that are typical of total flooding systems such as pre-discharge alarms, time delays, and system abort switches should be provided, as directed by applicable Occupational Safety and Health Administration (OSHA) regulations and NFPA standards. For establishments manufacturing, installing and maintaining equipment using this agent, EPA recommends the following: • In the case that HCFO–1233zd(E)/C6-perfluoroketone blend is inhaled, person(s) should be immediately removed and exposed to fresh air; if breathing is difficult, person(s) should seek medical attention. • Eye wash and quick drench facilities should be available. In case of ocular exposure, person(s) should immediately flush the eyes, including under the eyelids, with water for 15 minutes. • In the case of dermal exposure, the safety data sheet (SDS) recommends that person(s) should immediately wash the affected area with water and remove all contaminated clothing to avoid irritation. • Although unlikely, in case of ingestion of HCFO–1233zd(E)/C6-perfluoroketone blend, the person(s) should drink a cup of water, if fully conscious, and consult a physician immediately. • Manufacturing space should be equipped with engineering controls, specifically an adequate exhaust ventilation system, to effectively mitigate potential occupational exposure. • Employees responsible for chemical processing should wear the appropriate personnel protective equipment (PPE), such as protective gloves, tightly sealed goggles, protective work clothing, and suitable respiratory protection in case of release or insufficient ventilation. • All spills should be cleaned up immediately in accordance with good industrial hygiene practices. • Training for safe handling procedures should be provided to all employees that would be likely to handle containers of the agent or extinguishing units filled with the agent. See additional comments 1, 2, 3, 4, 5.

[1] The EPA recommends that users consult Section VIII of the OSHA Technical Manual for information on selecting the appropriate types of personal protective equipment for all listed fire suppression agents. The EPA has no intention of duplicating or displacing OSHA coverage related to the use of personal protective equipment (*e.g.,* respiratory protection), fire protection, hazard communication, worker training or any other occupational safety and health standard with respect to halon substitutes.

[2] Use of all listed fire suppression agents should conform to relevant OSHA requirements, including 29 CFR part 1910, subpart L, sections 1910.160 and 1910.162.

[3] Per OSHA requirements, protective gear (SCBA) should be available in the event personnel should reenter the area.

[4] Discharge testing should be strictly limited to that which is essential to meet safety or performance requirements.

[5] The agent should be recovered from the fire protection system in conjunction with testing or servicing, and recycled for later use or destroyed.

[FR Doc. 2020–23861 Filed 12–10–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R01–UST–2020–0207; FRL–10015–22–Region 1]

Rhode Island: Final Approval of State Underground Storage Tank Program Revisions, Codification, and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the State of Rhode Island's Underground Storage Tank (UST) program submitted by the Rhode Island Department of Environmental Management (RI DEM). This action also codifies EPA's approval of Rhode Island's State program and incorporates by reference those

provisions of the State regulations that we have determined meet the requirements for approval. The provisions will be subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA Subtitle I and other applicable statutory and regulatory provisions.

DATES: This rule is effective February 9, 2021, unless EPA receives adverse comment by January 11, 2021. If EPA receives adverse comments, it will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register, as of February 9, 2021, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: Submit your comments by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Email: beland.andrea@epa.gov.*

Instructions: Direct your comments to Docket ID No. EPA–R01–UST–2020–0207. EPA's policy is that all comments received will be included in the public docket without change and may be available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov,* or email. The Federal *https://www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and also with any disk or CD–ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. EPA encourages electronic submittals, but if you are unable to submit electronically, please reach out to the EPA contact person listed in the notice for assistance.

Docket: All documents in the docket are listed in the *https://www.regulations.gov* index. Although listed in the index, some information might not be publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, might be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy.

IBR and supporting material: You can view and copy the documents that form the basis for this codification and associated publicly available materials either through *www.regulations.gov* or at the EPA Region 1 Office, 5 Post Office Square, 1st floor, Boston, MA 02109–3912. The facility is open from 8:30 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Andrea Beland, RCRA Waste Management, UST, and Pesticides Section, at (617) 918–1313, before visiting the Region 1 office. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Andrea Beland, (617) 918–1313, *beland.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Approval of Revisions to Rhode Island's Underground Storage Tank Program

A. Why are revisions to state programs necessary?

States that have received final approval from the EPA under RCRA section 9004(b) of RCRA, 42 U.S.C. 6991c(b), must maintain an underground storage tank program that is equivalent to, consistent with, and no less stringent than the Federal UST program. Either EPA or the approved state may initiate program revision. When EPA makes revisions to the regulations that govern the UST program, states must revise their programs to comply with the updated regulations and submit these revisions to the EPA for approval. Program revision may be necessary when the controlling Federal or state statutory or regulatory authority is modified or when responsibility for the state program is shifted to a new agency or agencies.

B. What decisions has the EPA made in this rule?

On February 4, 2020, in accordance with 40 CFR 281.51(a), Rhode Island submitted a complete program revision application seeking the EPA approval for its UST program revisions (State Application). Rhode Island's revisions correspond to the EPA final rule published on July 15, 2015 (80 FR 41566), which revised the 1988 UST regulations and the 1988 State program approval (SPA) regulations (2015 Federal Revisions). As required by 40 CFR 281.20, the State Application contains the following: A transmittal letter requesting approval, a description of the program and operating procedures, a demonstration of the State's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant State statutes and regulations. We have reviewed the State Application and determined that the revisions to Rhode Island's UST program are equivalent to, consistent with, and no less stringent than the corresponding Federal requirements in subpart C of 40 CFR part 281, and that the Rhode Island program provides for adequate enforcement of compliance (40 CFR 281.11(b)). Therefore, the EPA grants Rhode Island final approval to operate its UST program with the changes described in the program revision application, and as outlined below in section I.G. of this document.

C. What is the effect of this approval decision?

This action does not impose additional requirements on the regulated community because the regulations being approved by this rule are already effective in Rhode Island, and they are not changed by this action. This action merely approves the existing State regulations as meeting the Federal requirements and renders them federally enforceable.

D. Why is EPA using a direct final rule?

EPA is publishing this direct final rule concurrent with a proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. EPA is providing an opportunity for public comment now.

E. What happens if the EPA receives comments that oppose this action?

Along with this direct final rule, the EPA is publishing a separate document in the ''Proposed Rules'' Section of this issue of the **Federal Register** that serves as the proposal to approve the State's UST program revisions, providing opportunity for public comment. If EPA receives comments that oppose this approval, EPA will withdraw the direct final rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the approval of the State program changes after considering all comments received during the comment period. EPA will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this approval, you must do so at this time.

F. For what has Rhode Island previously been approved?

On February 3, 1993, the EPA finalized a rule approving the UST program, effective March 5, 1993, to operate in lieu of the Federal program. On February 20, 1996, effective April 22, 1996, the EPA codified the approved Rhode Island program, incorporating by reference the State statutes and regulatory provisions that are subject to EPA's inspection and enforcement authorities under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions.

G. What changes are we approving with this action?

On February 4, 2020, in accordance with 40 CFR 281.51(a), Rhode Island submitted a complete application for final approval of its UST program revisions adopted on November 20, 2018. The EPA now makes an immediate final decision, subject to receipt of written comments that oppose this action, that Rhode Island's UST program revisions satisfy all of the requirements necessary to qualify for final approval. Therefore, EPA grants Rhode Island final approval for the following program changes:

Required federal element	Implementing state authority
40 CFR 281.30, New UST Systems and Notification	250–RICR–140–25 Part(s): 1.4; 1.7; 1.8; 1.11; 1.11(C); 1.11(L); and 1.12.
40 CFR 281.31, Upgrading Existing UST Systems	250–RICR–140–25 Part(s): 1.10(E); and 1.15.
40 CFR 281.32, General Operating Requirements	250–RICR–140–25 Part(s): 1.4(I) 1.5(A)(8) and (27); 1.7P(2)(b); 1.10(B)(4) and (5); 1.10(E); 1.10(F)(1)(f); 1.10(G)(2)(d); 1.10(N); 1.10(N)(3); 1.10(U)(9); 1.11(C)(6); 1.11(D); 1.12(C) and (D); 1.12(D)(1)(g); and 1.13.
40 CFR 281.33, Release Detection	250–RICR–140–25–1 Part(s): 1.10(A), (F), (G) and (M); 1.11(A), (N), (O) and (P).
40 CFR 281.34, Release Reporting, Investigation, and Confirmation	250–RICR–140–25–1 Part(s): 1.14.
40 CFR 281.35, Release Response and Corrective Action	250–RICR–140–25–1 Part(s): 1.14.
40 CFR 281.36, Out-of-service Systems and Closure	250–RICR–140–25–1 Part(s): 1.15(C); 1.15(D); and 1.15(D)(12).
40 CFR 281.37, Financial Responsibility for USTs Containing Petroleum.	250–RICR–140–25–1 Part(s): 1.8; and 1.9.
40 CFR 281.39, Operator Training	250–RICR–140–25–1 Part(s): 1.10(U).
40 CFR 281.40, Legal Authorities for Compliance Monitoring	250–RICR–140–25–1 Part(s): 1.4; 1.10; 1.13; 1.14(I); 1.16.
40 CFR 281.41, Legal Authorities for Enforcement Response	250–RICR–140–25–1 Part(s): 1.10(T).

The State also demonstrates that its program provides adequate enforcement of compliance as described in 40 CFR 281.11(b) and part 281, subpart D. The RI DEM has broad statutory authority with respect to USTs to regulate installation, operation, maintenance, closure, and UST releases, and to the issuance of orders. These statutory authorities are found in: Rhode Island General Laws, Title 38: Public Records, Chapters 38–1, 2, and 3; Rhode Island General Laws, Title 42: State Affairs and Government, Chapter 42–17.1–2(20), Department of Environmental Management; and Rhode Island General Laws, Title 46: Waters and Navigation, Chapter 46–12: Water Pollution, Section 12–3, Sections 12–9 and 10, 12–13 through 15, and Section 46–12–22.

H. Where are the revised rules different from the Federal rules?

Broader in Scope Provisions

The following statutory and regulatory provisions are considered broader in scope than the Federal program, and are therefore not enforceable as a matter of Federal law:

The State of Rhode Island regulates heating oil of all grades at non-residential locations and partially regulates residential tanks storing heating oil at one, two, or three-unit dwellings; farm tanks storing heating oil for non-commercial purposes, and holding tanks.

All owners and operators of USTs must comply with registration requirements, with the exception of those exempted under 250–RICR–140–25 section 1.4(D). Registration applies to all farm and residential tanks containing heating or fuel oils consumed on-site and containing motor fuels for on-site use.

The Rhode Island Underground Storage Tank Financial Responsibility Fund (RI UST FR Fund) was established to provide a mechanism to comply with financial responsibility requirements and to ensure that the environmental and public health impacts of leaks from USTs are addressed in an effective and timely manner.

Owners/operators must ensure that their facilities comply with Rhode Island's UST regulations by conducting their own inspections and certifying their compliance by completing and submitting the Environmental Results Program Certification (ERP) Booklet. At least every three years the RI DEM will issue an ERP Certification Booklet to all operating UST facilities.

With the exception of UST systems that store fuel oil of any grade consumed on-site for heating, all single-walled tanks and/or piping installed before May 8, 1985 were required to be permanently closed by December 22, 2017. All single-walled tanks and/or piping installed between May 8, 1985 and July 20, 1992, shall be permanently closed within thirty-two (32) years of the date of installation. If the installation date is not known, then any single-walled tank and/or piping shall be permanently closed immediately.

All USTs containing heating oil of any grade at commercial or industrial facilities are required to be tested for tightness beginning in 2021.

Remote pumping systems, including dispensers, shall be equipped with an emergency shut-off valve designed to close automatically in the event that a dispensing unit is significantly impacted or exposed to fire.

New USTs are prohibited from being installed in wellhead protection areas for community water systems. However, USTs registered before November 20, 2018 that were not abandoned or removed for more than 180 days are permitted to be replaced with tanks of equivalent size, or less, and substance stored.

The installation of an UST within 200 feet of a public drilled (rock), driven, or dug well or within 400 feet of a gravel-packed or gravel-developed well is prohibited.

USTs are to be installed as far away as possible from private wells.

Construction of a new tank system or replacement tank system, and modification (including product piping replacement) to any UST facility for which an application for a certificate of registration is required, is prohibited without prior written notification to, and approval by, the Director.

Before installing or replacing any USTs or product piping, the owner is required to submit a completed UST Registration Form; a completed Equipment List Addendum; a completed UST Installation/Modification/Upgrade Supplemental Information form; a site plan, including all of the information listed in 250–RICR–140–25 section 1.7(D)(1)(a)(3) which must be reviewed and stamped by a registered Professional Engineer; specifications or a diagram indicating depth of excavation, bedding, and backfill, supports and anchorage used, distance between tanks, and dimensions (including thickness) of traffic pad; and the appropriate registration fees.

All new and replacement tanks and piping (primary and secondary) shall be tightness tested after all paving over the tanks and piping has been completed and before commencing regular UST operation.

USTs storing heating oil used onsite for heating purposes only with aboveground fill pipes do not require spill containment as long as the ground around the fill pipe is covered with a positive-limiting barrier constructed of material impervious to the substance stored and can contain spills less than three gallons; the fill pipe extends a minimum of six inches above the finished grade; and aboveground fill pipes in high traffic areas are protected by concrete-filled bollards.

When permanently closing any UST system and/or product pipeline, a $75.00 per UST fee must be submitted at least 10 days prior to the removal date.

No person can conduct tightness or interstitial testing on USTs or tank components in Rhode Island unless they are in compliance with the licensing and other provisions of these regulations. Any individual wishing to be licensed must submit a completed application with the required documentation and application fee. Any business who employs or subcontracts licensed testers to conduct tank and/or piping tests are required to submit a completed application for a tank testing business license to the RI DEM.

Any owner/operator of a facility, or person subject to these regulations may submit a written request to the Director for a variance from some or all provisions of these regulations.

More Stringent Provisions

Facilities subject to leak detection requirements must post or provide, in a location readily accessible to the facility staff, emergency response procedures, including instructions on responding to alarms, releases, spills, and other abnormal events, and include current contact information for the Class A and B operator or a 24-hour call center or spill response hotline.

All USTs and product piping installed after 1992 are required to have liquid-tight secondary containment and be equipped with continuous monitoring of the interstitial space.

Double-walled USTs with a dry interstice (except those for heating fuels for on-site use, emergency generators, and waste or motor oil) must have a tightness test of the interstitial space completed every two years once the tanks have been installed for 20 years. If the test fails, the primary wall must be tested within 48 hours. Any product remaining in the tank can be consumed for up to 30 days if the primary tank tests tight. If the primary wall is unable to be tested or fails, the tank must be taken out of service, the contents removed within 24 hours, and the tank tester must notify DEM immediately. Within 30 days and before adding product to the repaired tank, an additional interstitial tightness test must be done to confirm the repair. All failed USTs must be repaired or replaced within 60 days or be temporarily closed. Test results are to be maintained on-site at all times as permanent records.

If a piping interstitial space tightness test fails, and there is no evidence of a release, the primary product pipeline wall must be tested for tightness within 48 hours. If it is tight, any product remaining in the failed product pipeline and all USTs directly connected to that pipeline may be consumed for no longer than 30 days. No additional product may be added to any UST connected to the failed product pipeline until it has been repaired or replaced and passes a final tightness test. The repaired pipeline must be re-tested within 30 days and before placing it back into regular service. Test results are to be maintained on-site at all times as permanent records.

If the primary wall of the piping is unable to be tested or fails, the failed line must be taken out of service immediately, the contents removed, and the tank tester must notify the RI DEM immediately. No product may be added to an UST that services the failed pipeline until it has been repaired or replaced and passed a final tightness test to confirm the repair. All failed USTs must be repaired or replaced within 60 days or be temporarily closed. Test results are to be maintained on-site at all times as permanent records.

All single-walled USTs and all single-walled product pipelines, including pressurized, U.S. suction, and European suction, must be tested for tightness by a third-party licensed tester on an annual basis, regardless of age or installation date.

Statistical inventory reconciliation, groundwater, and vapor monitoring are not accepted as leak detection methods.

Owners/Operators of single-walled USTs are required to operate an approved automatic tank gauging system that tests for loss or gain of the contents stored, perform a leak test capable of detecting a leak rate of 0.2 gal/hour or less at least once per month, perform daily and monthly inventory recordkeeping, and perform a tank tightness test annually.

Interior lining is no longer accepted as a method of corrosion protection. USTs lined prior to November 20, 2018, must be inspected within 10 years after lining, and every five years thereafter. Any pitting, tearing, discoloration, failure to adhere to the tank structure, or other damage will be considered a lining failure. The USTs must be removed from service and permanently closed within 90 days. Failed lining inspections must be reported to the RI DEM by the inspector within 24 hours and the final report/results are to be submitted within 30 calendar days. Records of all tank lining inspections are required to be permanently kept.

Impressed current cathodic protection systems are required to be tested every 2 years.

All facilities are required to have a trained and certified Class A and Class B operator registered with RI DEM who

are required to perform monthly walk-through inspections and complete the Department's monthly inspection checklist. Class A and B operator certification is valid for five years from the date of passing provided the facility remains in compliance with these regulations. Class C operators must be trained every two years, by a Class A or B operator.

Written approval is needed to operate as an unmanned facility before operating without a Class C operator being present during all operating hours. Certified Class A and Class B operators must be designated to the facility and registered with the RI DEM. A sign must be posted with the names and telephone numbers of the Class A and B operators, facility owner/operator, 911, local emergency responders, and must include a statement advising persons to call these numbers to report a spill or other emergency. This sign must be visible for the person fueling the vehicle or the USTs to read. A designated person(s) must be available to respond to emergencies immediately when the owner or operator is contacted.

Airport hydrant fuel distribution systems and UST systems with field-constructed tanks shall meet release detection requirements for tanks and piping systems. Piping associated with airport hydrant distribution systems and field constructed UST systems shall have secondary containment.

All new and replacement spill containment basins must be capable of holding a minimum of three gallons, be double-walled and capable of periodic interstitial monitoring. Single-walled spill containment basins are prohibited from being installed as of November 20, 2018.

USTs and/or their associated piping can be modified or repaired only once.

Owners and operators of all UST facilities must maintain the following records for three years beyond the facility's operational life: Data used in the certificate of registration application; modifications or repairs to pipes, fittings, or other UST system components; storage of regulated substances greater than 10% ethanol and 20% biodiesel, and the UST system compatibility of those substances; annual test results of leak detection equipment and systems; records of closure activities; tank and line tightness test results; corrosion protection methods documentation; records of leaks, spills, releases, overfill, site investigations, and remedial response activities; equipment warranties and manufacturers' checklists; monitoring, testing, and/or inspections for single-walled and double-walled spill prevention equipment, containment sumps, and overfill prevention equipment.

All confirmed and suspected leaks or releases from USTs must be immediately reported.

A temporary closure application must be submitted to the RI DEM for approval at least 15 days prior to the requested closure date. Class A, Class B, or Class A/B operator must be registered with RI DEM for the entire duration of the temporary closure, must visit the site biannually to ensure the facility and the UST components are in good condition, there are no missing components, and no unsafe situations exist on the property. The operator must complete the monthly inspection checklist and at least once per year measure the product and water level in the tanks. The RI DEM must be notified within 24 hours if there is any change in the product or water level, and corrective action may be required. The facility owner/operator must notify RI DEM 30 days before re-opening the UST system and must receive written approval before adding or dispensing any regulated substances or hazardous materials.

Prior approval and oversight from the RI DEM is required for the permanent closure of any UST, UST system, or an UST and product pipeline.

II. Codification

A. What is codification?

Codification is the process of placing a state's statutes and regulations that comprise the state's approved UST program into the CFR. Section 9004(b) of RCRA, as amended, allows the EPA to approve State UST programs to operate in lieu of the Federal program. The EPA codifies its authorization of state programs in 40 CFR part 282 and incorporates by reference state statutes and regulations that the EPA will enforce under sections 9005 and 9006 of RCRA and any other applicable state provisions. The incorporation by reference of state authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the approved state program and state requirements that can be federally enforced. This effort provides clear notice to the public of the scope of the approved program in each state.

B. What is the history of codification of Rhode Island's UST program?

EPA incorporated by reference the Rhode Island DEM approved UST program effective April 22, 1996 (61 FR 6320; February 20, 1996). In this document, EPA is revising 40 CFR 282.89 to include the approved revisions.

C. What codification decisions have we made in this rule?

Incorporation by reference: In this rule, we are finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the federally approved Rhode Island UST program described in the amendments to 40 CFR part 282 set forth below. The EPA has made, and will continue to make, this document generally available through *www.regulations.gov* and at the EPA Region 1 office (see the **ADDRESSES** Section of this preamble for more information).

The purpose of this **Federal Register** document is to codify Rhode Island's approved UST program. The codification reflects the State program that would be in effect at the time EPA's approved revisions to the Rhode Island UST program addressed in this direct final rule become final. The document incorporates by reference Rhode Island's UST statutes and regulations and clarifies which of these provisions are included in the approved and federally enforceable program. By codifying the approved Rhode Island program and by amending the CFR, the public will more easily be able to discern the status of the federally-approved requirements of the Rhode Island program.

EPA is incorporating by reference the Rhode Island approved UST program in 40 CFR 282.89. Section 282.89(d)(1)(i)(A) incorporates by reference for enforcement purposes the State's statutes and regulations.

Section 282.89 also references the Attorney General's Statement, Demonstration of Adequate Enforcement Procedures, the Program Description, and the Memorandum of Agreement, which are approved as part of the UST program under Subtitle I of RCRA. These documents are not incorporated by reference.

D. What is the effect of Rhode Island's codification on enforcement?

The EPA retains the authority under sections 9005 and 9006 of Subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions and to issue orders in approved States. With respect to these actions, EPA will rely on Federal sanctions, Federal inspection authorities, and Federal procedures rather than the state

authorized analogues to these provisions. Therefore, the EPA is not incorporating by reference such particular, approved Rhode Island procedural and enforcement authorities. Section 282.89(d)(1)(ii) of 40 CFR lists those approved Rhode Island authorities that would fall into this category.

E. What State provisions are not part of the codification?

The public also needs to be aware that some provisions of the State's UST program are not part of the federally approved State program. Such provisions are not part of the RCRA Subtitle I program because they are ''broader in scope'' than Subtitle I of RCRA. Section 281.12(a)(3)(ii) of 40 CFR states that where an approved state program has provisions that are broader in scope than the Federal program, those provisions are not a part of the federally approved program. As a result, State provisions which are broader in scope than the Federal program are not incorporated by reference for purposes of enforcement in Part 282. Section 282.89(d)(1)(iii) lists for reference and clarity the Rhode Island statutory and regulatory provisions which are broader in scope than the Federal program and which are not, therefore, part of the approved program being codified in this document. Provisions that are broader in scope cannot be enforced by EPA; the State, however, will continue to implement and enforce such provisions under State law.

III. Statutory and Executive Order Reviews

This action only applies to Rhode Island's UST Program requirements pursuant to RCRA section 9004 and imposes no requirements other than those imposed by State law. It complies with applicable Executive orders (EOs) and statutory provisions as follows:

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

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action approves and codifies State requirements for the purpose of RCRA section 9004 and imposes no additional requirements beyond those imposed by State law. Therefore, this action is not subject to review by OMB.

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

This action is not a regulatory action subject to Executive Order 13771 (82 FR 9339, February 3, 2017) because actions such as this final approval of Rhode Island's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Because this action approves and codifies pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). As discussed above, EPA is not acting on approval to operate the State's UST program as it applies to Tribal lands in the State. Therefore, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves and codifies State requirements as part of the State RCRA underground storage tank program without altering the relationship or the distribution of power and responsibilities established by RCRA.

E. Executive Order 13045: Services of Children From Environmental Health and Safety Risks

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant, and it does not make decisions based on environmental health or safety risks.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a ''significant regulatory action'' as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA section 9004(b), EPA grants a State's application for approval as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by Section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the Executive order.

J. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). ''Burden'' is defined at 5 CFR 1320.3(b).

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent

practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this rule approves pre-existing State rules which are at least equivalent to, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). However, this action will be effective February 9, 2021 because it is a direct final rule.

Authority: This rule is issued under the authority of sections 2002(a), 7004(b), and 9004 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 282

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Incorporation by reference, Insurance, Intergovernmental relations, Penalties, Petroleum, Reporting and recordkeeping requirements, Surety bonds, Underground storage tanks, Water supply.

Dated: November 10, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

For the reasons set forth in the preamble, EPA is amending 40 CFR part 282 as follows:

PART 282—APPROVED UNDERGROUND STORAGE TANK PROGRAMS

■ 1. The authority citation for part 282 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

■ 2. Revise § 282.89 to read as follows:

§ 282.89 Rhode Island State-Administered Program.

(a) The State of Rhode Island is approved to administer and enforce an underground storage tank program in lieu of the Federal program under Subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 *et seq.* The State's program, as administered by the Rhode Island Department of Environmental Management (RI DEM), was approved by EPA pursuant to 42 U.S.C. 6991c and 40 CFR part 281. EPA approved the Rhode Island program on February 3, 1993, which was effective on March 5, 1993.

(b) Rhode Island has primary responsibility for administering and enforcing its federally approved underground storage tank program. However, EPA retains the authority to exercise its inspection and enforcement authorities under sections 9005 and 9006 of Subtitle I of RCRA, 42 U.S.C. 6991d and 6991e, as well as under any other applicable statutory and regulatory provisions.

(c) To retain program approval, Rhode Island must revise its approved program to adopt new changes to the Federal Subtitle I program which makes it more stringent, in accordance with section 9004 of RCRA, 42 U.S.C. 6991c and 40 CFR part 281, subpart E. If Rhode Island obtains approval for the revised requirements pursuant to section 9004 of RCRA, 42 U.S.C. 6991c, the newly approved statutory and regulatory provisions will be added to this subpart and notification of any change will be published in the **Federal Register**.

(d) Rhode Island has final approval for the following elements of its program application originally submitted to EPA and approved effective March 5, 1993, and the program revision application approved by EPA, effective on February 9, 2021.

(1) *State statutes and regulations*—(i) *Incorporation by reference.* The material cited in this paragraph (d)(1)(i), and listed in appendix A to this part, is incorporated by reference as part of the underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.* (See § 282.2 for incorporation by reference approval and inspection information.) You may obtain copies of the Rhode Island regulations and statutes that are incorporated by reference in this paragraph (d)(1)(i) from Kevin Gillen, Rhode Island DEM, 235 Promenade Street, Providence, RI 02908–5767; Phone number: 401–222–2797; *kevin.gillen@dem.ri.gov,* Hours: Monday–Friday, 7:00 a.m. to 3:30 p.m.; link to statutes and regulations: State of Rhode Island General Laws: *https://webserver.rilin.state.ri.us/Statutes/; http://www.dem.ri.gov/programs/wastemanagement/ust/.* You may inspect all approved material at the EPA Region 1 Office, 5 Post Office Square, 1st floor, Boston, MA 02109–3912; Phone Number: (617) 918–1313; or the National Archives and Records Administration (NARA), Email: *fedreg.legal@nara.gov,* website: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

(A) ''EPA-Approved Rhode Island Statutory and Regulatory Requirements Applicable to the Underground Storage Tank Program, May 2020.''

(B) [Reserved]

(ii) *Legal basis.* EPA evaluated the following statutes and regulations which are part of the approved program, but they are not being incorporated by reference for enforcement purposes, and do not replace Federal authorities:

(A) The statutory provisions include:

(*1*) *Rhode Island General Laws, Title 38: Public Records;* Chapter 38–1, Custody and Protection of Public Records; Chapter 38–2, Access to Public Records; and 38–3, Administration of Public Records.

(*2*) *Rhode Island General Laws, Title 42—Affairs and Government;* Chapter 42–17.1–2(20), Department of Environmental Management, Powers and Duties to Enter, Examine or Survey for Criminal Investigations; Chapter 42–17.6, Administrative Penalties for Environmental Violations.

(*3*) *Rhode Island General Laws, Title 46—Waters and Navigation;* Chapter 46–12—Water Pollution, Section 12–3, Powers and Duties of the Director, except (21); Section 12–9, Notices of Violation and Compliance Orders; 12–10, Emergency Powers; 12–13, Civil Penalties; 12–14, Criminal Penalties; 12–15, Inspection Powers—Rules and Regulations; and Section 12–22. Access of Enforcement Officers to Premises.

(B) The regulatory provisions include:

(*1*) *Title 250—Department of Environmental Management, Chapter 140—Waste and Materials Management, Subchapter 25—Oil and Underground Tanks, Part 1—Rhode Island Rules and Regulations for Underground Storage Facilities Used for Regulated Substances*

and Hazardous Materials, adopted as 250–RICR–140–25–1, Section: 1.10(T) Delivery Prohibition; 1.16(F) Suspension or Revocation of License; 1.16(G) Procedure for Suspension and Revocation; 1.16(H) Requests for Hearings; 1.21 Appeals; 1.22 Penalties.

(*2*) *Title 250—Department of Environmental Management, Chapter 20—Legal Services, Subchapter 00—N/A, Part 1—Administrative Rules of Practice and Procedure for the Department of Environmental Management 20–00–1, adopted as 250–RICR–20–00–1.*

(*3*) *Title 250—Department of Environmental Management, Chapter 130—Compliance and Inspection, Subchapter 00—N/A, Part 1—Rules and Regulations for Assessment of Penalties, adopted as 250–RICR–130–00–1.*

(iii) *Provisions not incorporated by reference.* The following specifically identified statutory and regulatory provisions applicable to the Rhode Island's UST program are broader in scope than the Federal program, are not part of the approved program, and are not incorporated by reference in this section for enforcement purposes:

(A) *Rhode Island Rules and Regulations for Underground Storage Facilities Used for Regulated Substances and Hazardous Materials, 250–RICR–140–25–1,* Section: 1.4(E) Partial regulation of residential tanks storing heating oil at one, two, or three-unit dwellings and farm tanks storing heating oil for non-commercial purposes; 1.4(G) Partial regulation of holding tanks; 1.7(A) Registration applies to all farm and residential tanks containing heating or fuel oils consumed on-site and containing motor fuels for on-site use; 1.9 The Rhode Island UST Financial Responsibility Fund; 1.10 Minimum UST Operation and Maintenance Requirements, (C), (D), (F)(4) and (J); 1.11 New and Replacement UST System Requirements, (B)(1–3) and (5), (C)(1), (J)(1), and (L)(2); 1.12 Facility Modifications or Repairs, (A); 1.15 Closure, (D)(5); 1.16 Approval of Tank and/or Line Tightness Tests, Leak Detection Methods and Licensing Requirements, (B), (D), and (E); 1.19 Holding Tanks; 1.20 Variances.

(B) [Reserved]

(2) *Statement of legal authority.* The Attorney General's Statements, signed by the Attorney General of Rhode Island on July 1, 1992, and January 23, 2020, though not incorporated by reference, are referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(3) *Demonstration of procedures for adequate enforcement.* The ''Demonstration of Procedures for Adequate Enforcement'' submitted as part of the original application on July 2, 1992, and as part of the program revision application for approval on February 4, 2020, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(4) *Program description.* The program description and any other material submitted as part of the original application on July 2, 1992, and as part of the program revision application on February 4, 2020, though not incorporated by reference, are referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region 1 and the Rhode Island Department of Environmental Services, signed by the EPA Regional Administrator on February 12, 2019, though not incorporated by reference, is referenced as part of the approved underground storage tank program under Subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

■ 3. Appendix A to part 282 is amended by revising the entry for Rhode Island to read as follows:

Appendix A to Part 282—State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

* * * * *

Rhode Island

(a) The statutory provisions include:

1. *Rhode Island General Laws, Title 42: State Affairs and Government; Chapter 42–17.1, Department of Environmental Management; Section 42–17.1–2, Powers and Duties.*

(31) standards for the quality of air, and water, and the location, design, construction, and operation of all underground storage facilities used for storing petroleum products or hazardous materials.

2. *Rhode Island General Laws, Title 46: Waters and Navigation; Chapter 46–12. Water Pollution; Section 46–12–3, Powers and Duties of the Director.*

(4) accepting and administering loans and grants.

(21) standards for location, design, construction, maintenance, and operation of underground storage facilities used for storing petroleum products or hazardous materials to prevent, abate, and remedy the discharge of petroleum products and hazardous materials into the waters of the state.

(22) promulgate regulations for monitoring wells.

(b) The regulatory provisions include:

1. *Rhode Island Rules and Regulations for Underground Storage Facilities Used for Regulated Substances and Hazardous Materials, 250–RICR–140–25–1, (effective November 20, 2018)*

Section 1.1 Purpose.
Section 1.2. Authority.
Section 1.3 Incorporated Materials.
Section 1.4 Applicability, except (E) and (G).
Section 1.5 Definitions.
Section 1.6 Administrative Findings.
Section 1.7 Facility Registration.
Section 1.8 Financial Responsibility, except (D).
Section 1.10 Minimum UST Operation and Maintenance Requirements, except (C), (D), and (F)(4) and (T).
Section 1.11 New and Replacement UST System Requirements, except (B)(1–3) and (5), (C)(1), (J)(1), and (L)(2).
Section 1.12 Facility Modifications or Repairs, except (A).
Section 1.13 Maintaining Records.
Section 1.14 Leak and Spill Response.
Section 1.15 Closure, except (D)(5).
Section 1.16 Approval of Tank and/or Line Tightness Tests, Leak Detection Methods and Licensing Requirements, except (B), (D), (E), (F), (G) and (H).
Section 1.17 Signatories to Registration and Closure Applications.
Section 1.18 Transfer of Certificates of Registration and Closure.

* * * * *

[FR Doc. 2020–25831 Filed 12–10–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2560

[LLAK940000 L14100000.HM0000 20X]

RIN 1004–AE66

Alaska Native Vietnam-Era Veterans Allotments

Correction

In rule document 2020–24954, appearing in the Issue of Friday, November 27, 2020, appearing on pages 75874–75892, make the following changes:

§ 2569.404 (Corrected)

■ 1. In section 2569.404, on page 75889, in the second column, delete the paragraph designation ''(d)'' at the end of the section.

§ 2569.405 (Corrected)

■ 2. In section 2569.405 on page 75889, in the second column, delete the paragraph designation ''(e)'' immediately following the section heading and immediately prior to paragraph designation ''(a)''.

§ 2569.405 (Corrected)

■ 3. In section 2569.405, on page 75889, in the third column, delete the second ''(d)'' immediately after the paragraph designated ''(d)''.

§ 2569.411 (Corrected)

■ 4. In section 2569.411, on page 75890, in the first column, delete the second ''(c)'' immediately after the paragraph designated ''(c)''.

§ 2569.501 (Corrected)

■ 5. In section 2569.501, on page 75891, in the first column, delete the second ''(j)'' immediately after the paragraph designated ''(j)''.

§ 2569.506 (Corrected)

■ 6. In section 2569.506, on page 75892, in the first column, make the second paragraph ''(c)'' into a paragraph ''(d)''.

[FR Doc. C1–2020–24954 Filed 12–10–20; 8:45 am]

BILLING CODE 1300–00–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 201204–0325]

RIN 0648–BJ74

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Coast Groundfish Fishery Management Plan; Amendment 29; 2021–22 Biennial Specifications and Management Measures

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

ACTION: Final rule.

SUMMARY: This final rule establishes the 2021–22 harvest specifications for groundfish taken in the U.S. exclusive economic zone off the coasts of Washington, Oregon, and California, consistent with the Magnuson-Stevens Fishery Conservation and Management Act and the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). This final rule revises the management measures that are intended to keep the total annual catch of each groundfish stock or stock complex within the annual catch limits. These measures are intended to help prevent overfishing, rebuild overfished stocks, achieve optimum yield, and ensure that management measures are based on the best scientific information available. Additionally, this final rule implements Amendment 29 to the PCGFMP, which designates shortbelly rockfish as an ecosystem component species, and changes the trawl and nontrawl allocations for blackgill rockfish within the southern slope complex south of 40°10' North latitude (N. lat.), petrale sole, lingcod south of 40°10′ N lat., and widow rockfish.

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

ADDRESSES:

Electronic Access

This rule is accessible via the internet at the Office of the Federal Register website at *https://www.federalregister.gov/.* Background information and documents including an integrated analysis for this action (Analysis), which addresses the statutory requirements of the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the National Environmental Policy Act, Presidential Executive Order 12866, and the Regulatory Flexibility Act are available at the NMFS West Coast Region website at *https://www.fisheries.noaa.gov/region/west-coast* and at the Pacific Fishery Management Council's website at *http://www.pcouncil.org.* The final 2020 Stock Assessment and Fishery Evaluation (SAFE) report for Pacific Coast groundfish, as well as the SAFE reports for previous years, are also available from the Pacific Fishery Management Council's website at *http://www.pcouncil.org.*

FOR FURTHER INFORMATION CONTACT: Karen Palmigiano, phone: 206–526–4491 or email: *karen.palmigiano@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Harvest Specifications

This final rule sets 2021–22 harvest specifications and management measures for 127 of the 128 groundfish stocks which currently have annual catch limits (ACLs) or ACL contributions to stock complexes managed under the PCGFMP, except for Pacific whiting. Pacific whiting harvest specifications are established annually through a separate bilateral process with Canada. Under Amendment 29, shortbelly rockfish, which was managed with harvest specifications in the most recent biennium (2019–20), will no longer be managed with harvest specifications and will be instead designated as an ecosystem component species.

The overfishing limits (OFLs), acceptable biological catch (ABCs), and ACLs are based on the best available biological and socioeconomic data, including projected biomass trends, information on assumed distribution of stock biomass, and revised technical methods used to calculate stock biomass. See Tables 1a and 2a to Part 660, Subpart C in the regulatory text supporting this rule for the 2021–22 OFLs, ABCs, and ACLs for each stock or stock complex.

A detailed description of each stock and stock complex for which the Council establishes harvest specifications set through this rule can be found in the 2020 SAFE document posted on the Council's website at *http://www.pcouncil.org/groundfish/safe-documents/.* A summary of how the 2021–22 harvest specifications were developed, including a description of off-the-top deductions for tribal, research, incidental, and experimental fisheries, was provided in the proposed rule and is not repeated here. Additional information on the development of these harvest specifications is also provided in the Analysis.

For most stocks, the Council recommended harvest specifications based on the default harvest control rule used in the prior biennium. The Council recommended deviating from the default harvest control rule for four stocks in 2021–2022. Table 1 presents a summary of the changes to the harvest control rules for these four stocks for the 2021–22 biennium. Each of these changes was discussed in the proposed rule and that discussion is not repeated here.

Table 1 -- Changes to Harvest Control Rules for 2021–22 Biennium between the Default Harvest Control Rule used in the 2019-2020 Biennium, and the New Harvest Control Rule, recommended by the Council, and being implemented by NMFS in this Final Rule

Stock	Alternative	Harvest Control Rule	ACL[a/]
Cowcod. south of 40°10' N lat.	Default	ACL=ABC (P*=0.45)	98 mt (2021), 96 mt (2022)
	New Harvest Control Rule	ACL=ABC (P*=0.40)	84 mt (2021), 82 mt (2022)
Oregon Black Rockfish	Default	ACL=ABC (P*=0.45)	479 mt (2021), 472 mt (2022)
	New Harvest Control Rule	ACL=2020 ABC	512 mt (2021), 512 mt (2022)
Sablefish[b]	Default	ACL=ABC (P*=0.40)	ACL North-6,435 mt, South-1,773 mt (2021), ACL North-6,124 mt, South-1,687 mt (2022)
	New Harvest Control Rule	ACL=ABC (P*=0.45)	ACL North- 6,892 mt, South-1,899 mt (2021), ACL North-6,566 mt, South-1,809 mt (2022)
Shortbelly Rockfish	Default	P*=0.40, fixed ACL	500 mt
	New Harvest Control Rule	Designate as an Ecosystem Component Species	N/A

[a/] Default ACL is for 2021 and 2022 under the default harvest control rule, new harvest control rule ACL is for 2021 and 2022 under the Council's recommended harvest specifications.

[b/]The coastwide ABC is apportioned 78.4 percent north of 36° N. lat. (ACL North) and 21.6 percent south of 36° N. lat. (ACL South).

II. Management Measures

This section describes management measures (*i.e.,* biennial fishery harvest guidelines and set-asides) used to further allocate the ACLs to the various sectors of the fishery and to manage the fishery. Management measures for the commercial fishery modify fishing behavior during the fishing year to ensure that catch does not exceed the ACL, and include trip and cumulative landing limits, time/area closures, size limits, and gear restrictions. Management measures for the recreational fisheries include bag limits, size limits, gear restrictions, fish dressing requirements, and time/area closures. Each of these changes was discussed in the proposed rule and that discussion is not repeated here.

A. Deductions From the ACLs

Before making allocations to the primary commercial and recreational components of groundfish fisheries, the Council recommends ''off-the-top deductions,'' or deductions from the ACLs to account for anticipated mortality for certain types of activities: Harvest in Pacific Coast treaty Indian tribal fisheries; harvest in scientific research activities; harvest in non-groundfish fisheries (incidental catch); and harvest that occurs under exempted fishing permits (EFPs). These off-the-top deductions are for individual stocks or stock complexes and can be found in the footnotes to Tables 1a and 2a to part 660, subpart C.

B. Tribal Fisheries

The Quileute Tribe, Quinault Indian Nation, Makah Indian Tribe, and Hoh Indian Tribe (collectively, ''the Pacific Coast Tribes'') implement management measures for Tribal fisheries both independently as sovereign governments and cooperatively with the management measures in the Federal regulations. The Pacific Coast Tribes may adjust their Tribal fishery management measures inseason to stay within the Tribal harvest targets and estimated impacts to overfished stocks. Table 2 provides the Tribal harvest targets for the 2021–22 biennium.

Table 2 -- Tribal Harvest Targets for the 2021–22 Biennium Compared to Those in Place in 2020

Stock	Off the Top Deduction	
	2020 (mt)	2021-2022 (mt)
Arrowtooth Flounder	2,041	2,041
Big Skate	15	15
WA Black Rockfish	18	18
Canary Rockfish	50	50
Darkblotched Rockfish	0.2	0.2
Dover Sole	1,497	1,497
English Sole	200	200
Lingcod N. of 40°10' N. lat.	250	250
Longnose Skate	130	220
Longspine Thornyhead N. of 34°27' N. lat.	30	30
Pacific cod	500	500
Pacific Ocean Perch	9.2	9.2
Pacific whiting	36,251	TBD
Petrale Sole	220	350
Sablefish N. of 36° N. lat.	604	689.2
Shortspine Thornyhead S. of 34°27 N. lat.	50	50
Spiny Dogfish	275	275
Widow rockfish	200	200
Yellowtail Rockfish	1,000	1,000
WA Cabezon/Kelp Greenling	-	2
Nearshore Rockfish North	1.5	1.5
Other Flatfish	60	60
Shelf Rockfish North	30	30
Slope Rockfish North	36	36

C. Biennial Fishery Allocations

The Council recommends two-year trawl and nontrawl allocations during the biennial specifications process for all stocks without formal allocations (as defined in Section 6.3.2 of the PCGFMP) or stocks where the long-term allocation is suspended because the stock is declared overfished. As part of the 2021–22 biennium, the Council also decided to revise the trawl and nontrawl allocations for canary rockfish, as well as Petrale sole, widow rockfish, lingcod south of 40°10′ N lat., and the slope rockfish complex south of 40°10′ N. lat., which were established through Amendment 21 to the PCGFMP (75 FR 32993, June 10, 2010), to better align these allocations with current harvest trends. The changes to these allocations are part of Amendment 29 and were discussed in the Notice of Availability for that amendment (85 FR 54529, September 2, 2020).

The trawl and nontrawl allocations, with the exception of sablefish north of 36° N lat., are based on the fishery harvest guideline. The fishery harvest guideline is the tonnage that remains after subtracting the off-the-top deductions described in Section II, A, entitled ''Deductions from the ACLs,'' in this preamble. The trawl and nontrawl allocations are designed to accommodate anticipated mortality in each sector as well as variability and uncertainty in those mortality estimates. Additional information on the Council's allocation framework and formal allocations can be found in Section 6.3 of the PCGFMP and § 660.55 of the Federal regulations. Trawl and nontrawl allocations are detailed in Tables 1b and 2b in the regulatory text for this rule.

D. Corrections to Waypoints for Rockfish Conservation Areas

Rockfish Conservation Areas (RCAs) are large groundfish area closures intended to reduce the catch of a stock or stock complex by restricting fishing activity at specific depths. The boundaries for RCAs are defined by straight lines connecting a series of latitude and longitude coordinates that approximate depth contours. These sets of coordinates, or lines, are not gear or fishery specific, but can be used in combination to define an area. NMFS then implements fishing restrictions for a specific gear and/or fishery within each defined area. Table 3 below shows the RCA boundaries by gear type in place starting in 2021.

For the 2021–22 biennium, the Council recommended and NMFS is implementing minor adjustments to the 40 fathom (fm) depth contour offshore of San Mateo in Central California, and the 100 fm depth contours off of California to more accurately refine the depth contours, as well as the addition of coordinates to define the 100 fm line around the Channel Islands (Table 3).

Table 3 – Trawl and Non-Trawl RCA Boundaries for 2021

Sector	Area	RCA in effect
Trawl	North of 45°46' N. lat.	100 fm - 150 fm
	South of 45°46' N. lat.	None
Limited entry fixed gear and open access	North of 46°16' N. lat.	shoreline - 100 fm
	46°16' N. lat. - 40°10' N. lat.[1]	30 fm - 40 fm
		40 fm - 100 fm
	40°10' N. lat. - 38°57.5' N. lat.	40 fm – 125 fm
	38°57.5' N. lat. - 34°27' N. lat.	50 fm – 125 fm
	South of 34°27' N. lat.	100 fm - 125 fm (also applies around islands)

[1]Between 46°16' N. lat. and 40°10' N. lat. limited entry fixed gear and open access vessels may only use hook-and-line gear other than bottom longline and dinglebar gear.

E. Limited Entry Trawl

The limited entry trawl fishery is made up of the Shorebased IFQ Program, which includes both whiting and non-whiting targets, and the at-sea whiting sectors. For some stocks and stock complexes with a trawl allocation, an amount is first set-aside for the at-sea whiting sector with the remainder of the trawl allocation going to the Shorebased IFQ Program. Set-asides are not actively managed by NMFS or the Council except in the case of a risk to the ACL.

At-Sea Set-Asides

For several species, the trawl allocation is reduced by an amount set-aside for the at-sea whiting sector. This amount is designed to accommodate catch by the at-sea whiting sector when they are targeting Pacific whiting. The Council recommended and NMFS is implementing the set-asides in Table 4 for the 2021–22 biennium.

Table 4 -- 2021–22 At-sea Set-asides for Vessels Targeting Pacific Whiting While Fishing as Part of the At-sea Sector

Stock or Stock Complex	Area	At-sea Set Aside Amount (mt)
Arrowtooth Flounder	Coastwide	70
Canary rockfish	Coastwide	36
Darkblotched rockfish	Coastwide	76.4
Dover sole	Coastwide	10
Lingcod	N. of 40°10' N. lat.	15
Longnose skate	Coastwide	5
Minor shelf rockfish	N. of 40°10' N. lat.	35
Minor slope rockfish	N. of 40°10' N. lat.	300
Other flatfish	Coastwide	35
Pacific halibut [b/]	Coastwide	10
Pacific ocean perch	N. of 40°10' N. lat.	300
Petrale sole	Coastwide	5
Sablefish	N. of 36° N. lat.	100
Shortspine thornyhead	N. of 34°27' N. lat.	70
Widow rockfish	Coastwide	476
Yellowtail rockfish	N. of 40°10' N. lat.	320

Incidental Trip Limits for IFQ Vessels

For vessels fishing in the Shorebased IFQ Program, with either groundfish trawl gear or nontrawl gears, the following incidentally-caught stocks are managed with trip limits: Minor Nearshore Rockfish north and south, black rockfish, cabezon (46°16′ to 40°10′ N lat. and south of 40°10′ N lat.), spiny dogfish, shortbelly rockfish, big skate, Pacific whiting, and the Other Fish complex. For all these stocks, except big skate, this rule is implementing the same IFQ fishery trip limits for these stocks for the 2021–22 biennium as those in place in 2020. For big skate, the Council recommended, and NMFS is implementing, an unlimited trip limit at the start of 2021. Additionally, the Council recommended and NMFS is implementing a trip limit for blackgill rockfish within the southern slope rockfish complex. The trip limit is unlimited to start the 2021 fishing year. The purpose of the blackgill trip limit is to allow the Council to reduce targeting

of blackgill rockfish inseason, if needed. Trip limits for the IFQ fishery can be found in Table 1 North and Table 1 South to part 660, subpart D in the regulatory text of this rule. Changes to trip limits for the IFQ fishery are considered a routine measure under § 660.60(c), and may be implemented or adjusted, if determined necessary, through inseason action.

F. Limited Entry Fixed Gear and Open Access Nontrawl Fishery

Management measures for the Limited Entry Fixed Gear (LEFG) and Open Access (OA) nontrawl fisheries tend to be similar because the majority of participants in both fisheries use hook-and-line gear. Management measures, including area restrictions (*e.g.,* nontrawl RCA) and trip limits in these nontrawl fisheries, are generally designed to allow harvest of target stocks while keeping catch of overfished stocks low. For the 2021–22 biennium, the Council recommended, and NMFS is implementing, increased trip limits for almost all LEFG and OA fisheries, many of which were first implemented decades ago and do not reflect stocks that rebuilt in previous biennium or other management changes (*e.g.,* stock complex reorganizations). LEFG and OA trip limits are specified in Table 2 (North), Table 2 (South) to subpart E for LEFG and in Table 3 (North) and Table 3 (South) to subpart F for OA in the regulatory text of this rule.

Sablefish Trip Limits

Sablefish are managed separately north and south of 36°N lat. For the portion of the stock north of 36°N lat., the Council recommended and NMFS is implementing higher trip limits for the LEFG and OA fisheries in 2021. For the portion south of 36°N lat., the Council recommended, and NMFS is implementing, removing the daily trip limit for the OA fishery but maintaining the same weekly and bimonthly trip limits as were in place in the start of 2020. The sablefish trip limits for 2021–22 are shown in Table 5.

Table 5 -- Sablefish Trip Limits for Limited Entry and Open Access Sectors North and South of 36° N. lat.

Sector	Area	Jan-Feb	Mar-Apr	May-Jun	Jul-Aug	Sept-Oct	Nov-Dec
Limited entry	north of 36° N. lat.	1,700 lb (771 kg)/week; not to exceed 5,100 lb (2,313 kg) per two months					
	south of 36° N. lat.	2,500 lb (1,134 kg) per week					
Open Access	north of 36° N. lat.	600 lb (272 kg) per day, or one landing per week up to 2,000 lb (907 kg), not to exceed 4,000 lb (1,814 kg) per two months					
	south of 36° N. lat.	2,000 lb (907 kg) per week; not to exceed 6,000 lb (2722 kg) per two months					

LEFG and OA Trip Limits

The Council recommended, and NMFS is implementing, higher trip limits for LEFG and OA fisheries in 2021, including trip limits for shortspine thornyhead, longspine thornyhead, widow rockfish, shelf rockfish, shortbelly rockfish, canary rockfish, Pacific ocean perch, yellowtail rockfish, slope rockfish, darkblotched rockfish, Lingcod, nearshore rockfish, black rockfish, Other Flatfish, bocaccio south of 40°10′ N lat., and chilipepper rockfish.

As discussed in the proposed rule for this action (85 FR 62492; October 2, 2020), the Council recommended establishing an OA trip limit for shortspine and longspine thornyheads in the area between 40°10′ N lat. and 34°27′ N lat. Therefore, NMFS is implementing a 50 lb (22.7 kg) per month limit for OA fisheries targeting shortspine and longspine thornyheads in the area between 40°10′ N lat. and 34°27′ N lat.

Primary Sablefish Tier Limits

Some limited entry fixed gear permits are endorsed to receive annual sablefish quota, or tier limits. Vessels registered with one, two, or up to three of these permits may participate in the primary sablefish fishery. The tier limits are as follows: In 2021, Tier 1 at 58,649 lb (26,602 kg), Tier 2 at 26,659 lb (12,092 kg), and Tier 3 at 15,234 lb (6,910 kg). For 2022 the limits are: Tier 1 at 55,858 lb (25,337 kg), Tier 2 at 25,390 lb (11,517 kg), and Tier 3 at 14,509 lb (6,581 kg).

Yellowtail Trip Limit for the Salmon Troll Fishery North and South of 40°10′ N Lat.

The Council recommended and NMFS is implementing an increase to the yellowtail rockfish limit in the salmon troll fishery north of 40°10′ N lat. from 200 lbs (91 kg) to 500 lbs (227 kg) and removing the ratio for yellowtail to salmon.

The Council also recommended, and NMFS is implementing, a yellowtail rockfish trip limit in the salmon troll fishery south of 40°10′ N lat. of 1 lb (0.45 kg) of yellowtail rockfish for every 2 lbs (0.9 kg) of Chinook salmon landed, with a cumulative limit of 200 lb (91 kg) per month, both within and outside of the RCA. This second change was included in the regulatory text of the proposed rule. However, the description

of this change was inadvertently left out of the preamble. This was highlighted by a commenter during the public comment period. See Comment 4 in Section III, entitled ''Response to Comments.''

Removal of Other Flatfish Gear Restriction Off California

The Council recommended and NMFS is removing the gear restrictions for the LEFG and OA fisheries targeting stocks in the Other Flatfish complex inside the nontrawl RCA south of 42° N lat.

Nontrawl RCA Adjustments

In addition to increasing the LEFG and OA trip limits, the Council recommended and NMFS is implementing the following changes to the Nontrawl RCA off Oregon and Washington:

- Between 40°10′ N lat. and 46°16′ N lat. (the Oregon-Washington border): Open the area between the 30- and 40-fm management lines to hook-and-line gear except bottom longline and dinglebar, as defined in the ''general definitions'' section of the Federal regulations at 50 CFR 660.11;
- Between 38°57.5′ N lat. and 34°27′ N lat., (Point Arena to Point Conception): Open the area between 40 fm and 50 fm; and
- South of 34°27′ N lat.: Open the area between 75 fm and 100 fm.

These changes, along with the changes to recreational conservation areas (discussed in Section II, H., Recreational Fisheries) will provide much needed access to these areas for the LEFG and OA fisheries to better attain their trip limits. Nontrawl RCA closures can be found in the LEFG and OA trip limits in Table 2 (North), Table 2 (South) to subpart E for LEFG and in Table 3 (North) and Table 3 (South) to subpart F for OA in the regulatory text of this rule.

New Management Line at 38°57.5′ N Lat.

In order to make some of the changes to the Nontrawl RCA, the Council also recommended and NMFS is implementing a new management line at 38°57.5′ N lat., which is Point Arena, California. Point Arena is already defined in Federal regulations under the definition for North-South Management Areas, as a commonly used geographic coordinate.

H. Recreational Fisheries

This section outlines the recreational fisheries management measures for 2021–22. Washington, Oregon, and California each proposed, the Council recommended, and NMFS is implementing different combinations of seasons, bag limits, area closures, and size limits for stocks targeted in recreational fisheries.

Washington

This rule implements the following season structure in Table 6.

Table 6 -- Washington Recreational Fishing Season Structure

Marine Area	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
3 and 4 (North Coast)	Closed		Open		Open<20 fm June 1-August 31 [a/ b/]				Open		Closed	
2 (South Coast)	Closed		Open [c/d/]			Open [d/]					Closed	
1 (Columbia River)	Closed		Open [e/ f/]								Closed	

a/ Retention of lingcod, Pacific cod and sablefish allowed >20 fm on days when Pacific halibut is open.
b/ Retention of yellowtail and widow rockfish is allowed > 20 fm in July.
c/ From May 1 through May 31 lingcod retention prohibited > 30 fathoms except on days that the primary halibut season is open.
d/ When lingcod is open, retention is prohibited seaward of line drawn from Queets River (47°31.70' N. lat. 124°45.00' W. Lon.) to Leadbetter Point (46° 38.17' N. lat. 124°30.00' W. Lon.), except on days open to the primary halibut fishery and, June 1 – 15 and September 1 - 30.
e/ Retention of groundfish allowed during the all-depth Pacific halibut fishery. Lingcod retention is only allowed north of the WA-OR border with halibut on board.
f/ Retention of lingcod is prohibited seaward of a line drawn from Leadbetter Point (46° 38.17' N. lat. 124°21.00' W. Lon.) to 46° 33.00' N. lat. 124°21.00' W. Lon. year round except lingcod retention is allowed from June 1 - June 15 and Sept 1 - Sept 30.

The aggregate groundfish bag limits in waters adjacent to Washington will continue to be nine fish in all areas with a sub-bag limit for cabezon (one per day), rockfish (seven per day), and lingcod (two per day). The flatfish limit will be five fish, and is not counted towards the groundfish bag limit of nine but is in addition to it.

Consistent with the 2019–20 biennium, the Council recommended and NMFS is implementing to continue to prohibit recreational fishing for groundfish and Pacific halibut inside the North Coast Recreational Yelloweye Rockfish Conservation Area (YRCA), a C-shaped closed area off the northern Washington coast. However, the Council recommended and NMFS is implementing opening the South Coast Recreational YRCA and the Westport Offshore YRCA to recreational fishing for the 2021–22 biennium. Coordinates for YRCAs are defined at § 660.70.

Oregon

The Council recommended, and NMFS is implementing, an all months all depths season structure for the Oregon recreational fishery to start the 2021 fishing year. The Council recommended, and NMFS is implementing, the following aggregate bag and size limits: Three lingcod per day, with a minimum size of 22 in (56 cm); 25 flatfish per day, excluding

Pacific halibut; and a marine fish aggregate bag limit of 10 fish per day, where cabezon have a minimum size of 16 in (41 cm).

As part of the 2021–22 biennium, the ODFW also requested that the Council consider allowing longleader gear fishing and ''all-depth'' Pacific halibut fishing on the same trip, which is currently prohibited. Therefore, the Council recommended, and NMFS is removing the prohibition on combining Oregon longleader trips with all depths halibut trips.

California

Table 7 shows the season structure and depth limits by California management area for 2021 and 2022.

Table 7 – California Season Structure and Depth Limits by Management Area for 2021 and 2022

Management Area	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Northern (42° N. lat. to 40°10' N. lat.)	CLOSED				May 1-October 31 <30 fm						All Depths	
Mendocino (40°10' N. lat. to 38°57.50' N. lat.)	CLOSED				May 1-October 31 <30 fm						All Depths	
San Francisco (38°57.50' N. lat. to 37°11' N. lat.)	CLOSED				April 1-December 31 <50 fm							
Central (37°11'N. lat. to 34°27' N. lat.)	CLOSED				April 1-December 31 <50 fm							
Southern (South of 34°27' N. lat)	CLOSED				March 1-December 31 <100 fm							

The Council recommended, and NMS is implementing, size limits that are the same in 2021 as they were for 2020 for all stocks. However, the Council recommended and NMFS is eliminating the sub-bag limits for black rockfish, canary rockfish, and cabezon, and NMFS is implementing a sub-bag limit for vermillion rockfish of five fish.

III. Response to Comments

NMFS received nine unique comment letters during the public comment period on the proposed rule (October 2, 2020 through November 2, 2020). Two state agencies submitted comments, the California Department of Fish and Wildlife (CDFW) and the Oregon Department of Fish and Wildlife (ODFW). The letters from the state agencies included requests for clarifications on information included in the preamble to the proposed rule, noted several small errors and inconsistencies in the regulatory text of the proposed rule, and also provided more substantive comments. The Northwest Fisheries Science Center (NWFSC) also submitted a comment noting an error. NMFS has addressed those small errors and inconsistencies in Section IV, ''Corrections to the Proposed Rule.'' The more substantive comments are addressed below.

The seven other comment letters were from private citizens and non-governmental organizations (NGOs). Two of those letters made comments that were outside the scope of this action and are not addressed here. Four letters were received from members of industry and made substantially similar comments. The responses to these comments have been grouped together and addressed below. The remaining comment letter contained substantive comments. NMFS addresses all substantive comments below. Changes from the proposed rule as a result of substantive comments received during the comment period are addressed in Section V, ''Changes to the Proposed Rule.''

Comment 1: Two commenters stated their support for the at-sea set-aside values.

NMFS Response: We agree and appreciate the collaborative work undertaken by the members of different sectors of the Pacific whiting fishery to come together to develop a proposal for the at-sea set-aside values for the 2021–22 biennium. Collaborative work always delivers a better product, and we hope this type of collaboration will continue into future harvest specification cycles.

Comment 2: Three commenters stated their support for Amendment 29 and the designation of shortbelly rockfish as an ecosystem component species based on extensive discussion over several meetings at the Council and based on the best available science.

NMFS Response: We agree that the Council has spent significant time over the past two years in order to develop the best approach to managing shortbelly rockfish based on the best available science and in a way in which it will not significantly impact industry or the resource.

Comment 3: One commenter stated their support for the changes in Amendment 29 to the trawl and nontrawl allocations for blackgill rockfish south of 40°10 N lat., petrale sole, lingcod south of 40°10 N lat., and widow rockfish, and for keeping blackgill rockfish in the slope rockfish complex south of 40°10 N lat.

NMFS Response: We agree with the changes in Amendment 29 to the trawl and nontrawl allocations for these species. These changes better reflect the current distribution of catch and will likely allow more of the ACLs for these stocks and the stock complex to be

caught, resulting in more economic benefit to the fishing communities without significantly impacting the resources.

Comment 4: One commenter stated that the discussion in the proposed rule for yellowtail trip limits in the salmon troll fishery north of 40°10″ N lat. neglected to include any discussion on the change for the salmon troll fishery south of 40°10′ N lat.

NMFS response: We agree. The commenter is correct that the discussion of the yellowtail trip limits in the salmon troll fishery south of 40°10′ N lat. was inadvertently left out of the preamble of the proposed rule. Therefore, in this final rule, we updated the heading and added a discussion of the rationale for the regulatory change, as now found above, under the subheading ''Yellowtail Trip Limits in the Salmon Troll Fishery North and South of 40°10′ N lat.'' in Section II, ''Management Measures,'' paragraph ''F. Limited Entry Fixed Gear and Open Access Nontrawl Fishery''.

Comment 5: One commenter stated that the regulatory text of the proposed rule for the removal of the gear restriction for other flatfish gear in the open access fishery correctly reflected the changes in the trip limit tables for south of 40°10′ N lat., but neglected to include this change in Table 1 for the open access fishery between 40°10′ and 42° N lat. The Council intended to remove this restriction for the entire state of California (south of 42° N lat.). Therefore, the change should also be, made in both Tables 2 North and South for the open access fishery.

NMFS response: We agree. The proposed rule inadvertently left in the gear restrictions for other flatfish gear for the open access fishery for the area between 40°10′ and 42° N lat. in Table 2 North. Therefore, Table 2 North in the regulatory text of this final rule has been corrected to reflect that this change was made for the entire state of California (south of 42° N lat.).

Comment 6: One commenter stated their concern with allowing vessels to fish with hook and line gears, except dinglebar and longline, in the RCA between 42° N lat. and 40°10′ N lat. and 30 fm to 40 fm. The commenter is concerned that having differential gear allowances within the nontrawl RCA will complicate enforcement in these areas, particularly without the addition of a new declaration to clarify if a vessel was fishing with hook and line gear, but not fishing with longline or dinglebar gear. Additionally, because the Council is also removing the limitation on the number and size of hooks allowed by the open access fishery when fishing for other flatfish inside the RCAs off California, the commenter is concerned about the compounded impacts by removing these two provisions at once.

NMFS response: We disagree that the change to allow vessels using hook and line gears, except dinglebar and bottom longline gear, to fish between 30 fm and 40 fms in this area will cause confusion and complication amongst members of law enforcement. The Council's Groundfish Management Team (GMT) has worked with the Council's Enforcement Committee and NMFS' Office of Law Enforcement (OLE) to ensure that there are no enforcement issues associated with this action. Although the Council did not recommend and NMFS is not implementing changes to the declarations so that vessels can declare hook and line gear that is not dinglebar or longline, this does not appear to be an issue. In recent years, vessels have been notifying NMFS OLE when making declarations of the type of hook and line gear used when making their declaration for hook and line gears. Additionally, in recent years, the total number of vessels that have used bottom longline or dinglebar gear versus other types of hook-and-line gear have been a small proportion of the total landings, because other gears are more efficient for the types of species targeted. For example, for vessels targeting lingcod between 2017 and 2019, 20.7 percent of landings by commercial non-trawl gear were taken by bottom longline and 78.6 percent were taken by other hook-and-line gears. For midwater shelf rockfishes (*i.e.,* yellowtail, canary, widow, vermillion and other rockfishes that occur on the shelf), 37.3 percent was taken by bottom longline compared to 62.7 percent taken by other hook-and-line gears. In addition, based on conversations with NMFS OLE, of the other hook-and-line gears being used, only about five vessels use dinglebar gear annually. Therefore, NMFS also does not have concerns over the allowing the use of hook and line gear, except bottom longline or dinglebar, in the nontrawl RCA between 42° N lat. and 40°10′ N lat.

Comment 7: Two commenters stated their opposition to the Council's recommendation and NMFS's proposal to designate shortbelly rockfish as an ecosystem component species beginning with the 2021–22 biennium. In stating their opposition, the commenters raised multiple issues, and we provide a response for each stated issue below.

Shortbelly Rockfish Issue 1: Shortbelly rockfish must remain in the fishery because the species is in need of conservation and management.

NMFS Response: We disagree. Section 302(h)(1) of the Magnuson-Stevens Act requires a Council to prepare an FMP for each fishery under its authority that is in need of conservation and management. ''Conservation and management'' is defined in section 3(5) of the Magnuson-Stevens Act. The National Standard guidelines at § 600.305(c) provide direction for determining which stocks will require conservation and management and provide direction to regional councils and NMFS for how to consider these factors in making this determination. First, NMFS must consider whether the stocks are ''predominately caught in Federal waters and are overfished or subject to overfishing, or likely to become overfished or subject to overfishing.'' 50 CFR 600.305(c). Such stocks require conservation and management. If a stock is not likely to become overfished or be subject to overfishing, Councils may still decide that it is appropriate for conservation and management. The guidelines direct regional fishery management councils and NMFS to consider a non-exhaustive list of ten factors when deciding whether stocks require conservation and management. After considering the 10 factors, based on the best available science, the Council recommended and NMFS is implementing designating shortbelly rockfish as an ecosystem component species.

Conservation and management, as defined under the MSA and the National Standard guidelines, is needed when a stock must be rebuilt, restored, or to maintain the status of a stock. Shortbelly rockfish is not under a rebuilding status, and it is not overfished, subject to overfishing or likely to become overfished or subject to overfishing. Stock status was estimated during the last stock assessment to be above 73 percent of the unfished biomass, and less than 20 percent of the ABC has been taken annually in the past several years; these metrics indicate the stock does not need to be rebuilt or restored. Over the past 10 years the population has remained constant and likely has even increased in abundance, with new information suggesting that the population could be booming. As was discussed in the Analysis, based on multiple strong incoming year-classes and as supported by current scientific literature, the shortbelly rockfish stock is expected to thrive for at least the next decade or so.

We agree with the commenter that shortbelly rockfish are an important forage species and are increasingly caught in federally managed fisheries. However, these factors are not

determinative that a stock is in need of conservation and management as defined under the MSA. Nor do these factors disqualify a stock from being designated an ecosystem component species. Because there is no directed fishing and incidental fishing-related mortality has been low in comparison to the ABC, it is very unlikely that catch would exceed the overfishing limit for shortbelly rockfish, resulting in shortbelly rockfish becoming overfished and in need of rebuilding. There are no known conservation concerns for shortbelly rockfish, since they are not targeted (shortbelly are primarily caught as bycatch in the Pacific whiting fishery), are not profitable, and future uses of shortbelly rockfish remain unavailable. Therefore, maintaining shortbelly rockfish as a target species in the PCGFMP is not likely to change stock condition. As discussed in the Council meetings, Council reports, and the Analysis, after reviewing each of the ten factors, the Council recommended and NMFS agrees that shortbelly rockfish are not in need of conservation and management, as defined by the MSA.

Finally, we disagree with the requester that designating shortbelly rockfish as an ecosystem component species would prevent NMFS from addressing bycatch in the future, should that become an issue. As stated in the scope of the action in the Analysis, the Council has the ability to change the designation of a stock or stock complex every biennium based on new information. While we agree that we are unable to predict whether or not this fishery will become a target in the future, designating shortbelly rockfish as an ecosystem component species does not mean that NMFS will not monitor the stock or be unable to revisit that designation. Catch of shortbelly rockfish will continue to be reported on fish tickets and that catch data is available to the public on a daily basis through the Pacific Fisheries Information Network (PacFIN) database.[1] Additionally, the Council has already tasked the Council's GMT with providing updates at each Council meeting on the current catch of shortbelly rockfish. If bycatch of the stock starts to increase or a fishery for the stock were to begin to develop, the Council would have the ability to take action to reevaluate the designation of shortbelly rockfish. In the event that the stock becomes in need of conservation and management, the Council would have the obligation to include it in the PCGFMP.

Shortbelly Rockfish Issue 2: Shortbelly rockfish play a vital role in the California current ecosystem.

NMFS Response: We agree. As discussed in the Analysis, shortbelly rockfish is a vital species in the California Current Ecosystem. However, while importance in the marine ecosystem is one of the factors we consider, it alone is not determinative of whether a stock is in need of conservation and management as defined under the MSA. In recommending Amendment 29, the Council relied on the best available science, which indicated increased stock abundance in recent years, to determine that there was a lack of a need for conservation and management of this stock in the 2021–22 biennium. Recent scientific literature indicates that the increased abundance due to high recruitment in 2013 (51 times higher than in 2014) and 2014 (1,750 times higher than 2005) and the extension of the stock's range into more northern waters where Pacific whiting is targeted likely resulted in the higher bycatch in 2018 and 2019 (Agenda Item H.6.a, GMT Report 2, November 2019). Even with the higher bycatch of shortbelly rockfish in recent years, total shortbelly rockfish catch has stayed below 50 percent of the stock's OFL and less than 75 percent of the stock's ABC since 2011. There is no evidence to demonstrate that these catch trends would increase exponentially under an ecosystem component species designation.

The commenters also stated their specific concerns for the marbled murrelet in California, Oregon, and Washington, as the species is listed as threatened under the Endangered Species Act (ESA), and for the California least tern, which is listed as endangered. On May 2, 2017, the U.S. Fish and Wildlife Service (FWS) issued a biological opinion (2017 biological opinion) concurring with NMFS that the fishery is not likely to adversely affect the marbled murrelet or California least tern, among other species, because adverse interactions with vessels and forage depletion are extremely unlikely to occur. Notably, the FWS concluded that small pelagic rockfish, including shortbelly rockfish, are expected to increase in abundance during the continued operation of the groundfish fishery. This action is not expected to change the conclusions from the 2017 biological opinion, because it does not modify the action analyzed in that opinion in a manner or to an extent that would cause an effect to listed species or critical habitat that was not previously considered =.

Shortbelly Rockfish Issue 3: NMFS has not shown that reclassifying shortbelly rockfish as an ecosystem component species would prevent overfishing.

NMFS Response: We disagree. National Standard 9 provides that ''[c]onservation and management measures shall, to the extent practicable: (1) Minimize bycatch; and (2) To the extent bycatch cannot be avoided, minimize the mortality of such bycatch.'' Designating shortbelly rockfish does not impair the PCGFMP's ability to meet this requirement. All of the PCGFMP's bycatch reduction components are unaffected by this action. Furthermore, there is no evidence to suggest that bycatch of shortbelly rockfish will increase due to this action.

There is no evidence to suggest that designating shortbelly rockfish as an ecosystem component species would result in a significant increase in catch. As has been discussed by members of industry at every Council meeting since November 2018, and as was also stated in the Analysis, the proposed rule, and the NOA for this action, industry has significant incentives not to catch shortbelly rockfish. Currently, shortbelly rockfish prices for processing are extremely low and often don't cover the cost of the vessel to catch and deliver the shortbelly rockfish. Shortbelly rockfish can also clog nets and may spoil Pacific whiting catch. There are no known conservation concerns for shortbelly rockfish since they are not targeted, are not profitable, and future uses of shortbelly rockfish remain unavailable. Therefore, the incentives exist to avoid shortbelly rockfish, and there is no indication that changing the designation of this stock will alter these incentives.

In the future, if there were indications of bycatch of shortbelly rockfish at significantly higher levels than what has been caught in recent years, the Council would be able to revisit the ecosystem component species designation. The Council has previously done exactly this for big skate. The Council designated big skate as an ecosystem component species in the 2017–18 biennium, but after catch of big skate began to increase, the Council re-designated big skate as a stock that is in need of conservation and management in the 2019–20 biennium. As discussed above and below, designation of shortbelly rockfish as an ecosystem component species does not preclude NMFS or the Council from monitoring the stock or taking action to minimize

[1] *https://reports.psmfc.org/pacfin/f?p=501:1000:13391209073431:::::.*

bycatch, if necessary. Catch of shortbelly rockfish will continue to be reported, and that catch data is available publicly through the PacFIN database.

Shortbelly Rockfish Issue 4: Removing all management measures to constrain or reduce shortbelly rockfish bycatch ignores NMFS' ongoing mandate to reduce bycatch.

NMFS Response: We disagree. Designating shortbelly rockfish as an ecosystem component species does not preclude the Council from monitoring catch of shortbelly rockfish or developing management measures to reduce bycatch, if necessary. As stated in the 2020 SAFE document and at § 600.305(c)(5), consistent with National Standard 9, MSA section 303(b)(12), and other applicable MSA sections, management measures can be adopted in order to, for example, collect data on the ecosystem component species, minimize bycatch or bycatch mortality of ecosystem component species, protect the associated role of ecosystem component species in the ecosystem, and/or to address other ecosystem issues. Further, the PCGFMP clarifies that ecosystem component species should be monitored to the extent that any new pertinent scientific information becomes available (*e.g.,* catch trends, vulnerability, etc.) to determine changes in their status or their vulnerability to the fishery. In making its decision in June 2020 to recommend designating shortbelly rockfish as an ecosystem component species, the Council specifically noted that catch of shortbelly rockfish would continue to be monitored by the Council's GMT, and inseason catches will be reported out to the Council at each meeting using the species scorecard. Therefore, in the event that bycatch of shortbelly rockfish does increase significantly in the future, the Council will be notified and will have the ability to adopt management measures in order to minimize bycatch of shortbelly rockfish while it is an ecosystem component species. In designating shortbelly rockfish as an ecosystem component species, the Council still has the ability to recommend, and NMFS can still implement, management measures for shortbelly rockfish to address high bycatch in the future.

The most recent scientific literature indicates that population abundance has increased, accompanied by a northern range expansion. These changes are the most likely explanation for the increased bycatch levels since 2018. Following the ACL (the ACL is a harvest specification) overages in 2018 and 2019, the Council considered this issue extensively and was unable to conclude that any specific management measure would prevent the ACL overages, largely because the stock is not directly targeted and industry already has significant incentives to avoid the stock. However, even without effective management measures, bycatch of shortbelly rockfish has remained less than 50 percent of the stock's OFL. Because of the increasing abundance of the stock and the lack of apparent management measures which will maintain or improve stock status, the Council recommended, and NMFS is implementing, designating shortbelly rockfishas an ecosystem component species.

Shortbelly Rockfish Issue 5: Designating shortbelly rockfish as an ecosystem component species ignores the best available science.

NMFS Response: We disagree. The Council recommended and NMFS is implementing designation of shortbelly rockfish as an ecosystem component species based on the best available peer-reviewed scientific information. The Council and NMFS relied on the most recent and best information available to make determinations on the management of shortbelly rockfish. This information is extensively documented throughout the record of Council meetings discussing shortbelly rockfish since 2018, including Council discussions, advisory body reports and meeting briefing books, and in the Analysis for this rule.

Shortbelly Rockfish Issue 6: As applied to shortbelly rockfish, the regulations authorizing NMFS to designate ecosystem component species violate the Magnuson-Stevens Act.

NMFS Response: We disagree. After extensive analysis and consideration of the best available scientific information and public comment, the Council recommended, and NMFS is implementing, designation of shortbelly rockfish as an ecosystem component species for the 2021–22 biennium. Since 2018, the Council and its advisory bodies have considered this issue extensively, as documented in Council discussion, briefing books and advisory body reports. Both the Council and NMFS have extensively discussed and analyzed the best way to conserve and manage shortbelly rockfish. The most recent information on stock abundance, the likely extension of the stock into northern waters, the lack of a targeted fishery, and the existing disincentives for industry to catch shortbelly rockfish all support the designation of shortbelly rockfish as an ecosystem component species. As discussed above, designation as an ecosystem species does not preclude the Council from monitoring catch of the stock, adopting management measures to reduce bycatch, or revisiting the designation.

Shortbelly Rockfish Issue 7: NMFS must consult on the designation of shortbelly rockfish as an ecosystem component species as it may affect ESA-listed species.

NMFS Response: We disagree that additional consultation is needed due to the designation of shortbelly rockfish as an ecosystem component species for the 2021–22 biennium. As discussed above, the USFWS issued the 2017 biological opinion regarding the effects of the continued operation of the Pacific Coast groundfish fishery (which includes shortbelly rockfish) on California least tern, southern sea otter, bull trout, marbled murrelet, and short-tailed albatross. This action is not expected to change the conclusions of the 2017 biological opinion because it does not modify the action analyzed in that opinion in a manner or to an extent that would cause an effect to listed species or critical habitat that was not previously considered . On December 11, 2017, NMFS issued a biological opinion finding that the effects of the continued operation of the Pacific Coast groundfish fishery is likely to adversely affect, but is not likely to jeopardize, the continued existence of the following listed salmon evolutionarily significant units: Puget Sound Chinook, Snake River Fall Chinook, Lower Columbia River Chinook, Upper Willamette River Chinook, Snake River spring/summer Chinook, California Coastal Chinook, Lower Columbia River Coho, Oregon Coast Coho, Southern Oregon/Northern California coho, and Central California Coast coho. This action does not modify the action analyzed in the December 2017 biological opinion in a manner that may affect listed species in a manner or to an extent not previously considered.

Shortbelly Rockfish Issue 8: Designating shortbelly rockfish as an ecosystem component species could result in the deprioritization of it as a stock to be assessed as part of the 2023–24 biennium.

NMFS Response: We neither agree nor disagree. The Council has adopted a list of candidate stocks for assessment in 2023 for which shortbelly rockfish is included. The Council will make a final decision on this candidate list in June 2022. While we do not know what decision the Council will ultimately make, we have no indication that the Council will remove shortbelly rockfish from this list based on designation as an ecosystem component species. There is no requirement that the Council prioritize only those stocks that are in need of conservation and management

for stock assessments. We anticipate that the Council will continue to weigh all options and needs when finalizing their prioritized list of stocks to be assessed for the 2023–24 biennium.

IV. Corrections to the Proposed Rule

NMFS received comment letters from the NWFSC, the CDFW, and the ODFW noting inaccuracies in information presented in the preamble to the proposed rule. NMFS offers the following corrections in this final rule. These clarifications and corrections to the information described in the preamble to the proposed rule do not change the substance or intent of this action. Where necessary, corrections to harvest specifications numbers in the preamble have been carried through to the regulatory text of this final rule.

Table 1 in the preamble of the proposed rule was not labeled correctly. Instead of being labeled as the ''Old and New σ Values for Category 1–3 Stocks Over a 10-Year Period'' the table should have been labeled, ''A Comparison of the Old and New Scientific Uncertainty Reductions for P*=0.45''. These percentages represent the buffer between the OFL, given a P* value of 0.45, and the ABC.

Table 2 in the preamble, and subsequent discussion thereafter, provided incorrect values for the ACLs for sablefish north and south of 36° N lat. and the coastwide apportionment of the ABC for sablefish south of 36° N lat. It was determined during review of the Analysis that these errors were the result of typographical errors in the Council's background material. The errors were not carried through to the calculations for allocations made below the ACLs. The Council recommended these technical changes be made at their September 2020 meeting. Therefore, this final rule corrects the Sablefish ACLs and the Sablefish apportionment, as follows:

Table 8 -- Incorrect and Corrected Values for Sablefish ACLs and Sablefish Apportionment for the 2021-22 biennium

Year	Area	Incorrect ACLs used in the Proposed Rule	Correct ACLs
2021	N. of 36° N. lat.	6,479 mt	6,892 mt
	S. of 36° N. lat.	6,172 mt	6,566 mt
2022	N. of 36° N. lat.	2,312 mt	1,899 mt
	S. of 36° N. lat.	2,203 mt	1,809 mt

On page 62495 of the proposed rule, the section header, entitled ''C. Proposed ACLs for 2019 and 2020'', used the incorrect years; the title should have used the correct years, 2021 and 2022.

On page 62498 of the proposed rule, the section header entitled ''D. Summary of ACL Changes from 2019 to 2021–22'', used the incorrect year. The year 2019 was incorrect and should have read 2020.

Table 5—ACLs for Major Stocks for 2020, and 2021–22, on page 62499 of the proposed rule, included incorrect values for the ACL for Nearshore Rockfish North. These number should be 79 mt and 77 mt for 2021 and 2022, respectively.

In the proposed rule, there were two tables labeled as ''Table 9'': Table 9—2021 and 2022 Allocations of Canary Rockfish on page 62502, and Table 9—2021 and 2022 Trawl/NonTrawl Allocations of Cowcod on page 62503. The second Table 9 for cowcod should have been numbered as Table 10.

In the proposed rule's Table 9—2021 and 2022 Trawl/NonTrawl Allocations of Cowcod on page 62502, the nontrawl and trawl allocation values were transposed. They should have been 32 mt for the non-trawl fishery and 18 mt for the trawl fishery in both 2021 and 2022. In Table 10 of this final rule, these values have been updated to reflect the correct allocations.

In the proposed rule's Table 10—2021 and 2022 Trawl/Nontrawl Allocations of Lingcod south of 40°10′ N lat. on page 62503, the allocations for trawl and non-trawl were transposed. The nontrawl allocation should be 653.4 mt for 2021 and 695.4 mt for 2022. The trawl allocation should be 435.6 mt in 2021 and 463.6 mt in 2022. The correct allocations can be found in Table 11 of this final rule.

In the proposed rule's Table 19—Proposed Season Structure and Depth Limits by Management Area for 2021 and 2022 on page 62509, for the southern management area, the depth limit was incorrectly listed as <50 fm which was the same depth for the two areas north of the southern management area (San Francisco and Central management areas). This depth was inadvertently carried through to the southern management area. However, the depth limit should be <100 fm, as recommended by the Council. The correct value is included in Table 20 of this final rule.

The CDFW and the ODFW also highlighted several technical errors in the regulatory text of the proposed rule. These technical errors are discussed below, and are corrected in the regulatory text of this final rule, but do not change the substance of this final rule.

In Table 1a, Subpart C—2021 Specifications of OFL, ABC, ACL, ACT, and Fishery HG in the regulatory text, in footnote ''h'' for bocaccio on page 62515, the nearshore and non-nearshore allocation listed was the allocation for 2022 (315.7 mt) instead of for 2021 (320.2 mt). In this final rule, the same table contains the corrected allocation, 320.2 mt for 2021.

In Table 1a, Subpart C—2021 Specifications of OFL, ABC, ACL, ACT, and Fishery HG in the regulatory text of the proposed rule, in footnote ''aa'' for sablefish south of 36° N. lat. on page 62517, the percentage of the coastwide catch was shown as 21.5 percent. This number has been corrected in this final rule to be shown as 21.6 percent, which accurately reflects the Council's recommended allocation percentage of sablefish south of 36° N. lat..

In Table 1b, Subpart C—2021 Allocations by Species or Species Group of the regulatory text of the proposed rule on page 62519, the trawl allocation for English sole had a comma in the wrong place. In this final rule, the value is correctly listed as 8,478.2 mt.

In Table 2a, Subpart C—2022 Specifications of OFL, ABC, ACL, ACT and Fishery Harvest Guidelines in the regulatory text of the proposed rule, in footnote ''h'' for bocaccio on page 62523, there was no listed amount for the combined nearshore and non-nearshore fishery. In this final rule, footnote ''h'' of this table states that the 2022 combined allocation to the nearshore and non-nearshore fishery is 315.7 mt.

In Table 2a, Subpart C—2022 Specifications of OFL, ABC, ACL, ACT and Fishery Harvest Guidelines in the regulatory text of the proposed rule, in footnote ''u'' for longspine thornyhead on page 52523, the value was incorrectly listed as 77771.8 mt. In this final rule, the value has been corrected so that it is 771.8 mt.

In Table 2a, Subpart C—2022 Specifications of OFL, ABC, ACL, ACT and Fishery Harvest Guidelines in the regulatory text of the proposed rule, in footnote ''w'' on page 62524, the harvest guideline value for Pacific ocean perch was incorrectly listed as 3,829.3 mt. In this final rule, the value has been corrected to 3,686.2 mt.

In Table 2a, Subpart C—2022 Specifications of OFL, ABC, ACL, ACT and Fishery Harvest Guidelines in the regulatory text of the proposed rule, in footnote ''mm'' for Nearshore Rockfish north of 40°10′ N lat. on page 62525, the last sentence in the footnote referred to the harvest guidelines as recreational harvest guidelines. However, these guideline apply to more than just recreational fisheries. Therefore, in this final rule this text has been corrected by changing ''Recreational HGs are'' to ''State-specific HGs are''.

In Table 2b, Subpart C—2022 and Beyond, Allocations by Species or Species Group, in the regulatory text of the proposed rule on page 62526, the fishery harvest guideline for yellowtail rockfish was incorrectly listed in the proposed rule as 4,793.5 mt. This value has been corrected to 4,783.5 mt in this final rule.

In Table 1 to paragraph (d)(1)(ii)(D) in § 660.140 ''Shorebased IFQ Program'' in the regulatory text of the proposed rule on page 62528, the 2021 and 2022 shorebased trawl allocations for Sablefish south of 36° N lat. were incorrectly listed as 782.3 mt and 744.9 mt, respectively. These values have been corrected to 786 mt and 748 mt, respectively, in this final rule.

In Table 1 to paragraph (d)(1)(ii)(D) in § 660.140 ''Shorebased IFQ Program'' in the regulatory text of the proposed rule on page 62528, the 2022 shorebased trawl allocations for Yellowtail Rockfish were incorrectly listed as 3,889.4 mt. This value has been corrected to 3,898.24 mt, in this final rule.

In Table 3 (North), Subpart F—Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears North of 40°10′ N lat., in the regulatory text of the proposed rule on page 62534, the text describing the salmon troll limit in the north was been cut off. In this final rule, the table cell has been resized so that all the text is shown.

In Table 3 (South), Subpart F—Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears South of 40°10′ N lat., in the regulatory text of the proposed rule on page 62535, the text of the salmon troll trip limit incorrectly stated the area of the limit as ''This limit is within the 4,000 lbs per 2 month limit for minor shelf rockfish between 40°10′ N lat. and 24°27′ N lat.'' In this final rule, the text has been corrected to state that ''This limit is within the 4,000 lbs per 2 month limit for minor shelf rockfish between 40°10′ N lat. and 34°27′ N lat.''.

In Table 3 (South), Subpart F—Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears South of 40°10′ N lat., in the regulatory text of the proposed rule on page 62535, the text describing the Pink shrimp Nongroundfish Trawl fishery (Line 49) was been cut off. In this final rule, the table cell has been resized so that all the text is shown.

In § 660.360(c)(3)(i)(A) in the regulatory text of the proposed rule on page 62537, the text inadvertently referenced the coordinates approximating the boundary lines at 10-fm (18 m) through 40-fm (73 m) depth contours at § 660.71. However, because the recreational fisheries extend from 50-fm to 100-fm, the referenced coordinates should be at §§ 660.72 and 660.73. In this final rule, this text has been amended to include reference to the correct sections.

In § 660.360(c)(3)(ii)(B) in the regulatory text of the proposed rule on page 62537, the text states ''In times and areas when the recreational season for the RCG Complex is open, there is a limit of 2 hooks and 1 line when fishing for the RCG complex and lingcod.'' Lingcod does not need to be listed here, as it is address in § 660.360(c)(3)(iii); therefore, the reference has been removed from the regulatory text in this final rule.

V. Changes From the Proposed Rule

As a result of comments received on the proposed rule, NMFS is making the following changes to the proposed rule. In addition, one set of minor changes is being made to the proposed rule in accordance with a November 2020 Council recommendation based on newly updated catch data that was not available before the proposed rule was published.

In § 660.230(d)(10)(i), current regulations include reference to the other flatfish gear prohibition on the number and size of hooks allowed for the open access fishery. This text was not suggested to be deleted in the proposed rule. However, because the Council recommended, and NMFS is implementing, changes to this prohibition, conforming amendments to this text should also have been proposed to reflect this change. Because the text at § 660.230(d)(10)(i) is no longer necessary, this final rule removes pargraph § 660.230(d)(10)(i).

The regulatory text in the proposed rule removed the recreational season structure text in § 660.360(c)(3)(i)(A)(1)-(5), and replaced it with a table. The CDFW commented that it had concerns with the change and felt that it omitted text that was critical for state enforcement and which was referenced in state regulations. Based on this concern, in this final rule, NMFS has removed Table 2 in this section and replaced it with the paragraph structure used in the 2019–20 biennium. All Council recommendations are reflected in the new paragraph structure.

In § 660.360(c)(3)(i)(A)(1) of the regulatory text in the proposed rule, there is only reference to the depth contour (''prohibited seaward of the 30 fm (55 m) depth contour along the mainland coast and along islands and offshore seamounts''), without any reference to the boundary line. To remain consistent with other sections of the regulatory text that describe the boundary lines for the recreational fisheries, this final rule is corrected to to read, ''prohibited seaward of the boundary line approximating the 30 fm (55 m) depth contour along the mainland coast and along islands and offshore seamounts''.

In § 660.360(c)(3)(i)(A)(2) of the regulatory text in the proposed rule, there is only reference to the depth contour, without any reference to the boundary line. To remain consistent with other section of the regulatory text that describe the boundary lines for the recreational fisheries, in this final rule, this text has been updated from ''is prohibited seaward of the 20 fm (37 m) depth contour along the mainland coast and along islands and offshore seamounts'' to read, ''is prohibited seaward of the boundary line approximating the 20 fm (37 m) depth contour along the mainland coast and along islands and offshore seamounts''.

Finally, at its November 2020 meeting, the Council recommended changes to the trip limits for the limited entry and open access fisheries north and south of 36° N lat. for sablefish and lingcod south of 40°10′ N lat., and the open access trip limit for shortspine and longspine thornyhead south of 34°27′ N lat. All changes are to increase trip limits as a result of updated catch data that show lower than projected attainment for these stocks in the most recent fishing season. As a result, trip limits can be raised to allow for full attainment of the HG for both of these stocks in 2021. These changes were recommended by the Council to NMFS through the inseason action process and are incorporated into this final rule for implementation for the 2021 fisheries. Because these trip limits are within the range of what was previously analyzed, they constitute a minor, routine adjustment to the management measures for the 2021 groundfish fisheries.

VI. Classification

Pursuant to section 304 (b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the PCGFMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

NMFS finds good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(3), so that this final rule may become effective on January 1, 2021. This action establishes the final specifications (*i.e.,* annual catch limits) for the Pacific Coast groundfish fisheries for the 2021 fishing year, which begins on January 1, 2021. If this final rule is not effective on January 1, 2021, then the fishing year begins using the catch limits and management measures from 2020.

Because this final rule increases the catch limits for several species for 2021, leaving 2020 harvest specifications in place could unnecessarily delay fishing opportunities until later in the year, potentially reducing the total catch for these species in 2021. Thus, a delay in effectiveness could ultimately cause economic harm to the fishing industry and associated fishing communities or result in harvest levels inconsistent with the best available scientific information.

This final rule is not unexpected or controversial. The groundfish harvest specifications are published biennially and are intended to be effective on January 1 of odd numbered years. Additionally, the subject of this final rule has been developed over a series of six public meetings of the Council from June 2019 to June 2020. The public is given notice of these meetings, and the public is provided opportunity to comment on actions through that venue as well as through the rulemaking process.

Because of the potential harm to fishing communities that could be caused by delaying the effectiveness of this final rule, and because of the previous notification to the regulated public of these changes through the Council process, NMFS finds there is good cause to waive the 30-day delay in effectiveness.

Pursuant to Executive Order 13175, this rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the PCGFMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, regulations implementing the PCGFMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the PCGFMP request new allocations or regulations specific to the tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. The regulations at 50 CFR 660.324(d) further direct NMFS to develop tribal allocations and regulations in consultation with the affected tribes. The tribal management measures in this proposed rule have been developed following these procedures. The tribal representative on the Council made a motion to adopt the non-whiting tribal management measures, which was passed by the Council. Those management measures, which were developed and proposed by the tribes, are included in this final rule.

The Council prepared an environmental assessment for Amendment 29 to the PCGFMP and the 2021–22 harvest specifications and management measures, and concluded that there will be no significant impact on the human environment as a result of this rule. A copy of the integrated analysis is available from NMFS (see **ADDRESSES**).

This final rule has been determined to be not significant for purposes of Executive Order 12866.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule, and is not repeated here. No comments were received regarding this certification. As a result, a final regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 7, 2020.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.11, revise the introductory text and paragraph (2)(xviii) of the definition of ''*North-South management area*'' to read as follows:

§ 660.11 General definitions.

* * * * *

North-South management area means the management areas defined in paragraph (1) of this definition, or defined and bounded by one or more or the commonly used geographic coordinates set out in paragraph (2) of this definition for the purposes of implementing different management measures in separate geographic areas of the U.S. West Coast.

* * * * *

(2) * * *

(xviii) Point Arena, CA—management line—38°57.50′ N lat.

* * * * *

■ 3. Amend § 660.40 by:
■ a. Revising the section heading;
■ b. Removing paragraph (a);
■ c. Redesignating paragraph (b) as paragraph (a), and revising newly redesignated paragraph (a); and
■ d. Adding and reserving a new paragraph (b).

The revision reads as follows:

§ 660.40 Rebuilding plans.

* * * * *

(a) *Yelloweye rockfish.* Yelloweye rockfish was declared overfished in

2002. The target year for rebuilding the yelloweye rockfish stock to B_{MSY} is 2029. The harvest control rule to be used to rebuild the yelloweye rockfish stock is an annual SPR harvest rate of 65.0 percent.

(b) [Reserved]

■ 4. In § 660.50, revise paragraphs (f)(2)(ii) and (f)(6) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(2) * * *

(ii) The Tribal allocation is 689.2 mt in 2021 and 656.6 mt in 2022 per year. This allocation is, for each year, 10 percent of the Monterey through Vancouver area (North of 36° N lat.) ACL. The Tribal allocation is reduced by 1.7 percent for estimated discard mortality.

* * * * *

(6) *Petrale sole.* For petrale sole, treaty fishing vessels are restricted to a fleetwide harvest target of 350 mt each year.

* * * * *

■ 5. Amend § 660.71 by:

■ a. Redesignating paragraphs (o)(133) through (216) as paragraphs (o)(135) through (218); and

■ b. Adding new paragraphs (o)(133) and (134) to read as follows:

§ 660.71 Latitude/longitude coordinates defining the 10-fm (18-m) through 40-fm (73-m) depth contours.

* * * * *

(o) * * *

(133) 37°25.00′ N lat., 122°38.66′ W long.;

(134) 37°20.68′ N lat., 122°36.79′ W long.;

* * * * *

■ 6. Amend § 660.73 by:

■ a. Revising paragraphs (a)(2902) and (a)(309) through (315);

■ b. Adding paragraphs (a)(316) through (321);

■ c. Revising paragraphs (b)(1) through (14);

■ d. Adding paragraph (b)(15);

■ e. Revising paragraphs (c)(10) through (14);

■ f. Redesignatng paragraphs (d) through (l) as paragraphs (e) through (m); and

■ g. Adding new paragraph (d).

The additions and revisions read as follows:

§ 660.73 Latitude/longitude coordinates defining the 100 fm (183 m) through 150 fm (274 m) depth contours.

* * * * *

(a) * * *

(290) 34°03.33′ N lat., 119°12.93′ W long.;

* * * * *

(309) 33°2.81′ N lat., 117°21.17′ W long.;

(310) 33°1.76′ N lat., 117°20.51′ W long.;

(311) 32°59.90′ N lat., 117°19.38′ W long.;

(312) 32°57.29′ N lat., 117°18.94′ W long.;

(313) 32°56.15′ N lat., 117°19.54′ W long.;

(314) 32°55.30′ N lat., 117°19.38′ W long.; and

(315) 32°54.27′ N lat., 117°17.17′ W long.

(316) 32°52.94′ N lat., 117°17.11′ W long.;

(317) 32°52.66′ N lat., 117°19.67′ W long.;

(318) 32°50.95′ N lat., 117°21.17′ W long.;

(319) 32°47.11′ N lat., 117°22.98′ W long.;

(320) 32°45.60′ N lat., 117°22.64′ W long.; and

(321) 32°42.79′ N lat., 117°21.16′ W long.;

(b) * * *

(1) 33°04.80′ N lat., 118°37.90′ W long.;

(2) 33°02.65′ N lat., 118°34.08′ W long.;

(3) 32°55.80′ N lat., 118°28.92′ W long.;

(4) 32°55.04′ N lat., 118°27.68′ W long.;

(5) 32°49.79′ N lat., 118°20.87′ W long.;

(6) 32°48.05′ N lat., 118°19.62′ W long.;

(7) 32°47.41′ N lat., 118°21.86′ W long.;

(8) 32°44.03′ N lat., 118°24.70′ W long.;

(9) 32°47.81′ N lat., 118°30.20′ W long.;

(10) 32°49.79′ N lat., 118°32.00′ W long.;

(11) 32°53.36′ N lat., 118°33.23′ W long.;

(12) 32°55.13′ N lat., 118°35.31′ W long.;

(13) 33°00.22′ N lat., 118°38.68′ W long.;

(14) 33°03.13′ N lat., 118°39.59′ W long.; and

(15) 33°04.80′ N lat., 118°37.90′ W long.

(c) * * *

(10) 33°18.14′ N lat., 118°27.94′ W long.;

(11) 33°19.84′ N lat., 118°32.22′ W long.;

(12) 33°20.81′ N lat., 118°32.91′ W long.;

(13) 33°21.94′ N lat., 118°32.03′ W long.;

(14) 33°23.14′ N lat., 118°30.12′ W long.;

(d) The 100 fm (183 m) depth contour around the northern Channel Islands off the state of California is defined by straight lines connecting all of the following points in the order stated:

(1) 34°12.89′ N lat., 120°29.31′ W long.;

(2) 34°10.96′ N lat., 120°25.19′ W long.;

(3) 34°08.74′ N lat., 120°18.00′ W long.;

(4) 34°07.02′ N lat., 120°10.45′ W long.;

(5) 34°06.75′ N lat., 120°05.09′ W long.;

(6) 34°08.15′ N lat., 119°54.96′ W long.;

(7) 34°′07.17 N lat., 119°48.54′ W long.;

(8) 34°05.66′ N lat., 119°37.58′ W long.;

(9) 34°04.76′ N lat., 119°26.28′ W long.;

(10) 34°02.93′ N lat., 119°18.06′ W long.;

(11) 34°00.97′ N lat., 119°18.78′ W long.;

(12) 33°59.38′ N lat., 119°21.71′ W long.;

(13) 33°58.62′ N lat., 119°32.05′ W long.;

(14) 33°57.69′ N lat., 119°33.38′ W long.;

(15) 33°57.40′ N lat., 119°35.84′ W long.;

(16) 33°56.07′ N lat., 119°41.10′ W long.

(17) 33°55.54′ N lat., 119°47.99′ W long.;

(18) 33°56.60′ N lat., 119°51.40′ W long.;

(19) 33°55.56′ N lat., 119°53.87′ W long.;

(20) 33°54.40′ N lat., 119°53.74′ W long.;

(21) 33°52.72′ N lat., 119°54.62′ W long.;

(22) 33°47.95′ N lat., 119°53.50′ W long.;

(23) 33°45.75′ N lat., 119°51.04′ W long.;

(24) 33°40.18′ N lat., 119°50.36′ W long.;

(25) 33°38.19′ N lat., 119°57.85′ W long.;

(26) 33°44.92′ N lat., 120°02.95′ W long.;

(27) 33°48.90′ N lat., 120°05.34′ W long.;

(28) 33°51.64′ N lat., 120°08.11′ W long.;

(29) 33°58.31′ N lat., 120°27.99′ W long.;

(30) 34°03.23′ N lat., 120°34.34′ W long.;

(31) 34°09.42′ N lat., 120°37.64′ W long.; and

(32) 34°12.89′ N lat., 120°29.31′ W long.

* * * * *

■ 7. Revise table 1a to subpart C to read as follows:

Table 1a to Part 660, Subpart C—2021, Specifications of OFL, ABC, ACL, ACT and Fishery HG (Weights in Metric Tons). Capitalized stocks are rebuilding.

Stocks	Area	OFL	ABC	ACL[a/]	Fishery HG[b/]
YELLOWEYE ROCKFISH[c/]	Coastwide	97	83	50	41.2
Arrowtooth Flounder[d/]	Coastwide	13,551	9,933	9,933	7,837.9
Big Skate[e/]	Coastwide	1,690	1,477	1,477	1,419.7
Black Rockfish[f/]	California (S. of 42° N. lat.)	379	348	348	345.7
Black Rockfish[g/]	Washington (N. of 46°16' N. lat.)	319	293	293	274.9
Bocaccio[h/]	S. of 40°10' N. lat.	1,887	1,748	1,748	1,700.2
Cabezon[i/]	California (S. of 42° N. lat.)	225	210	210	208.7
California Scorpionfish[j/]	S. of 34°27' N. lat.	319	291	291	287.1
Canary Rockfish[k/]	Coastwide	1,459	1,338	1,338	1,268.6
Chilipepper[l/]	S. of 40°10' N. lat.	2,571	2,358	2,358	2,260.3
Cowcod[m/]	S. of 40°10' N. lat.	114	84	84	72.8
Cowcod	(Conception)	95	72	NA	NA
Cowcod	(Monterey)	19	11	NA	NA
Darkblotched Rockfish[n/]	Coastwide	953	882	882	862.9
Dover Sole[o/]	Coastwide	93,547	84,192	50,000	48,402.8
English Sole[p/]	Coastwide	11,107	9,175	9,175	8,924.37
Lingcod[q/]	N. of 40°10' N. lat.	5,816	5,386	5,369	5,090.6
Lingcod[r/]	S. of 40°10' N. lat.	1,255	1,162	1,102	1,089
Longnose Skate[s/]	Coastwide	2,086	1,823	1,823	1,571.6
Longspine Thornyhead[t/]	N. of 34°27' N. lat.	5,097	3,466	2,634	2,580.3
Longspine Thornyhead[u/]	S. of 34°27' N. lat.			832	829.8
Pacific Cod[v/]	Coastwide	3,200	1,926	1,600	1,093.9
Pacific Ocean Perch[w/]	N. of 40°10' N lat.	4,497	3,854	3,854	3,829.3
Pacific Whiting[x/]	Coastwide	x/	x/	x/	x/
Petrale Sole[y/]	Coastwide	4,402	4,115	4,115	3,727.5
Sablefish[z/]	N. of 36° N. lat.	9,402	8,791	6,892	See Table 1c
Sablefish[aa/]	S. of 36° N. lat			1,899	1,871.6
Shortspine Thornyhead[bb/]	N. of 34°27' N. lat.	3,211	2,183	1,428	1,349.6
Shortspine Thornyhead[cc/]	S. of 34°27' N. lat.			756	749.3
Spiny Dogfish[dd/]	Coastwide	2,479	1,621	1,621	1,277
Splitnose[ee/]	S. of 40°10' N. lat.	1,868	1,666	1,666	1,647.6
Starry Flounder[ff/]	Coastwide	652	392	392	343.6
Widow Rockfish[gg/]	Coastwide	15,749	14,725	14,725	14,476.7
Yellowtail Rockfish[hh/]	N. of 40°10' N. lat.	6,534	6,050	6,050	5,012.5
Stock Complexes					
Blue/Deacon/Black Rockfish[ii/]	Oregon	676	603	603	600.7
Cabezon/Kelp Greenling[jj/]	Oregon	215	198	198	197.8
Cabezon/Kelp Greenling[kk/]	Washington	25	20	20	18.0

Nearshore Rockfish North[ll/]	N. of 40°10' N. lat.	94	79	79	75.9
Nearshore Rockfish South[mm/]	S. of 40°10' N. lat.	1,232	1,016	1,016	1,011.6
Other Fish[nn/]	Coastwide	286	223	223	201.7
Other Flatfish[oo/]	Coastwide	7,714	4,802	4,802	4,581.1
Shelf Rockfish North[pp/]	N. of 40°10' N. lat.	1,888	1,511	1,511	1,438.7
Shelf Rockfish South[qq/]	S. of 40°10' N. lat.	1,842	1,439	1,438	1,305.2
Slope Rockfish North[rr/]	N. of 40°10' N. lat.	1,862	1,595	1,595	1,529.1
Slope Rockfish South[ss/]	S. of 40°10' N. lat.	873	709	709	670.1

a/ Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

b/ Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

c/ Yelloweye rockfish. The 50 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 8.85 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP catch (0.24 mt), research (2.92 mt), and the incidental open access fishery (0.69 mt) resulting in a fishery HG of 41.2 mt. The non-trawl HG is 37.9 mt. The combined non-nearshore/nearshore HG is 7.9 mt. Recreational HGs are: 9.7 mt (Washington); 8.8 mt (Oregon); and 11.4 mt (California). In addition, the non-trawl ACT is 29.5, and the combined non-nearshore/nearshore ACT is 6.2 mt. Recreational ACTs are: 7.5 mt (Washington), 6.9 (Oregon), and 8.9 mt (California).

d/ Arrowtooth flounder. 2,095.08 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), EFP fishing (0.1 mt), research (12.98 mt) and incidental open access (41 mt), resulting in a fishery HG of 7,837.9 mt.

e/ Big skate. 57.31 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), EFP fishing (0.1 mt), and research catch (5.49 mt), and incidental open access (36.72 mt), resulting in a fishery HG of 1,419.7 mt.

f/ Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research (0.08 mt), and incidental open access (1.18 mt), resulting in a fishery HG of 345.7 mt.

g/ Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 274.9 mt.

h/ Bocaccio south of 40°10' N lat. 47.82 mt is deducted from the ACL to accommodate EFP catch (40 mt), research (5.6 mt), and incidental open access (2.22 mt), resulting in a fishery HG of 1,700.2 mt. The combined non-nearshore and nearshore HG is 320.2 mt. The California recreational fishery HG is 716.2 mt.

i/ Cabezon (California). 1.28 mt is deducted from the ACL to accommodate EFP (1 mt), research (0.02 mt), and incidental open access fishery (0.26 mt), resulting in a fishery HG of 208.7 mt.

j/ California scorpionfish south of 34°27' N lat. 3.89 mt is deducted from the ACL to accommodate research (0.18 mt) and the incidental open access fishery (3.71 mt), resulting in a fishery HG of 287.1 mt.

k/ Canary rockfish. 69.39 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP catch (8 mt), and research catch (10.08 mt), and the incidental open access fishery (1.31 mt), resulting in a fishery HG of 1,268.6 mt. The combined nearshore/non-nearshore HG is 126.6 mt. Recreational HGs are: 43.3 mt (Washington); 65.1 mt (Oregon); and 116.7 mt (California).

l/ Chilipepper rockfish south of 40°10' N lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research (14.04 mt), the incidental open access fishery (13.66 mt), resulting in a fishery HG of 2,260.3 mt.

m/ Cowcod south of 40°10' N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research (10 mt), and incidental open access (0.17 mt), resulting in a

fishery harvest guideline of 72.8 mt. A single ACT of 50 mt is being set for the Conception and Monterey areas combined.

n/ Darkblotched rockfish. 19.06 mt is deducted from the ACL to accommodate the Tribal fishery (0.2 mt), EFP catch (0.6 mt), and research catch (8.46 mt), and the incidental open access fishery (9.8 mt) resulting in a fishery HG of 862.9 mt.

o/ Dover sole. 1,597.21 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), EFP fishing (0.1 mt), research (50.84 mt), and incidental open access (49.27 mt), resulting in a fishery HG of 48,402.8 mt.

p/ English sole. 250.63 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (0.1 mt), research (8.01 mt), and the incidental open access fishery (42.52 mt), resulting in a fishery HG of 8,924.37 mt.

q/ Lingcod north of 40°10' N lat. 278.38 mt is deducted from the ACL for the Tribal fishery (250 mt), EFP catch (0.1 mt), research (16.6 mt), and the incidental open access fishery (11.68 mt) resulting in a fishery HG of 5,090.6 mt.

r/ Lingcod south of 40°10' N lat. 13 mt is deducted from the ACL to accommodate EFP catch (1.5 mt), research (3.19 mt), and incidental open access fishery (8.31 mt), resulting in a fishery HG of 1,089 mt.

s/ Longnose skate. 251.40 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), EFP catch (0.1 mt), and research catch (12.46 mt), and incidental open access fishery (18.84 mt), resulting in a fishery HG of 1,571.6 mt.

t/ Longspine thornyhead north of 34°27′ N. lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and the incidental open access fishery (6.22 mt), resulting in a fishery HG of 2,580.3 mt.

u/ Longspine thornyhead south of 34°27′ N. lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and the incidental open access fishery (0.8 mt), resulting in a fishery HG of 829.6 mt.

v/ Pacific cod. 506.1 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), EFP fishing (0.1 mt), research catch (5.47 mt), and the incidental open access fishery (0.53 mt), resulting in a fishery HG of 1,093.9 mt.

w/ Pacific ocean perch north of 40°10' N lat. 24.73 mt is deducted from the ACL to accommodate the Tribal fishery (9.2 mt), EFP fishing (0.1 mt), research catch (5.39 mt), and the incidental open access fishery (10.04 mt), resulting in a fishery HG of 3,829.3 mt.

x/ Pacific whiting. Pacific whiting are assessed annually. The final specifications will be determined consistent with the U.S.-Canada Pacific Whiting Agreement and will be announced after the Council's April 2021 meeting.

y/ Petrale sole. 387.54 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP catch (0.1 mt), research (24.14 mt), and the incidental open access fishery (13.3 mt), resulting in a fishery HG of 3,727.5 mt.

z/ Sablefish north of 36° N lat. This coastwide ACL value is not specified in regulations. The coastwide ACL value is apportioned north and south of 36° N. lat., using a rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 78.4 percent apportioned north of 36° N. lat. and 21.6 percent apportioned south of 36° N. lat. The northern ACL is 6,892 mt and is reduced by 689.2 mt for the Tribal allocation (10 percent of the ACL north of 36° N. lat.). The 689.2 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in Table 1c.

aa/ Sablefish south of 36° N lat. The ACL for the area south of 36° N. lat. is 1,899 mt (21.6 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research (2.40 mt) and the incidental open access fishery (25 mt), resulting in a fishery HG of 1,871.6 mt.

bb/ Shortspine thornyhead north of 34°27′ N. lat. 78.4 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP catch (0.1 mt), and research catch (10.48 mt), and

the incidental open access fishery (17.82 mt), resulting in a fishery HG of 1,349.6 mt for the area north of 34°27′ N. lat.

cc/ Shortspine thornyhead south of 34°27′ N. lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and the incidental open access fishery (6 mt), resulting in a fishery HG of 749.3 mt for the area south of 34°27′ N. lat.

dd/ Spiny dogfish. 344 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP catch (1.1 mt), research (34.27 mt), and the incidental open access fishery (33.63 mt), resulting in a fishery HG of 1,277 mt.

ee/ Splitnose rockfish south of 40°10' N lat. 18.42 mt is deducted from the ACL to accommodate EFP catch (1.5 mt), research (11.17 mt), and the incidental open access fishery (5.75 mt), resulting in a fishery HG of 1,647.6 mt.

ff/ Starry flounder. 48.38 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), EFP catch (0.1 mt), research (0.57 mt), and the incidental open access fishery (45.71 mt), resulting in a fishery HG of 343.6 mt.

gg/ Widow rockfish. 248.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP catch (28 mt), research (17.27 mt), and the incidental open access fishery (3.05 mt), resulting in a fishery HG of 14,476.7 mt.

hh/ Yellowtail rockfish north of 40°10' N lat. 1,047.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), EFP catch (10 mt), research (20.55 mt), and the incidental open access fishery (7 mt), resulting in a fishery HG of 5,012.5 mt.

ii/ Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 2.32 mt is deducted from the ACL to accommodate the EFP catch (0.5 mt), research (0.08 mt), and the incidental open access fishery (1.74 mt), resulting in a fishery HG of 600.7 mt.

jj/ Cabezon/kelp greenling (Oregon). 0.21 mt is deducted from the ACL to accommodate EFP catch (0.1 mt), research (0.05 mt), and the incidental open access fishery (0.06 mt), resulting in a fishery HG of 197.8 mt.

kk/ Cabezon/kelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, therefore the fishery HG is 18 mt.

ll/Nearshore Rockfish north of 40°10' N lat. 3.08 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), EFP catch (0.5 mt), research (0.47 mt), and the incidental open access fishery (0.61 mt), resulting in a fishery HG of 75.9 mt. State specific HGs are Washington (18.4 mt), Oregon (22.7 mt), and California (37.6 mt).

mm/ Nearshore Rockfish south of 40°10' N lat. 4.42 mt is deducted from the ACL to accommodate research catch (2.68 mt) and the incidental open access fishery (2.68 mt), resulting in a fishery HG of 1,011.6 mt.

nn/ Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.34 mt is deducted from the ACL to accommodate EFP catch (0.1 mt), research (6.29 mt), and the incidental open access fishery (14.95 mt), resulting in a fishery HG of 201.7 mt.

oo/ Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.89 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), EFP catch (0.1 mt), research (23.63 mt), and the incidental open access fishery (137.16 mt), resulting in a fishery HG of 4,581.1 mt.

pp/ Shelf Rockfish north of 40°10' N lat. 72.44 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), EFP catch (1.5 mt), research (15.32 mt), and the incidental open access fishery (25.62 mt), resulting in a fishery HG of 1,438.66 mt.

qq/ Shelf Rockfish south of 40°10' N lat. 132.77 mt is deducted from the ACL to accommodate EFP catch (50 mt), research catch (15.1 mt), and the incidental open access fishery (67.67 mt) resulting in a fishery HG of 1,305.2 mt.

rr/ Slope Rockfish north of 40°10’ N lat. 65.89 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), EFP catch (0.5 mt), and research (10.51 mt), and the incidental open access fishery (18.88 mt), resulting in a fishery HG of 1,529.1 mt.

ss/ Slope Rockfish south of 40°10’ N lat. 38.94 mt is deducted from the ACL to accommodate EFP catch (1 mt), and research (18.21 mt), and the incidental open access fishery (19.73 mt), resulting in a fishery HG of 670.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10' N lat. set equal to the species' contribution to the ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10’ N lat. counts against this HG of 176.5 mt.

■ 8. Revise Table 1b to subpart C to read as follows

Table 1b. to Part 660, Subpart C—2021, Allocations by Species or Species Group (Weight in Metric Tons)

Stocks/Stock Complexes	Area	Fishery HG or ACT a/ b/	Trawl		Non-Trawl	
			%	Mt	%	Mt
YELLOWEYE ROCKFISH a/	Coastwide	41.2	8	3.3	92	37.9
Arrowtooth flounder	Coastwide	7,837.9	95	7,446	5	391.9
Big skate a/	Coastwide	1,419.7	95	1,348.7	5	71
Bocaccio a/	S of 40°10' N. lat.	1,700.2	39	663.8	60	1,036.4
Canary rockfish a/	Coastwide	1,268.6	72	917	28	351.6
Chilipepper rockfish	S of 40°10' N. lat.	2,260.3	75	1,695.2	25	565.1
Cowcod a/	S of 40°10' N. lat.	50	36	18	64	32
Darkblotched rockfish	Coastwide	862.9	95	819.8	5	43.1
Dover sole	Coastwide	48,402.8	95	45,982.7	5	2,420.1
English sole	Coastwide	8,924.4	95	8,478.2	5	446.2
Lingcod	N of 40'10° N. lat.	5,090.6	45	2,290.8	55	2,799.8
Lingcod a/	S of 40'10° N. lat.	1,089	40	435.6	60	653.4
Longnose skate a/	Coastwide	1,571.6	90	1,414.4	10	157.2
Longspine thornyhead	N of 34°27' N. lat.	2,580.3	95	2,451.3	5	129
Pacific cod	Coastwide	1,093.9	95	1,039.2	5	54.7
Pacific ocean perch	N of 40°10' N. lat.	3,829.3	95	3,637.8	5	191.5
Pacific whiting c/	Coastwide	TBD	100	TBD	0	0
Petrale sole a/	Coastwide	3,727.9		3,697.9		30
Sablefish	N of 36° N. lat.	NA	See Table 1c			
Sablefish	S of 36° N. lat.	1,861.6	42	782.3	58	1,080.3
Shortspine thornyhead	N of 34°27' N. lat.	1,349.6	95	1,282.1	5	67.5
Shortspine thornyhead	S of 34°27' N. lat.	749.3		50		699.3
Splitnose rockfish	S of 40°10' N. lat.	1,647.6	95	1,565.2	5	82.4
Starry flounder	Coastwide	343.6	50	171.8	50	171.8
Widow rockfish a/	Coastwide	14,476.7		14,076.7		400
Yellowtail rockfish	N of 40°10' N. lat.	5,012.5	88	4,411.0	12	601.5
Other Flatfish	Coastwide	4581.1	90	4,123	10	458.1
Shelf Rockfish a/	N of 40° 10' N. lat.	1,438.7	60.2	866.1	39.8	572.6
Shelf Rockfish a/	S of 40° 10' N. lat.	1,305.2	12.2	159.2	87.8	1,146
Slope Rockfish	N of 40° 10' N. lat.	1,529.1	81	1,238.6	19	290.5
Slope Rockfish a/	S of 40° 10' N. lat.	670.1		526.4		143.7

a/ Allocations decided through the biennial specification process.
b/ The cowcod fishery harvest guideline is further reduced to an ACT of 50 mt. The non-trawl allocation is further split 50:50 between the commercial and recreational sectors.
c/ Consistent with regulations at §660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/P Coop Program; 24 percent for the MS

Coop Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.

■ 9. Revise Table 1c to subpart C to read as follows:

Table 1c. to Part 660, Subpart C - Sablefish North of 36° N. lat. Allocations, 2021

Year	ACL	Set-asides		Recreational Estimate	EFP	Commercial HG	Limited Entry HG		Open Access HG	
		Tribal a/	Research				Percent	mt	Percent	mt b/
2021	6,892	689	30.7	6	1.1	6,165	91	5,586	9	580

Year	LE All	Limited Entry Trawl c/			Limited Entry Fixed Gear d/		
		All Trawl	At-sea Whiting	Shorebased IFQ	All FG	Primary	DTL
2021	5,586	3,240	100	3,139.59	2,346	1,994	352

a/ The tribal allocation is further reduced by 1.7 percent for discard mortality resulting in 677.5 mt in 2021.

b/ The open access HG is taken by the incidental OA fishery and the directed OA fishery.

c/ The trawl allocation is 58 percent of the limited entry HG.

d/ The limited entry fixed gear allocation is 42 percent of the limited entry HG.

■ 10. Revise Table 2a to Subpart C, are revised to read as follows:

Table 2a. to Part 660, Subpart C—2022, and Beyond, Specifications of OFL, ABC, ACL, ACT and Fishery Harvest Guidelines (Weights in Metric Tons). Capitalized stocks are overfished.

Stocks	Area	OFL	ABC	ACL[a/]	Fishery HG[b/]
YELLOWEYE ROCKFISH[c/]	Coastwide	98	83	51	42.2
Arrowtooth Flounder[d/]	Coastwide	11,764	8,458	8,458	6,362.9
Big Skate[e/]	Coastwide	1,606	1,389	1,389	1,331.7
Black Rockfish[f/]	California (S. of 42° N. lat.)	373	341	341	338.7
Black Rockfish[g/]	Washington (N. of 46°16' N. lat.)	319	291	291	272.9
Bocaccio[h/]	S. of 40°10' N. lat.	1,870	1,724	1,724	1,676.2
Cabezon[i/]	California (S. of 42° N. lat.)	210	195	195	193.7
California Scorpionfish[j/]	S. of 34°27' N. lat.	303	275	275	271.1
Canary Rockfish[k/]	Coastwide	1,432	1,307	1,307	1,237.6
Chilipepper[l/]	S. of 40°10' N. lat.	2,474	2,259	2,259	2,161.3
Cowcod[m/]	S. of 40°10' N. lat.	113	82	82	70.8
Cowcod	(Conception)	94	70	NA	NA
Cowcod	(Monterey)	19	12	NA	NA
Darkblotched Rockfish[n/]	Coastwide	901	831	831	811.9
Dover Sole[o/]	Coastwide	87,540	78,436	50,000	48,402.8
English Sole[p/]	Coastwide	11,127	9,101	9,101	8,850.4
Lingcod[q/]	N. of 40°10' N. lat.	5,395	4,974	4,958	4,679.6
Lingcod[r/]	S. of 40°10' N. lat.	1,334	1,230	1,172	1,159
Longnose Skate[s/]	Coastwide	2,036	1,761	1,761	1,509.6
Longspine Thornyhead[t/]	N. of 34°27' N. lat.	4,838	3,227	2,452	2,398.3
Longspine Thornyhead[u/]	S. of 34°27' N. lat.			774	771.8
Pacific Cod[v/]	Coastwide	3,200	1,926	1,600	1,093.9
Pacific Ocean Perch[w/]	N. of 40°10' N lat.	4,371	3,711	3,711	3,686.3
Pacific Whiting[x/]	Coastwide	x/	x/	x/	x/
Petrale Sole[y/]	Coastwide	3,936	3,660	3,660	3,272.5
Sablefish[z/]	N. of 36° N. lat.	9,005	8,375	6,566	See Table 1c
Sablefish[aa/]	S. of 36° N. lat			1,809	1,781.6
Shortspine Thornyhead[bb/]	N. of 34°27' N. lat.	3,194	2,130	1,393	1,314.6
Shortspine Thornyhead[cc/]	S. of 34°27' N. lat.			737	730.3
Spiny Dogfish[dd/]	Coastwide	2,469	1,585	1,585	1,241.0
Splitnose[ee/]	S. of 40°10' N. lat.	1,837	1,630	1,630	1,611.6
Starry Flounder[ff/]	Coastwide	652	392	392	343.6
Widow Rockfish[gg/]	Coastwide	14,826	13,788	13,788	13,539.7
Yellowtail Rockfish[hh/]	N. of 40°10' N. lat.	6,324	5,831	5,831	4,793.5
Stock Complexes					
Blue/Deacon/Black Rockfish[ii/]	Oregon	669	600	600	597.7

Cabezon/Kelp Greenling[ii/]	Washington	22	17	17	15
Cabezon/Kelp Greenling[kk/]	Oregon	208	190	190	189.8
Nearshore Rockfish North[ll/]	N. of 40°10' N. lat.	93	77	77	73.9
Nearshore Rockfish South[mm/]	S. of 40°10' N. lat.	1,233	1,011	1,010	1,005.6
Other Fish[nn/]	Coastwide	286	223	223	201.7
Other Flatfish[oo/]	Coastwide	7,808	4,838	4,838	4,617.1
Shelf Rockfish North[pp/]	N. of 40°10' N. lat.	1,821	1,450	1,450	1,377.6
Shelf Rockfish South[qq/]	S. of 40°10' N. lat.	1,832	1,429	1,428	1,295.2
Slope Rockfish North[rr/]	N. of 40°10' N. lat.	1,842	1,568	1,568	1,502.1
Slope Rockfish South[ss/]	S. of 40°10' N. lat.	871	705	705	666.1

a/ Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

b/ Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

c/ Yelloweye rockfish. The 51 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 8.85 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP catch (0.24 mt), research (2.92 mt), and the incidental open access fishery (0.69 mt) resulting in a fishery HG of 42.2 mt. The non-trawl HG is 38.8 mt. The combined non-nearshore/nearshore HG is 8.1 mt. Recreational HGs are: 9.9 mt (Washington); 9 mt (Oregon); and 11.7 mt (California). In addition, the nontrawl ACT is 30.4 mt and the combined non-nearshore/nearshore ACT is 6.3 mt. Recreational ACTs are: 7.8 mt (Washington), 7.1 (Oregon), and 9.2 mt (California).

d/ Arrowtooth flounder. 2,095.08 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), EFP fishing (0.1 mt), research (12.98 mt) and incidental open access (41 mt), resulting in a fishery HG of 6,362.9 mt.

e/ Big skate. 57.31 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), EFP fishing (0.1 mt), and research catch (5.49 mt), and incidental open access (36.72 mt), resulting in a fishery HG of 1,331.7 mt.

f/ Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research (0.08 mt), and incidental open access (1.18 mt), resulting in a fishery HG of 338.7 mt.

g/ Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 272.9 mt.

h/ Bocaccio south of 40°10’ N lat. The stock is managed with stock-specific harvest specifications south of 40°10' N. lat. and within the Minor Shelf Rockfish complex north of 40°10' N. lat. 47.82 mt is deducted from the ACL to accommodate EFP catch (40 mt), research (5.6 mt), and incidental open access (2.22 mt), resulting in a fishery HG of 1,676.2 mt. The 2022 combined allocation to the nearshore and non-nearshore fishery is 315.7 mt. The California recreational fishery south of 40°10’ N lat has an HG of 706.1 mt.

i/ Cabezon (California). 1.28 mt is deducted from the ACL to accommodate EFP (1 mt), research (0.02 mt), and incidental open access fishery (0.26 mt), resulting in a fishery HG of 193.7 mt.

j/ California scorpionfish south of 34°27’ N lat. 3.89 mt is deducted from the ACL to accommodate research (0.18 mt) and the incidental open access fishery (3.71 mt), resulting in a fishery HG of 271.1 mt.

k/ Canary rockfish. 69.39 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP catch (8 mt), and research catch (10.08 mt), and the incidental open access fishery (1.31 mt), resulting in a fishery HG of 1,237.6 mt. The combined nearshore/non-nearshore HG is 123.5 mt. Recreational HGs are: 42.2 mt (Washington); 63.5 mt (Oregon); and 113.9 mt (California).

l/ Chilipepper rockfish south of 40°10' N lat. Chilipepper are managed with stock-specific harvest specifications south of 40°10′N. lat. and within the Minor Shelf Rockfish complex north of 40°10′ N. lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research (14.04 mt), the incidental open access fishery (13.66 mt), resulting in a fishery HG of 2,161.3 mt.

m/ Cowcod south of 40°10' N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research (10 mt), and incidental open access (0.17 mt), resulting in a fishery harvest guideline of 70.83 mt. A single ACT of 50 mt is being set for the Conception and Monterey areas combined.

n/ Darkblotched rockfish. 19.06 mt is deducted from the ACL to accommodate the Tribal fishery (0.2 mt), EFP catch (0.6 mt), and research catch (8.46 mt), and the incidental open access fishery (9.8 mt) resulting in a fishery HG of 811.9 mt.

o/ Dover sole. 1,597.21 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), EFP fishing (0.1 mt), research (50.84 mt), and incidental open access (49.27 mt), resulting in a fishery HG of 48,402.8 mt.

p/ English sole. 250.63 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (0.1 mt), research (8 mt), and the incidental open access fishery (42.52 mt), resulting in a fishery HG of 8,850.4 mt.

q/ Lingcod north of 40°10' N lat. 278.38 mt is deducted from the ACL for the Tribal fishery (250 mt), EFP catch (0.1 mt), research (16.6 mt), and the incidental open access fishery (11.68 mt) resulting in a fishery HG of 4,679.6 mt.

r/ Lingcod south of 40°10' N lat. 13 mt is deducted from the ACL to accommodate EFP catch (1.5 mt), research (3.19 mt), and incidental open access fishery (8.31 mt), resulting in a fishery HG of 1,159 mt.

s/ Longnose skate. 251.40 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), EFP catch (0.1 mt), and research catch (12.46 mt), and incidental open access fishery (18.84 mt), resulting in a fishery HG of 1,509.6 mt.

t/ Longspine thornyhead north of 34°27′ N. lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and the incidental open access fishery (6.22 mt), resulting in a fishery HG of 2,398.3 mt.

u/ Longspine thornyhead south of 34°27′ N. lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and the incidental open access fishery (0.83 mt), resulting in a fishery HG of 771.8mt.

v/ Pacific cod. 506.1 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), EFP fishing (0.1 mt), research catch (5.47 mt), and the incidental open access fishery (0.53 mt), resulting in a fishery HG of 1,093.9 mt.

w/ Pacific ocean perch north of 40°10’ N lat. 24.73 mt is deducted from the ACL to accommodate the Tribal fishery (9.2 mt), EFP fishing (0.1 mt), research catch (5.39 mt), and the incidental open access fishery (10.04 mt), resulting in a fishery HG of 3,686.2 mt.

x/ Pacific whiting. Pacific whiting are assessed annually. The final specifications will be determined consistent with the U.S.-Canada Pacific Whiting Agreement and will be announced after the Council's April 2021 meeting.

y/ Petrale sole. 387.54 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP catch (0.1 mt), research (24.14 mt), and the incidental open access fishery (13.3 mt), resulting in a fishery HG of 3,272.5 mt.

z/ Sablefish north of 36° N lat. This coastwide ACL value is not specified in regulations. The coastwide ACL value is apportioned north and south of 36° N. lat., using the a rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 78.4 percent apportioned north of 36° N. lat. and 21.5 percent apportioned south of 36° N. lat. The northern ACL is 6,566 mt and is reduced by 656.6 mt for the Tribal allocation (10 percent of the ACL

north of 36° N. lat.). The 656.6 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in Table 1c.

aa/ Sablefish south of 36° N lat. The ACL for the area south of 36° N. lat. is 1,809 mt (21.6 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research (2.40 mt) and the incidental open access fishery (25 mt), resulting in a fishery HG of 1,781.6 mt.

bb/ Shortspine thornyhead north of 34°27′ N. lat. 78.4 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP catch (0.1 mt), and research catch (10.48 mt), and the incidental open access fishery (17.82 mt), resulting in a fishery HG of 1,314.6 mt for the area north of 34°27′ N. lat.

cc/ Shortspine thornyhead south of 34°27′ N. lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and the incidental open access fishery (6 mt), resulting in a fishery HG of 730.3 mt for the area south of 34°27′ N. lat.

dd/ Spiny dogfish. 344 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP catch (1.1 mt), research (34.27 mt), and the incidental open access fishery (33.63 mt), resulting in a fishery HG of 1,241 mt.

ee/ Splitnose rockfish south of 40°10' N lat. Splitnose rockfish in the north is managed in the Slope Rockfish complex and with stock-specific harvest specifications south of 40°10′ N. lat. 18.42 mt is deducted from the ACL to accommodate EFP catch (1.5 mt), research (11.17 mt), and the incidental open access fishery (5.75 mt), resulting in a fishery HG of 1,611.6 mt.

ff/ Starry flounder. 48.38 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), EFP catch (0.1 mt), research (0.57 mt), and the incidental open access fishery (45.71 mt), resulting in a fishery HG of 343.6 mt.

gg/ Widow rockfish. 248.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP catch (28 mt), research (17.27 mt), and the incidental open access fishery (3.05 mt), resulting in a fishery HG of 13,539.7 mt.

hh/ Yellowtail rockfish north of 40°10' N lat. 1,037.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), EFP catch (10 mt), research (20.55 mt), and the incidental open access fishery (7 mt), resulting in a fishery HG of 4,793.5 mt.

ii/ Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 2.32 mt is deducted from the ACL to accommodate the EFP catch (0.5 mt), research (0.08 mt), and the incidental open access fishery (1.74 mt), resulting in a fishery HG of 597.7 mt.

jj/ Cabezon/kelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, therefore the fishery HG is 15 mt.

kk/ Cabezon/kelp greenling (Oregon). 0.21 mt is deducted from the ACL to accommodate EFP catch (0.1 mt), research (0.05 mt), and the incidental open access fishery (0.06 mt), resulting in a fishery HG of 189.8 mt.

ll/Nearshore Rockfish north of 40°10' N lat. 3.08 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), EFP catch (0.5 mt), research (0.47 mt), and the incidental open access fishery (0.61 mt), resulting in a fishery HG of 73.9 mt. State-specific HGs are 17.7 mt (Washington), 22.2 mt (Oregon), and 37.4 mt (California).

mm/ Nearshore Rockfish south of 40°10' N lat. 4.42 mt is deducted from the ACL to accommodate research catch (2.68 mt) and the incidental open access fishery (1.74 mt), resulting in a fishery HG of 1,005.6 mt.

nn/ Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.34 mt is deducted from the ACL to accommodate EFP catch (0.1 mt), research (6.29 mt), and the incidental open access fishery (14.95 mt), resulting in a fishery HG of 201.7 mt.

oo/ Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.89 mt is deducted from the

ACL to accommodate the Tribal fishery (60 mt), EFP catch (0.1 mt), research (23.63 mt), and the incidental open access fishery (137.16 mt), resulting in a fishery HG of 4,617.1 mt.

pp/ Shelf Rockfish north of 40°10' N lat. 72.44 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), EFP catch (1.5 mt), research (15.32 mt), and the incidental open access fishery (25.62 mt), resulting in a fishery HG of 1,377.6 mt.

qq/ Shelf Rockfish south of 40°10' N lat. 132.77 mt is deducted from the ACL to accommodate EFP catch (50 mt), research catch (15.1 mt), and the incidental open access fishery (67.67 mt) resulting in a fishery HG of 1,295.2 mt.

rr/ Slope Rockfish north of 40°10' N lat. 65.89 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), EFP catch (1.5 mt), and research (10.51 mt), and the incidental open access fishery (18.88 mt), resulting in a fishery HG of 1,502.1 mt.

ss/ Slope Rockfish south of 40°10' N lat. 38.94 mt is deducted from the ACL to accommodate EFP catch (1 mt), and research (18.21 mt), and the incidental open access fishery (19.73 mt), resulting in a fishery HG of 666.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10' N lat. set equal to the species' contribution to the 40-10-adjusted ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10' N lat. counts against this HG of 174 mt.

■ 11. Revise Table 2b to subpart C to read as follows:

Table 2b. to Part 660, Subpart C—2022, and Beyond, Allocations by Species or Species Group [Weight in Metric Tons]

Stocks/Stock Complexes	Area	Fishery HG or ACT a/ b/	Trawl		Non-Trawl	
			%	Mt	%	Mt
YELLOWEYE ROCKFISH [a/]	Coastwide	42.2	8	3.4	92	38.8
Arrowtooth flounder	Coastwide	6,362.9	95	6,044.8	5	318.1
Big skate [a/]	Coastwide	1,331.7	95	1,265.1	5	66.6
Bocaccio [a/]	S of 40°10' N. lat.	1,676.2	39.04	654.4	60.96	1,021.8
Canary rockfish [a/]	Coastwide	1,237.6	72.281	894.6	27.719	343.1
Chilipepper rockfish	S of 40°10' N. lat.	2,161.3	75	1,621	25	540.3
Cowcod [a/]	S of 40°10' N. lat.	50	36	18	64	32
Darkblotched rockfish	Coastwide	811.9	95	771.3	5	40.6
Dover sole	Coastwide	4,8402.8	95	45,982.7	5	2,420.1
English sole	Coastwide	8,850.4	95	8,407.8	5	442.5
Lingcod	N of 40'10° N. lat.	4,679.6	45	2,105.8	55	2,573.8
Lingcod [a/]	S of 40'10° N. lat.	1,159	40	463.6	60	695.4
Longnose skate [a/]	Coastwide	1,509.6	90	1,358.6	10	151
Longspine thornyhead	N of 34°27' N. lat.	2,398.3	95	2,278.4	5	119.9
Pacific cod	Coastwide	1,093.9	95	1,039.2	5	54.7
Pacific ocean perch	N of 40°10' N. lat.	3,686.3	95	3,502	5	184.3
Pacific whiting [c/]	Coastwide	TBD	100	TBD	0	0
Petrale sole [a/]	Coastwide	3,272.5	-	3,242.5	-	30
Sablefish	N of 36° N. lat.	NA	See Table 1c			
Sablefish	S of 36° N. lat.	1,781.6	42	748.3	58	1,033.3
Shortspine thornyhead	N of 34°27' N. lat.	1,314.6	95	1,248.9	5	65.7
Shortspine thornyhead	S of 34°27' N. lat.	730.3		50		680.3
Splitnose rockfish	S of 40°10' N. lat.	1,611.6	95	1,531	5	80.6
Starry flounder	Coastwide	343.6	50	171.8	50	171.8
Widow rockfish [a/]	Coastwide	13,539.7		13,139.7		400
Yellowtail rockfish	N of 40°10' N. lat.	4,793.5	88	4,218.2	12	575.2
Other Flatfish	Coastwide	4,617.1	90	4,155.4	10	461.7
Shelf Rockfish [a/]	N of 40° 10' N. lat.	1,377.6	60.2	829.3	39.8	548.3
Shelf Rockfish [a/]	S of 40° 10' N. lat.	1,295.2	12.2	158	87.8	1,137.2
Slope Rockfish	N of 40° 10' N. lat.	1,502.1	81	1,216.7	19	285.4
Slope Rockfish [a/]	S of 40° 10' N. lat.	666.1		523.9		142.2

a/ Allocations decided through the biennial specification process.

b/ The cowcod fishery harvest guideline is further reduced to an ACT of 50 mt.

c/ Consistent with regulations at §660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/P Coop Program; 24 percent for the MS

Coop Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.

■ 12. Revise Table 2c to subpart C to read as follows:

Table 2c. to Part 660, Subpart C - Sablefish North of 36° N. lat. Allocations, 2022 and Beyond

Year	ACL	Set-asides		Recreational Estimate	EFP	Commercial HG	Limited Entry HG		Open Access HG	
		Tribal a/	Research				Percent	mt	Percent	mt b/
2022	6,566	657	30.7	6	1.1	5,872	91	5,320	9	552

Year	LE All	Limited Entry Trawl c/			Limited Entry Fixed Gear d/	
		All Trawl	At-sea Whiting	Shorebased IFQ	All FG	Primary	DTL
2022	5,320	3,085	100	2,985.42	2,234	1,899	335

a/ The tribal allocation is further reduced by 1.7 percent for discard mortality resulting in 645.4 mt in 2022.
b/ The open access HG is taken by the incidental OA fishery and the directed OA fishery.
c/ The trawl allocation is 58 percent of the limited entry HG
d/ The limited entry fixed gear allocation is 42 percent of the limited entry HG

■ 13. In § 660.140, revise paragraphs (d)(1)(ii)(D) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(D) For the trawl fishery, NMFS will issue QP based on the following shorebased trawl allocations:

Table 1 To Paragraph (d)(1)(ii)(D)

IFQ species	Area	2021 Shorebased trawl allocation (mt)	2022 Shorebased trawl allocation (mt)
YELLOWEYE ROCKFISH	Coastwide	3.3	3.4
Arrowtooth flounder	Coastwide	7,376.02	5974.77
Bocaccio	South of 40°10′ N. lat.	663.75	654.38
Canary rockfish	Coastwide	880.96	858.56
Chilipepper	South of 40°10′ N. lat.	1,695.2	1,621
Cowcod	South of 40°10′ N. lat.	18	18
Darkblotched rockfish	Coastwide	743.39	694.94
Dover sole	Coastwide	45,972.65	45,972.65
English sole	Coastwide	8,478.2	8,407.9
Lingcod	North of 40°10′ N. lat.	2,275.78	2,090.83
Lingcod	South of 40°10′ N. lat.	435.6	463.6
Longspine thornyhead	North of 34°27′ N. lat.	2,451.28	2,278.38
Pacific cod	Coastwide	1,039.21	1,039.21
Pacific halibut (IBQ)	North of 40°10′ N. lat.	69.6	69.6
Pacific ocean perch	North of 40°10′ N. lat.	3,337.74	3,201.94
Pacific whiting	Coastwide	TBD	TBD
Petrale sole	Coastwide	3,692.9	3,237.5
Sablefish	North of 36° N;. lat.	3,139.59	2,985.42
Sablefish	South of 36° N. lat.	786	748
Shortspine thornyhead	North of 34°27′ N. lat.	1,212.12	1,178.87
Shortspine thornyhead	South of 34°27′ N. lat	50	50
Splitnose rockfish	South of 40°10′ N. lat.	1,565.20	1,531.00
Starry flounder	Coastwide	171.8	171.8
Widow rockfish	Coastwide	13,600.68	12,663.68
Yellowtail rockfish	North of 40°10′ N. lat.	4,091.13	3,898.4
Other Flatfish complex	Coastwide	4,088.00	4,120.40

Shelf Rockfish complex	North of 40°10′ N. lat.	831.07	794.56
Shelf Rockfish complex	South of 40°10′ N. lat.	159.24	158.02
Slope Rockfish complex	North of 40°10′ N. lat.	938.58	916.71
Slope Rockfish complex	South of 40°10′ N. lat.	526.4	523.9

* * * * *

■ 14. Revise Tables 1 (North) and 1 (South) to part 660, subpart D to read as follows:

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Table 1 (North) to Part 660, Subpart D -- Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for non-IFQ Species and Pacific Whiting North of 40°10' N. Lat.

This table describes Rockfish Conservation Areas for vessels using groundfish trawl gear. This table describes incidental landing allowances for vessels registered to a Federal limited entry trawl permit and using groundfish trawl or groundfish non-trawl gears to harvest individual fishing quota (IFQ) species.

Other Limits and Requirements Apply -- Read § 660.10 - § 660.399 before using this table 01/01/2021

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area (RCA)[1/]:							
1	North of 45°46' N. lat.	100 fm line[1/] - 150 fm line[1/]					
2	45°46' N. lat. - 40°10' N. lat.	Block Area Closures (BACs) may be implemented, and will be announced in the Federal Register.					

See provisions at § 660.130 for gear restrictions and requirements by area. Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry groundfish trawl fishery landing allowances in this table, regardless of the type of fishing gear used. Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry fixed gear non-trawl RCA, as described in Tables 2 (North) and 2 (South) to Part 660, Subpart E.

See § 660.60, § 660.130, and § 660.140 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).

State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.

3	**Minor Nearshore Rockfish, Washington Black rockfish & Oregon Black/blue/deacon rockfish**	300 lb/ month
4	**Whiting[3/]**	
5	midwater trawl	Before the primary whiting season: CLOSED. -- During the primary season: mid-water trawl permitted in the RCA. See §660.131 for season and trip limit details. -- After the primary whiting season: CLOSED.
6	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.
7	**Oregon Cabezon/Kelp Greenling complex**	50 lb/ month
8	**Cabezon in California**	50 lb/ month
9	**Spiny dogfish**	60,000 lb/ month
10	**Big skate**	Unlimited
11	**Longnose skate**	Unlimited
12	**Other Fish [4/]**	Unlimited

TABLE 1 (North)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ The "modified" fathom lines are modified to exclude certain petrale sole areas from the RCA.

3/ As specified at §660.131(d), when fishing in the Eureka Area, no more than 10,000 lb of whiting may be taken and retained, possessed, or landed by a vessel that, at any time during the fishing trip, fished in the fishery management area shoreward of 100 fm contour.

4/ "Other Fish" are defined at § 660.11 and include kelp greenling off California and leopard shark.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 1 (South) to Part 660, Subpart D -- Limited Entry Trawl Rockfish Conservation Areas and Landing Allowances for non-IFQ Species and Pacific Whiting South of 40°10' N. Lat.

This table describes Rockfish Conservation Areas for vessels using groundfish trawl gear. This table describes incidental landing allowances for vessels registered to a Federal limited entry trawl permit and using groundfish trawl or groundfish non-trawl gears to harvest individual fishing quota (IFQ) species.

Other Limits and Requirements Apply -- Read § 660.10 - § 660.399 before using this table 01/01/2021

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area (RCA)[1/]:							
1	South of 40°10' N. lat.	Block Area Closures (BACs) may be implemented, and will be announced in the Federal Register.					

See provisions at § 660.130 for gear restrictions and requirements by area. Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry groundfish trawl fishery landing allowances in this table, regardless of the type of fishing gear used. Vessels fishing groundfish trawl quota pounds with groundfish non-trawl gears, under gear switching provisions at § 660.140, are subject to the limited entry fixed gear non-trawl RCA, as described in Tables 2 (North) and 2 (South) to Part 660, Subpart E.

See § 660.60, § 660.130, and § 660.140 for Additional Gear, Trip Limit, and Conservation Area Requirements and Restrictions. See §§ 660.70-660.74 and §§ 660.76-660.79 for Conservation Area Descriptions and Coordinates (including RCAs, YRCA, CCAs, Farallon Islands, Cordell Banks, and EFHCAs).

State trip limits and seasons may be more restrictive than federal trip limits, particularly in waters off Oregon and California.

2	**Longspine thornyhead**	
3	South of 34°27' N. lat.	24,000 lb/ 2 months
4	**Minor Nearshore Rockfish, California Black rockfish, & Oregon Black/Blue/Deacon rockfish**	300 lb/ month
5	**Whiting**	
6	midwater trawl	During the Primary whiting season: allowed seaward of the trawl RCA. Prohibited within and shoreward of the trawl RCA.
7	large & small footrope gear	Before the primary whiting season: 20,000 lb/trip. -- During the primary season: 10,000 lb/trip. -- After the primary whiting season: 10,000 lb/trip.
8	**Cabezon**	50 lb/ month
9	**Spiny dogfish**	60,000 lb/ month
10	**Big skate**	Unlimited
11	**Longnose skate**	Unlimited
12	**California scorpionfish**	Unlimited
13	**Blackgill rockfish**	Unlimited
14	**Other Fish 2[/]**	Unlimited

TABLE 1 (South)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours, and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to the RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ "Other Fish" are defined at § 660.11 and include kelp greenling off California and leopard shark.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

■ 14. Amend § 660.230 by removing and reserving paragraph (d)(10)(i) and revising paragraph (d)(10)(ii) to read as follows:

§ 660.230 Fixed gear fishery—management measures.

* * * * *

(d) * * *

(10) * * *

(ii) Fishing for rockfish and lingcod is permitted shoreward of the boundary line approximating the 40 fm (73 m) depth contour within the CCAs when trip limits authorize such fishing and provided a valid declaration report as required at § 660.13(d) has been filed with NMFS OLE. Coordinates for the boundary line approximating the 40 fm (73 m) depth contour are listed in § 660.71.

* * * * *

■ 15. In § 660.231, revise paragraph (b)(3)(i) to read as follows:

§ 660.231 Limited entry fixed gear sablefish primary fishery.

* * * * *

(b) * * *

(3) * * * (i) A vessel participating in the primary season will be constrained by the sablefish cumulative limit associated with each of the permits registered for use with that vessel. During the primary season, each vessel authorized to fish in that season under paragraph (a) of this section may take, retain, possess, and land sablefish, up to the cumulative limits for each of the permits registered for use with that vessel (*i.e.,* stacked permits). If multiple limited entry permits with sablefish endorsements are registered for use with a single vessel, that vessel may land up

to the total of all cumulative limits announced in this paragraph for the tiers for those permits, except as limited by paragraph (b)(3)(ii) of this section. Up to 3 permits may be registered for use with a single vessel during the primary season; thus, a single vessel may not take and retain, possess or land more than 3 primary season sablefish cumulative limits in any one year. A vessel registered for use with multiple limited entry permits is subject to per vessel limits for species other than sablefish, and to per vessel limits when participating in the daily trip limit fishery for sablefish under § 660.232. In 2021, the following annual limits are in effect: Tier 1 at 58,649 lb (26,602 kg), Tier 2 at 26,659 lb (12,092 kg), and Tier 3 at 15,234 lb (6,910 kg). In 2022 and beyond, the following annual limits are in effect: Tier 1 at 55,858 lb (25,337 kg), Tier 2 at 25,390 lb (11,517 kg), and Tier 3 at 14,509 lb (6,581 kg).

* * * * *

■ 16. Revise Table 2 (North) and Table 2 (South) to part 660, subpart E, to read as follows:

Table 2 (North) to Part 660, Subpart E -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Limited Entry Fixed Gear North of 40°10' N.

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table — 1/1/2021

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[1/]:						
1	North of 46°16' N. lat.	shoreline - 100 fm line[1/]					
2	46°16' N. lat. - 40°10' N. lat.	40 fm line[1/] - 100 fm line[1/]					
		30 fm line [1/]- 40 fm line [1/2/]					
	See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and						
	State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.						
4	**Minor Slope Rockfish[3/] & Darkblotched rockfish**	8,000 lb/ 2 month					
5	**Pacific ocean perch**	3,600 lb/ 2 months					
6	**Sablefish**	1,700 lb week, not to exceed 5,100 lbs / 2 months					
7	**Longspine thornyhead**	10,000 lb/ 2 months					
8	**Shortspine thornyhead**	2,000 lb/ 2 months			2,500 lb/ 2 months		
9 10 11	**Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish[4/]**	10,000 lbs/ month					
12	**Whiting**	10,000 lb/ trip					
13	**Minor Shelf Rockfish[3/]**	800 lbs / month					
14	**Shortbelly Rockfish**	200 lbs / month					
15	**Widow rockfish**	4,000 lb/ 2 month					
16	**Yellowtail rockfish**	3,000 lb/ month					
17	**Canary rockfish**	3,000 lb/ 2 months					
18	**Yelloweye rockfish**	CLOSED					
19	**Minor Nearshore Rockfish, Oregon black/blue/deacon rockfish & CA black rockfish [5/]**						
20	North of 42°00' N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish or blue/deacon					
21	42°00' N. lat. - 40°10' N. lat.	7,000 lb/ 2 months, no more than 2,000 lb of which may be species other than black rockfish					
22	**Lingcod[6/]**						
23	North of 42°00' N. lat.	4,000 lb/ 2 months					
24	42°00' N. lat. - 40°10' N. lat.	2,000 lb/2 months					
25	**Pacific cod**	1,000 lb/ 2 months					
26	**Spiny dogfish**	200,000 lb / 2months		150,000 lb /		100,000 lb / 2months	
27	**Longnose skate**	Unlimited					
28	**Other Fish[7/]& Cabezon in California**	Unlimited					
29	**Oregon Cabezon/Kelp Greenling**	Unlimited					
30	**Big skate**	Unlimited					

TABLE 2 (North)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ Between 46°16' N. lat. and 40°10' N. lat. and the 30 fm and 40 fm lines, fishing is only allowed with hook-and-line gear except bottom longline and dinglebar gear, as defined in §660.11

3/ Bocaccio, chilipepper and cowcod are included in the trip limits for Minor Shelf Rockfish and splitnose rockfish is included in the trip limits for Minor Slope Rockfish.

4/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

5/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. there is an additional limit of 100 lb or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.(46°38.17' N. lat.),

6/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.

7/ "Other Fish" are defined at § 660.11 and include kelp greenling off California and leopard shark.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 2 (South) to Part 660, Subpart E -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Limited Entry Fixed Gear South of 40°10' N.

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table — 1/1/2021

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[1/]:						
1	40°10' N. lat. - 38°57.5' N. lat.	40 fm line[1/] - 125 fm line[1/]					
2	38°57.5' N. lat. -34°27' N. lat.	50 fm line[1/] - 125 fm line[1/]					
3	South of 34°27' N. lat.	100 fm line[1/] - 125 fm line[1/] (also applies around islands)					
	See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and						
	State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.						
3	**Minor Slope rockfish[2/] &**	40,000 lb/ 2 months, of which no more than 6,000 lb may be blackgill rockfish					
4	**Splitnose rockfish**	40,000 lb/ 2 months					
5	**Sablefish**						
6	40°10' N. lat. - 36°00' N. lat.	1,700 lb week, not to exceed 5,100 lbs / 2 months					
7	South of 36°00' N. lat.	2,500 lb/ week					
8	**Longspine thornyhead**	10,000 lb/ 2 months					
9	**Shortspine thornyhead**						
10	40°10' N. lat. - 34°27' N. lat.	2,000 lb/ 2 months			2,500 lb/ 2 months		
11	South of 34°27' N. lat.	3,000 lb/ 2 months					
12 13 14	**Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish[3/]**	10,000 lb/ month					
18	**Whiting**	10,000 lb/ trip					
	Minor Shelf Rockfish[2/]						
	40°10' N. lat. - 34°27' N. lat.	8,000 lbs. / 2 months, of which no more than 500 lbs. may be vermilion					
	South of 34°27' N. lat.	5,000 lbs. / 2 months, of which no more than 3,000lbs. may be vermilion					
	Widow						
	40°10' N. lat. - 34°27' N. lat.	10,000 lbs. / 2 months					
	South of 34°27' N. lat.	8,000 lbs. / 2 months					
21	**Chilipepper**						
	40°10' N. lat. - 34°27' N. lat.	10,000 lbs. / 2 months					
	South of 34°27' N. lat.	8,000 lbs. / 2 months					
	Shortbelly Rockfish						
	South of 40°10' N. lat.	200 lb/ month					
22	**Canary rockfish**	3,500 lbs/ 2 months					
23	**Yelloweye rockfish**	CLOSED					
24	**Cowcod**	CLOSED					
25	**Bronzespotted rockfish**	CLOSED					
26	**Bocaccio**	6,000 lbs/ 2 months					
27	**Minor Nearshore Rockfish**						
	Shallow nearshore[4/]	2,000 lbs/ 2 months					
	Deeper nearshore[5/]	2,000 lbs/ 2 months					
30	**California Scorpionfish**	3,500 lbs/ 2 months					
	Lingcod[6/]	1,600 lbs / 2 months					
32	**Pacific cod**	1,000 lb/ 2 months					
33	**Spiny dogfish**	200,000 lb/ 2 months		150,000 lb/ 2	100,000 lb/ 2 months		
34	**Longnose skate**	Unlimited					
35	**Other Fish[7/] & Cabezon in California**	Unlimited					
36	**Big Skate**	Unlimited					

TABLE 2 (South)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ POP is included in the trip limits for Minor Slope Rockfish. Blackgill rockfish have a species specific trip sub-limit within the Minor Slope Rockfish cumulative limit. Yellowtail rockfish are included in the trip limits for Minor Shelf Rockfish. Bronzespotted rockfish have a species specific trip limit.

3/ "Other Flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

4/ "Shallow Nearshore" are defined at § 660.11 under "Groundfish" (7)(i)(B)(*1*).

5/ "Deeper Nearshore" are defined at § 660.11 under "Groundfish" (7)(i)(B)(*2*).

6/ The commercial mimimum size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.

7/ "Other Fish" are defined at § 660.11 and include kelp greenling off California and leopard shark.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

■ 17. Revise Table 3 (North) and Table 3 (South) in part 660, subpart F, to read as follows:

Table 3 (North) to Part 660, Subpart F -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears North of 40°10' N. lat.

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table 1/1/2021

	JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area (RCA)[1/]:						
1 North of 46°16' N. lat.	shoreline - 100 fm line[1/]					
2 46°16' N. lat. - 40°10' N. lat.	40 fm line[1/] - 100 fm line[1/]					
	30 fm line [1/]- 40 fm line [1/2/]					
See §§660.60, 660.330 and 660.333 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for conservation area descriptions and coordinates (including RCAs, YRCAs, CCAs, Farallon Islands, Cordell Bank, and EFHCAs).						
State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.						
4 **Minor Slope Rockfish[3/] & Darkblotched rockfish**	2,000 lbs / months					
5 **Pacific ocean perch**	100 lbs/ month					
6 **Sablefish**	600 lbs. daily, or 1 landing per week up to 2,000 lbs., not to exceed 4,000 lbs/2 months					
7 **Shortpine thornyheads**	50 lb/month					
8 **Longspine thornyheads**	50 lb/month					
9 10 11 **Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish[4/]**	5,000 lbs/ month					
12 **Whiting**	300 lbs/ month					
13 **Minor Shelf Rockfish[3/]**	800 lbs / month					
14 **Widow rockfish**	2,000 lb/ 2 months					
15 **Shortbelly Rockfish**	200 lbs / month					
16 **Yellowtail rockfish**	1,500 lbs/ month					
17 **Canary rockfish**	1,000 lbs/ 2 months					
18 **Yelloweye rockfish**	CLOSED					
19 **Minor Nearshore Rockfish, Oregon black/blue/deacon rockfish & CA black rockfish**						
20 North of 42°00' N. lat.	5,000 lb/ 2 months, no more than 1,200 lb of which may be species other than black rockfish or blue/deacon rockfish[5/]					
21 42°00' N. lat. - 40°10' N. lat.	7,000 lb/ 2 months, no more than 2,000 lb of which may be species other than black rockfish					
22 **Lingcod[6/]**						
23 North of 42°00' N. lat.	2,000 lbs/ month					
24 42°00' N. lat. - 40°10' N. lat.	1,000 lbs / month					
25 **Pacific cod**	1,000 lbs/ 2 months					
26 **Spiny dogfish**	200,000 lbs/ 2 months		150,000 lbs/ 2 months		100,000 lbs/ 2 months	
27 **Longnose skate**	Unlimited					
28 **Big skate**	Unlimited					
29 **Other Fish[7/] & Cabezon in California**	Unlimited					
30 **Oregon Cabezon/Kelp Greenling**	Unlimited					
31 **SALMON TROLL** *(subject to RCAs when retaining all species of groundfish, except for yellowtail rockfish and lingcod, as described below)*						
32 North	Salmon trollers may retain and land up to 500 lbs of yellowtail rockfish per month as long as salmon is on board, both within and outside of the RCA. Salmon trollers may retain and land up to 1 lingcod per 5 Chinook per trip, plus 1 lingcod per trip, up to a trip limit of 10 lingcod, on a trip where any fishing occurs within the RCA. The limit only applies during times when lingcod retention is allowed, and is not "CLOSED." The limit is within the per month limit for lingcod described in the table above, and not in addition to that limit. All groundfish species are subject to the open access limits, seasons, size limits and RCA restrictions listed in the table above, unless otherwise stated here.					
33 **PINK SHRIMP NON-GROUNDFISH TRAWL** *(not subject to RCAs)*						
34 North	Effective April 1 - October 31: Groundfish: 500 lbs/day, multiplied by the number of days of the trip, not to exceed 1,500 lbs/trip. The following sublimits also apply and are counted toward the overall 500 lbs/day and 1,500 lbs/trip groundfish limits: lingcod 300 lbs/month (minimum 24 inch size limit); sablefish 2,000 lbs/month; canary, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lbs/day and 1,500 lbs/trip groundfish limits. Landings of these species count toward the per day and per trip groundfish limits and do not have species-specific limits. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

TABLE 3 (North)

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ Between 46°16' N. lat. and 40°10' N. lat. and the 30 fm and 40 fm lines, fishing is only allowed with hook-and-line gear except bottom longline and dinglebar gear, as defined in §660.11

3/ Bocaccio, chilipepper and cowcod rockfishes are included in the trip limits for Minor Shelf Rockfish. Splitnose rockfish is included in the trip limits for Minor Slope Rockfish.

4/ "Other flatfish" are defined at § 660.11 and include butter sole, curlfin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

5/ For black rockfish north of Cape Alava (48°09.50' N. lat.), and between Destruction Is. (47°40' N. lat.) and Leadbetter Pnt. (46°38.17' N. lat.), there is an additional limit of 100 lbss or 30 percent by weight of all fish on board, whichever is greater, per vessel, per fishing trip.

6/ The minimum size limit for lingcod is 22 inches (56 cm) total length North of 42° N. lat. and 24 inches (61 cm) total length South of 42° N. lat.

7/ "Other fish" are defined at § 660.11 and include kelp greenling off California and leopard shark.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

Table 3 (South) to Part 660, Subpart F -- Non-Trawl Rockfish Conservation Areas and Trip Limits for Open Access Gears South of 40°10' N. lat.

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table 1/1/2021

		JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
Rockfish Conservation Area (RCA)[1/]:							
1	40°10' N. lat. - 38°57.5' N. lat.	40 fm line[1/] - 125 fm line[1/]					
2	38°57.5' N. lat. -34°27' N. lat.	50 fm line[1/] - 125 fm line[1/]					
3	South of 34°27' N. lat.	100 fm line[1/] - 150 fm line[1/] (also applies around islands)					
See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for							
State trip limits and seasons may be more restrictive than Federal trip limits or seasons, particularly in waters off Oregon and California.							
4	**Minor Slope Rockfish[2/] & Darkblotched rockfish**	10,000 lbs/ 2 months, of which no more than 2,500 lbs may be blackgill rockfish					
5	**Splitnose rockfish**	200 lbs/ month					
6	**Sablefish**						
7	40°10' N. lat. - 36°00' N. lat.	600 lbs. daily, or 1 landing per week up to 2,000 lbs., not to exceed 4,000 lbs/2 months					
8	South of 36°00' N. lat.	2,000 lbs/week, not to exceed 6,000 lbs/2 months					
9	**Shortpine thornyheads**						
10	40°10' N. lat. - 34°27' N. lat.	50lb/ month					
11	**Longspine thornyheads**						
12	40°10' N. lat. - 34°27' N. lat.	50 lb/ month					
13	**Shortpine thornyheads and longspine**						
14	South of 34°27' N. lat.	100 lbs/day, no more than 1,000 lbs/ 2 months					
15 16 17	**Dover sole, arrowtooth flounder, petrale sole, English sole, starry flounder, Other Flatfish[3/]**	5,000 lbs/ month					
18	**Whiting**	300 lbs/ month					
19	**Minor Shelf Rockfish[2/]**						
20	40°10' N. lat. - 34°27' N. lat.	4,000 lbs. / 2 months, of which no more than 400 lbs. may be vermilion					
21	South of 34°27' N. lat.	3,000 lbs. / 2 months, of which no more than 1,200lbs. may be vermilion					
22	**Widow**						
23	40°10' N. lat. - 34°27' N. lat.	6,000 lbs. / 2 months					
24	South of 34°27' N. lat.	4,000 lbs. / 2 months					
25	**Chilipepper**						
26	40°10' N. lat. - 34°27' N. lat.	6,000 lbs. / 2 months					
27	South of 34°27' N. lat.	4,000 lbs. / 2 months					
28	**Shortbelly Rockfish**						
29	South of 40°10' N. lat.	200 lb/ month					
22	**Canary rockfish**	1,500 lbs/ 2 months					
23	**Yelloweye rockfish**	CLOSED					
24	**Cowcod**	CLOSED					
25	**Bronzespotted rockfish**	CLOSED					
26	**Bocaccio**	4,000 lbs/ 2 months					
30	**Minor Nearshore Rockfish**						
31	Shallow nearshore[4/]	2,000 lbs/ 2 months					
32	Deeper nearshore[5/]	2,000 lbs/ 2 months					
33	**California Scorpionfish**	3,500 lbs/ 2 months					
34	**Lingcod[6/]**	700 lbs / months					
35	**Pacific cod**	1,000 lbs/ 2 months					
36	**Spiny dogfish**	200,000 lbs/ 2 months		150,000 lbs/ 2	100,000 lbs/ 2 months		
37	**Longnose skate**	Unlimited					
38	**Big skate**	Unlimited					
39	**Other Fish[7/] & Cabezon in California**	Unlimited					

TABLE 3 (South)

Table 3 (South) Continued

Other limits and requirements apply -- Read §§660.10 through 660.399 before using this table 1/1/2021

			JAN-FEB	MAR-APR	MAY-JUN	JUL-AUG	SEP-OCT	NOV-DEC
	Rockfish Conservation Area (RCA)[1/]:							
40	40°10' N. lat. - 38°57.5' N. lat.		40 fm line[1/] - 125 fm line[1/]					
41	38°57.5' N. lat. -34°27' N. lat.		50 fm line[1/] - 125 fm line[1/]					
42	South of 34°27' N. lat.		100 fm line[1/] - 150 fm line[1/] (also applies around islands)					
	See §§660.60 and 660.230 for additional gear, trip limit and conservation area requirements and restrictions. See §§660.70-660.74 and §§660.76-660.79 for							
43	**SALMON TROLL** *(subject to RCAs when retaining all species of groundfish, except for yellowtail rockfish and lingcod, as described below)*							
44	South of 40°10' N. lat.		Salmon trollers may retain and land up to 1 lbs of yellowtail rockfish for every 2 lbs of Chinook salmon landed, with a cumulative limit of 200 lbs/month, both within and outside of the RCA. This limit is within the 4,000 lbs per 2 month limit for minor shelf rockfish between 40°10' and 34°27' N lat., and not in addition to that limit. All groundfish species are subject to the open access limits, seasons, size limits and RCA restrictions listed in the table above, unless otherwise stated here.					
45	**RIDGEBACK PRAWN AND, SOUTH OF 38°57.50' N. LAT., CA HALIBUT AND SEA CUCUMBER NON-GROUNDFISH TRAWL**							
46	**NON-GROUNDFISH TRAWL Rockfish Conservation Area (RCA) for CA Halibut, Sea Cucumber & Ridgeback Prawn:**							
47	*40°10' N. lat. - 38°00' N. lat.*		*100 fm line[1/] - 200*	*100 fm line[1/] - 150 fm line[1/]*				*100 fm line[1/] - 200*
48	*38°00' N. lat. - 34°27' N. lat.*		*100 fm line[1/] - 150 fm line[1/]*					
49	*South of 34°27' N. lat.*		01/01/2021+A108:P133					
50			Groundfish: 300 lbs/trip. Species-specific limits described in the table above also apply and are counted toward the 300 lbs					
51	**PINK SHRIMP NON-GROUNDFISH TRAWL GEAR** *(not subject to RCAs)*							
52		South	Effective April 1 - October 31: Groundfish: 500 lbs/day, multiplied by the number of days of the trip, not to exceed 1,500 lbs/trip. The following sublimits also apply and are counted toward the overall 500 lbs/day and 1,500 lbs/trip groundfish limits: lingcod 300 lbs/ month (minimum 24 inch size limit); sablefish 2,000 lbs/ month; canary rockfish, thornyheads and yelloweye rockfish are PROHIBITED. All other groundfish species taken are managed under the overall 500 lbs/day and 1,500 lbs/trip groundfish limits. Landings of all groundfish species count toward the per day, per trip or other species-specific sublimits described here and the species-specific limits described in the table above do not apply. The amount of groundfish landed may not exceed the amount of pink shrimp landed.					

Table 3 (South) Continued

1/ The Rockfish Conservation Area is an area closed to fishing by particular gear types, bounded by lines specifically defined by latitude and longitude coordinates set out at §§ 660.71-660.74. This RCA is not defined by depth contours (with the exception of the 20-fm depth contour boundary south of 42° N. lat.), and the boundary lines that define the RCA may close areas that are deeper or shallower than the depth contour. Vessels that are subject to RCA restrictions may not fish in the RCA, or operate in the RCA for any purpose other than transiting.

2/ POP is included in the trip limits for minor slope rockfish. Blackgill rockfish have a species specific trip sub-limit within the minor slope rockfish cumulative limits. Yellowtail rockfish is included in the trip limits for minor shelf rockfish. Bronzespotted rockfish have a species specific trip limit.

3/ "Other flatfish" are defined at § 660.11 and include butter sole, curifin sole, flathead sole, Pacific sanddab, rex sole, rock sole, and sand sole.

4/ "Shallow Nearshore" are defined at § 660.11 under "Groundfish" (7)(i)(B)(*1*).

5/ "Deeper Nearshore" are defined at § 660.11 under "Groundfish" (7)(i)(B)(*2*).

6/ The commercial mimimum size limit for lingcod is 24 inches (61 cm) total length South of 42° N. lat.

7/ "Other fish" are defined at § 660.11 and includes kelp greenling off California and leopard shark.

To convert pounds to kilograms, divide by 2.20462, the number of pounds in one kilogram.

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■ 18. Amend § 660.360 by:

■ a. Removing paragraphs (c)(1)(i)(D)(*1*) through (*3*); and

■ b. Revising paragraphs (c)(1) introductory text, (c)(1)(i)(B), (c)(1)(i)(C), (c)(1)(i)(D), (c)(2)(i)(B), (c)(2)(i)(D), (c)(3)(i)(A), and (c)(3)(ii)(B).

The revisions read as follows:

§ 660.360 Recreational fishery—management measures.

* * * * *

(c) * * *

(1) *Washington.* For each person engaged in recreational fishing off the coast of Washington, the groundfish bag limit is 9 groundfish per day, including rockfish, cabezon and lingcod. Within the groundfish bag limit, there are sublimits for rockfish, lingcod, and cabezon outlined in paragraph (c)(1)(i)(D) of this section. In addition to the groundfish bag limit of 9, there will be a flatfish limit of 5 fish, not to be counted towards the groundfish bag limit but in addition to it. The recreational groundfish fishery will open the second Saturday in March through the third Saturday in October for all species. In the Pacific halibut fisheries, retention of groundfish is governed in part by annual management measures for Pacific halibut fisheries, which are published in the **Federal Register**. The following seasons, closed areas, sublimits and size limits apply:

(i) * * *

(B) *South coast recreational yelloweye rockfish conservation area.* Recreational fishing for groundfish and halibut is allowed within the South Coast Recreational YRCA. The South Coast Recreational YRCA is defined by latitude and longitude coordinates specified at § 660.70, subpart C.

(C) *Westport offshore recreational yelloweye rockfish conservation area.* Recreational fishing for groundfish and halibut is allowed within the Westport Offshore Recreational YRCA. The Westport Offshore Recreational YRCA is defined by latitude and longitude coordinates specified at § 660.70, subpart C.

(D) *Recreational rockfish conservation area.* Fishing for groundfish with recreational gear is prohibited within the recreational RCA unless otherwise stated. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA unless otherwise stated. A vessel fishing in the recreational RCA may not be in possession of any groundfish unless otherwise stated. [For example, if a vessel participates in the recreational salmon fishery within the RCA, the vessel cannot be in possession of groundfish while in the RCA. The vessel may, however, on the same trip fish for and retain groundfish shoreward of the RCA on the return trip to port.] Coordinates approximating boundary lines at the 10-fm (18-m) through 100-fm (183-m) depth contours can be found at § 660.71 through § 660.73. The Washington recreational fishing season structure is as follows:

TABLE 1 TO PARAGRAPH ((C)(1)(I)(D)—WASHINGTON RECREATIONAL FISHING SEASON STRUCTURE

Marine Area	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
3 and 4 (North Coast)	Closed		Open		Open<20 fm June 1-July 31 [a/ b/]			Open			Closed	
2 (South Coast)	Closed		Open [c/d/]			Open [d/]					Closed	
1 (Columbia River)	Closed		Open [e/ f/]								Closed	

a/ Retention of Pacific cod, sablefish, lingcod, bocaccio, silvergray rockfish, canary rockfish, widow rockfish, and yellowtail rockfish allowed >20 fm on days when recreational Pacific halibut is open.
b/ Retention of yellowtail and widow rockfish is allowed > 20 fm in July.
c/ From May 1 through May 31 lingcod retention prohibited > 30 fathoms except on days that the primary halibut season is open.
d/ When lingcod is open, retention is prohibited seaward of line drawn from Queets River (47°31.70' N. Lat. 124°45.00' W. Lon.) to Leadbetter Point (46° 38.17' N. Lat. 124°30.00' W. Lon.), except on days open to the primary halibut fishery and, June 1 – 15 and September 1 - 30.
e/ Retention of flatfish, sablefish, Pacific cod, yellowtail rockfish, widow rockfish, canary rockfish, redstriped rockfish, greenstriped rockfish, silvergray rockfish, chilipepper, bocaccio, and blue/deacon rockfish allowed during the all-depth Pacific halibut fishery. Lingcod retention is only allowed north of the WA-OR border with halibut on board.
f/ Retention of lingcod is prohibited seaward of a line drawn from Leadbetter Point (46° 38.17' N. Lat. 124°21.00' W. Lon.) to 46° 33.00' N. Lat. 124°21.00' W. Lon. year round except lingcod retention is allowed from June 1 - June 15 and Sept 1 - Sept 30.

* * * * *

(2) * * *

(i) * * *

(B) *Recreational rockfish conservation area (RCA).* Fishing for groundfish with recreational gear is prohibited within the recreational RCA, a type of closed area or groundfish conservation area, except with long-leader gear (as defined at § 660.351). It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA, except with long-leader gear (as defined at § 660.351). A vessel fishing in the recreational RCA may not be in possession of any groundfish. [For example, if a vessel fishes in the recreational salmon fishery within the RCA, the vessel cannot be in possession of groundfish while within the RCA. The vessel may, however, on the same trip fish for and retain groundfish shoreward of the RCA on the return trip to port.] Off Oregon, from January 1 through December 31, recreational fishing for groundfish is allowed in all depths. Coordinates approximating boundary lines at the 10-fm (18 m) through 100-fm (183-m) depth contours can be found at § 660.71 through § 660.73.

* * * * *

(D) *In the Pacific halibut fisheries.* Retention of groundfish is governed in part by annual management measures for Pacific halibut fisheries, which are published in the **Federal Register**. Between the Columbia River and Humbug Mountain, during days open to the ''all-depth'' sport halibut fisheries, when Pacific halibut are onboard the vessel, no groundfish, except sablefish, Pacific cod, and other species of flatfish (sole, flounder, sanddab), may be taken and retained, possessed or landed, except with long-leader gear (as defined at § 660.351). ''All-depth'' season days are established in the annual management measures for Pacific halibut fisheries, which are published in the **Federal Register** and are announced on the NMFS Pacific halibut hotline, 1–800–662–9825.

(3) * * *

(i) * * *

(A) *Recreational rockfish conservation areas.* The recreational RCAs are areas that are closed to recreational fishing for groundfish. Fishing for groundfish with recreational gear is prohibited within the recreational RCA, except that recreational fishing for species in the Other Flatfish complex, petrale sole, and starry flounder is permitted within the recreational RCA as specified in paragraph (c)(3)(iv) of this section. It is unlawful to take and retain, possess, or land groundfish taken with recreational gear within the recreational RCA, unless otherwise authorized in this section. A vessel fishing in the recreational RCA may not be in possession of any species prohibited by the restrictions that apply within the recreational RCA. For example, if a vessel fishes in the recreational salmon fishery within the RCA, the vessel cannot be in possession of rockfish while in the RCA. The vessel may, however, on the same trip fish for and retain rockfish shoreward of the RCA on the return trip to port. If the season is closed for a species or species group, fishing for that species or species group is prohibited both within the recreational RCA and shoreward of the recreational RCA, unless otherwise authorized in this section. Coordinates approximating boundary lines at the 10-fm (18 m) through 100-fm (183-m) depth contours can be found at § 660.71 through § 660.73. The California recreational fishing season structure and RCA depth boundaries by management area and month are as follows:

(*1*) Between 42° N lat. (California/Oregon border) and 40°10′ N lat. (Northern Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and ''Other Flatfish'' as specified in paragraph (c)(3)(iv) of this section) is closed from January 1 through April 30;

is prohibited seaward of the 30 fm (55 m) depth contour along the mainland coast and along islands and offshore seamounts from May 1 through October 31 (shoreward of 30 fm is open); and is open at all depths from November 1 through December 31.

(*2*) Between 40°10′ N lat. and 38°57.50′ N lat. (Mendocino Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and ''Other Flatfish'' as specified in paragraph (c)(3)(iv) of this section) is closed from January 1 through April 30; prohibited seaward of the 30 fm (55 m) depth contour along the mainland coast and along islands and offshore seamounts from May 1 through October 31 (shoreward of 30 fm is open), and is open at all depths from November 1 through December 31.

(*3*) Between 38°57.50′ N lat. and 37°11′ N lat. (San Francisco Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and ''Other Flatfish'' as specified in paragraph (c)(3)(iv) of this section) is closed from January 1 through March 31; is prohibited seaward of the boundary line approximating the 50 fm (91 m) depth contour along the mainland coast and along islands and offshore seamounts from April 1 through December 31 (shoreward of 50 fm is open). Closures around Cordell Bank (see paragraph (c)(3)(i)(C) of this section) also apply in this area.

(*4*) Between 37°11′ N lat. and 34°27′ N lat. (Central Management Area), recreational fishing for all groundfish (except petrale sole, starry flounder, and ''Other Flatfish'' as specified in paragraph (c)(3)(iv) of this section) is closed from January 1 through March 31; and is prohibited seaward of a boundary line approximating the 50 fm (91 m) depth contour along the mainland coast and along islands and offshore seamounts from April 1 through December 31.

(*5*) South of 34°27′ N lat. (Southern Management Area), recreational fishing for all groundfish (except California scorpionfish, ''Other Flatfish,'' petrale sole, and starry flounder) is closed entirely from January 1 through the last day of February. Recreational fishing for all groundfish (except ''Other Flatfish,'' petrale sole, and starry flounder, as specified in paragraph (c)(3)(iv) of this section) is prohibited seaward of a boundary line approximating the 100 fm (137 m) depth contour from April 1 through December 31 along the mainland coast and along islands and offshore seamounts, except in the CCAs where fishing is prohibited seaward of the 40 fm (73 m) depth contour when the fishing season is open (see paragraph (c)(3)(i)(B) of this section).

* * * * *

(ii) * * *

(B) *Bag limits, hook limits.* In times and areas when the recreational season for the RCG Complex is open, there is a limit of 2 hooks and 1 line when fishing for the RCG complex. The bag limit is 10 RCG Complex fish per day coastwide, with a sub-bag limit of 5 fish for vermilion rockfish. This sub-bag limit counts towards the bag limit for the RCG Complex and is not in addition to that limit. Retention of yelloweye rockfish, bronzespotted rockfish, and cowcod is prohibited. Multi-day limits are authorized by a valid permit issued by California and must not exceed the daily limit multiplied by the value of days in the fishing trip.

* * * * *

[FR Doc. 2020–27142 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 201204–0324]

RIN 0648–BJ84

Pacific Islands Fisheries; 2020–2023 Annual Catch Limit and Accountability Measures for Hawaii Kona Crab

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

ACTION: Final rule.

SUMMARY: In this final rule, NMFS implements an annual catch limit (ACL) of 30,802 lb (13,972 kg), and an annual catch target (ACT) of 25,491 lb (11,563 kg), of Hawaii Kona crab for fishing years 2020–2023. This rule also implements, as accountability measures (AM), an in-season closure of the fishery if catch is projected to reach the ACT, and a post-season adjustment if catch exceeds the ACL. This action support the long-term sustainability of the Hawaii Kona crab fishery.

DATES: The final rule is effective January 11, 2021. The final rule is applicable in fishing years 2020, 2021, 2022, and 2023.

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

Copies of the environmental analyses and other supporting documents for this action are available from *https://www.regulations.gov/docket?D=NOAA-NMFS-2020-0091,* or from Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

FOR FURTHER INFORMATION CONTACT: Kate Taylor, NMFS PIRO Sustainable Fisheries, 808–725–5182.

SUPPLEMENTARY INFORMATION: NMFS is implementing an ACL of 30,802 lb (13,972 kg) and an ACT of 25,491 lb (11,563 kg) of Hawaii Kona crab for each of the 2020–2023 fishing years, as recommended by the Council. The fishing year is the calendar year, and catch from State and Federal waters will count toward the ACL and ACT.

NMFS is also implementing both an in-season and post-season AM. Under the in-season AM, when NMFS projects that the catch of Kona crab will reach the ACT, we will close the commercial and non-commercial fisheries for Kona crab in Federal waters for the remainder of the year. For the post-season AM, if NMFS and the Council determine, after the end of each fishing year, that the catch exceeded the ACL, NMFS will reduce the ACL and ACT in the subsequent fishing year by the amount of the overage. In the event that the catch exceeds the ACT, but is below the ACL, we will not apply a post-season correction.

This final rule will make a housekeeping change in the regulations for Hawaii Kona crab and deepwater shrimp ACLs and AMs. Specifically, this rule adds a separate paragraph for each stock in 50 CFR 665.253 to distinguish between the ACLs for Hawaii Kona crab and deepwater shrimp.

Additional background information on this action is found in the preamble to the proposed specifications; we do not repeat it here.

Comments and Responses

On October 15, 2020, NMFS published a proposed rule and request for comments (85 FR 65336). The comment period for the proposed specification ended on November 5, 2020. NMFS received comments from four individuals that generally supported the action and responds below.

Comment 1: This rule is necessary to ensure the sustainability of the main Hawaiian Islands (MHI) Kona crab populations and the proposed ACL and ACT are very reasonable.

Response: NMFS agrees. This action is based upon the best available scientific information and support the long-term sustainability of the Hawaii Kona crab fishery.

Comment 2: The sustainability of MHI Kona crab populations helps to maintain a healthy marine ecosystem, including Kona crab prey or predators.

Response: NMFS agrees that a sustainably managed Kona crab fishery contributes to a healthy marine ecosystem.

Comment 3: A short term ACL is preferred since it will allow NMFS and the Council to review and adjust the ACL and ACT as needed in the future.

Response: NMFS concurs; a 4-year ACL provides stability to fishermen, businesses, and Kona crab populations.

Comment 4: It is beneficial that fishermen cannot retain female Kona crabs, per State of Hawaii regulations. There is a high survivability rate for released crabs.

Response: NMFS acknowledges that the State of Hawaii prohibits the retention of female Kona crabs.

Comment 5: It is important to include accountability measures and provide timely notification to fishermen if the ACT or ACL is exceeded.

Response: NMFS agrees. This final rule includes an accountability measure that would require NMFS to close the fishery in Federal waters when the ACT is projected to be reached to prevent the fishery from exceeding the ACL. The final rule also requires NMFS to provide fishermen timely notification of any fishery closure at least 7 days before the effective date of the closure.

Changes From the Proposed Specification

This final rule contains no changes from the proposed rule.

Classification

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 665

Annual catch limits, Accountability measures, Kona crab, Fisheries, Fishing, Hawaii.

Dated: December 7, 2020.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 665 as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for 50 CFR part 665 continues to read as follows:

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

■ 2. In § 665.243, add paragraph (d) to read as follows:

§ 665.243 Prohibitions.

* * * * *

(d) In Crustacean Permit Area 2, it is unlawful for any person to fish for, possess, sell, or offer for sale any Kona crab from a closed fishery in the Federal waters of the MHI in violation of § 665.253(b).

■ 3. Revise § 665.253 to read as follows:

§ 665.253 Annual Catch Limits (ACL) and Annual Catch Targets (ACT).

(a) *Deepwater Shrimp.* (1) In accordance with § 665.4, the ACLs for each fishing year are as follows:

TABLE 1 TO PARAGRAPH (a)(1)

Fishing year	2020	2021
ACL (lb)	250,733	250,733

(2) If the average catch of the three most recent years of deepwater shrimp exceeds the specified ACL in a fishing year, the Regional Administrator will reduce the ACL for the subsequent year by the amount of the overage.

(b) *MHI Kona crab.* (1) In accordance with § 665.4, the ACLs and ACTs for each fishing year are as follows:

TABLE 2 TO PARAGRAPH (b)(1)

Fishing year	2020	2021	2022	2023
ACL (lb)	30,802	30,802	30,802	30,802
ACT (lb)	25,491	25,491	25,491	25,491

(2) When the ACT is projected to be reached based on analyses of available information, the Regional Administrator shall publish a document to that effect in the **Federal Register** and shall use other means to notify affected fishermen. The document will include an advisement that the fishery will be closed beginning on a specified date, which is not earlier than 7 days after the date of filing the closure notice for public inspection at the Office of the Federal Register, until the end of the fishing year in which the ACL is reached.

(3) On and after the date specified in paragraph (b)(2) of this section, no person may fish for, possess, sell, or offer for sale any Kona crab from a closed fishery in the Federal waters of the MHI, except as otherwise allowed in this section.

(4) If landings exceed the specified ACL in a fishing year, the Regional Administrator will reduce the ACL and the ACT for the subsequent year by the amount of the overage.

[FR Doc. 2020–27126 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 239
Friday, December 11, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1120; Product Identifier 2019–SW–056–AD]

RIN 2120–AA64

Airworthiness Directives; Goodrich Externally-Mounted Hoist Assemblies

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for various model helicopters with certain part-numbered Goodrich externally-mounted hoist assemblies (hoists) installed. This proposed AD would require replacing unmodified hoists, installing placards, revising the existing Rotorcraft Flight Manual (RFM) for your helicopter, deactivating or removing a hoist if a partial peel out occurs, reviewing the helicopter's hoist slip load test records, repetitively inspecting the hoist cable and overload clutch (clutch), and reporting information to the FAA. This proposed AD would also require establishing operating limitations on the hoist and prohibit installing an unmodified hoist. This proposed AD was prompted by hoists failing lower load limit inspections. The actions of this proposed AD are intended to address an unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 25, 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–2020–1120; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the European Union Aviation Safety Agency (EASA) AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed rule, contact Collins Aerospace; 2727 E Imperial Hwy., Brea, CA 92821; telephone 714–984–1461. 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.

FOR FURTHER INFORMATION CONTACT: Kristi Bradley, Aerospace Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *kristin.bradley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1120; Product Identifier 2019–SW–056–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal 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 *http://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposal.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Kristi Bradley, Aerospace Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *kristin.bradley@faa.gov.* Any comments that the FAA receives which are 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 a series of ADs, the most recent being EASA AD No. 2015–0226R5, Revision 5, dated July 23, 2020 (EASA AD 2015–0226R5), to correct an unsafe condition for various model helicopters with a Goodrich externally-mounted hoist that has one of the following part numbers (P/Ns) or base P/Ns installed: 42315, 42325, 44301–10–1, 44301–10–2, 44301–10–4, 44301–10–5, 44301–10–6, 44301–10–7, 44301–10–8, 44301–10–9, 44301–10–10, 44301–10–11, 44311, 44312, 44314, 44315, 44316, or 44318. These hoists have a common overload clutch design. EASA advises of an initial incident of a rescue hoist containing a dummy test

load of 552 lbs. that reeled-out without command of the operator and impacted the ground during a maintenance check flight. Examination of the hoist determined that the overload clutch had failed. EASA states that this condition, if not detected and corrected, could lead to further cases of in-flight loss of the hoist load, possibly resulting in injury to persons on the ground or in a hoisting accident.

EASA also determined that some versions of the existing clutch had not been approved for aircraft use. EASA advises that Goodrich developed a new overload clutch with improved process control to mitigate some of the factors resulting in the degraded clutch performance. EASA's series of ADs were issued to adjust compliance intervals and replacement times, and include revised service information. EASA AD 2015–0226R5 was prompted by a major change approval for Leonardo S.p.a. Model AW109SP helicopters that allows a longer overhaul interval for hoists with the new overload clutch installed.

Accordingly, EASA AD 2015–0226R5 requires a records review to determine if the cable has exceeded the allowable limit in previous load testing, a repetitive load check and test of the clutch slip value, removal or deactivation of a hoist that cannot be tested due to lack of approved instructions, replacement of the old clutch P/N with a new clutch developed by Goodrich to mitigate some of the factors resulting in clutch degradation, periodic replacement of the hoist, reduction of the maximum allowable load on the hoist, addition of operational limitations to the RFM, and replacement of the hoist after a partial peel out. EASA AD 2015–0226R5 also prohibits the installation of a replacement cable that has exceeded the allowable limit in previous load testing. EASA considers AD 2015–0226R5 to be interim action and advises further AD action may follow.

FAA's Determination

Affected helicopters include helicopters that have been approved by the aviation authorities of Canada, Italy, France, and Germany 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 about the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that an unsafe condition is likely to exist or develop on other helicopters.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Goodrich Alert Service Bulletin (ASB) 44301–10–18, Revision 6, dated October 10, 2016 (ASB 44301–10–18, Rev 6), which specifies maximum hoist load limitations with respect to ambient temperature and describes actions and conditions that could reduce the capacity of the clutch. This service information also specifies procedures for inspecting the cable and inspecting the clutch by performing a cable conditioning lift and a hoist slip load test.

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

Proposed AD Requirements

This proposed AD would require:

- Replacing any hoist without a ''4'' as the first digit of its serial number (S/N) within 12 months after the effective date of this AD or before the hoist accumulates 55 operating hours, 1,200 hoist cycles (cycles), or 1,600 hoist lifts (lifts), whichever occurs first.
- Installing placards and revising the existing RFM for your helicopter to add maximum hoist load limitations, an excessive maneuvering warning, a maximum sustained bank angle in turn, and a prohibition on operating the hoist in the event of a partial peel out.
- Deactivating or removing any hoist that experiences partial peel out from service.
- Reviewing records for cable load-testing that was previously performed, and depending on the findings, replacing the cable.
- Repetitively inspecting the cable, inspecting the clutch by performing a cable conditioning lift and hoist slip load test, inspecting the cable a second time, reporting certain information to the FAA, and depending on these inspection outcomes, replacing the cable or removing the hoist from service.
- This proposed AD would also prohibit installing an affected replacement or original installation hoist that has not been re-identified to indicate a new improved clutch assembly.

Installation of a hoist with an improved overload clutch assembly, which is indicated by having a ''4'' as the first digit of its S/N, would not terminate the actions required by this proposed AD.

Differences Between This Proposed AD and the EASA AD

The EASA AD requires repetitively replacing the hoist with a modified hoist, whereas this proposed AD would not require repetitive replacement once a modified hoist with the improved clutch assembly is installed. The EASA AD requires adding a placard or operational limitation to the RFM warning that exceeding 15° of lateral pendulum angle/helicopter vertical axis can lead to clutch slippage, and this proposed AD would not. The EASA AD requires adding an operating limitation to the RFM limiting the number of persons who can be hoisted, whereas this proposed AD would not. This proposed AD would require replacing the cable before the next hoist operation if a cable has previously been load-tested at more than 1,500 lbs or at an unknown weight during at least one cable pull, while the EASA AD requires this replacement during multiple cable pulls. This proposed AD would require visually inspecting and measuring the diameter of the cable before and after performing a cable conditioning and a hoist slip load test, whereas the EASA AD does not. This proposed AD would require performing the cable conditioning and hoist slip load test within 30 days and thereafter at intervals not to exceed 6 months, 400 lifts, or 300 cycles. The EASA AD specifies performing the hoist slip load test according to the compliance time of the design approval holder instead. After the installation (not reinstallation) of a modified hoist, the EASA AD requires performing an initial hoist load check/test prior to hoisting operation, whereas this proposed AD would not.

Interim Action

The FAA considers this proposed AD to be an interim action. The inspection reports that would be required by this proposed AD will enable better insight into the condition of the hoists, and eventually to develop final action to address the unsafe condition. Once final action has been identified, the FAA might consider further rulemaking.

Costs of Compliance

The FAA estimates that this proposed AD affects 2,911 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 proposed AD.

Replacing a hoist would take about 8 work-hours and parts would cost about

$200,000 for an estimated cost of $200,680.

Revising the existing RFM for your helicopter and installing placards would take about 0.5 work-hour for an estimated cost of $43 per helicopter and $125,173 for the U.S. fleet.

Deactivating or removing a hoist that experiences partial peel out would take about 2 work-hours for an estimated cost of $170.

Reviewing records would take about 0.5 work-hour for an estimated cost of $43 per helicopter and $125,173 for the U.S. fleet.

Inspecting the cable and performing a cable conditioning lift and hoist slip load test would take about 2 work-hours for an estimated cost of $170 per helicopter and $494,870 for the U.S. fleet per inspection cycle. Reporting the hoist slip load test information would take about 0.25 work-hour for a cost of $21 per helicopter and $61,131 for the U.S. fleet per reporting cycle.

Replacing the cable would take about 3 work-hours and parts would cost about $3,150 for a total replacement cost of $3,405.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 0.25 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify this proposed regulation:

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

2. Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Goodrich Externally-Mounted Hoist Assemblies: Docket No. FAA–2020–1120; Product Identifier 2019–SW–056–AD.

(a) Applicability

This AD applies to helicopters, certificated in any category, with an externally-mounted hoist assembly (hoist) with a part number (P/N) or base P/N listed under the Hoist Family column in Table 1 of Goodrich Alert Service Bulletin No. 44301–10–18, Revision 6, dated October 10, 2016 (ASB 44301–10–18 Rev 6), installed. An affected hoist may be installed on but not limited to the following:

Note 1 to the introductory text of paragraph (a): The hoist P/N may be included as a component of a different part-numbered kit.

(1) Airbus Helicopters (previously Eurocopter France) Model AS332L, AS332L1, AS332L2, AS350B2, AS350B3, AS365N3, and EC225LP helicopters;

(2) Airbus Helicopters Deutschland GmbH (AHD) (previously Eurocopter Deutschland GmbH) Model EC135P1, EC135P2, EC135P2+, EC135P3, EC135T1, EC135T2, EC135T2+, EC135T3, MBB–BK 117 C–2, and MBB–BK 117 D–2 helicopters;

(3) Bell Textron Canada Limited (previously Bell Helicopter Textron Canada Limited) Model 429 and 430 helicopters;

(4) Bell Textron Inc. (previously Bell Helicopter Textron Inc.) Model 205A, 205A–1, 205B, 212, 412, 412CF, and 412EP helicopters;

(5) Leonardo S.p.a. (previously Finmeccanica S.p.A., AgustaWestland S.p.A) Model A109, A109A, A109A II, A109C, A109E, A109K2, A109S, AB139, AB412, AB412 EP, AW109SP, and AW139, helicopters;

(6) MD Helicopters, Inc. (MDHI) Model MD900 helicopters;

(7) Transport and restricted category helicopters, originally manufactured by Sikorsky Aircraft Corporation, Models S–61A, S–61L, S–61N, S–76A, S–76B, S–76C, S–76D, and S–92A; and

(8) Restricted category Model HH–1K, TH–1F, TH–1L, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and UH–1P helicopters.

(b) Unsafe Condition

This AD defines the unsafe condition as failure of the hoist overload clutch resulting in an in-flight failure of the hoist, which could result in injury to a person being lifted.

(c) Comments Due Date

The FAA must receive comments by January 25, 2021.

(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) For a hoist without the number ''4'' as the first digit of its serial number (S/N), before further flight:

(i) For hoists that use operating hours to monitor hoist operation, within 12 months after the effective date of this AD or before the hoist accumulates 55 hoist operating hours, whichever occurs first, replace the hoist. For purposes of this AD, hoist operating hours are counted anytime the hoist motor is operating.

(ii) For hoists that use hoist cycles (cycles) to monitor hoist operation, within 12 months after the effective date of this AD or before the hoist accumulates 1,200 cycles, whichever occurs first, replace the hoist. For purposes of this AD, a cycle is counted anytime the cable is extended and then retracted a minimum of 16 feet (5 meters) during flight or on the ground, with or without a load.

(iii) For hoists that use hoist lifts (lifts) to monitor hoist operation, within 12 months after the effective date of this AD or before the hoist accumulates 1,600 lifts, whichever occurs first, replace the hoist. For purposes of this AD, a lift is counted anytime the cable is unreeled or recovered or both with a load attached to the hook, regardless of the length of the cable that is deployed or recovered. An unreeling or recovery of the cable with no load on the hook is not a lift. If a load is applied for half an operation (*i.e.* unreeling or recovery), it must be counted as one lift.

(2) For all hoists identified in the introductory text of paragraph (a) of this AD, before further flight, install placards and revise the existing Rotorcraft Flight Manual (RFM) for your helicopter by inserting a copy of this AD or by making pen-and-ink changes in Section 2, Limitations, of the RFM Supplement for the hoist as follows:

(i) For 500 pound (lb) rated hoists, install a placard with the information in Figure 1 to paragraph (e)(2)(i) of this AD in full view of the hoist operator and add the information in Figure 1 to paragraph (e)(2)(i) of this AD to the existing RFM for your helicopter:

500 lb Rated Hoist

OAT at or above 32°F (0°C): Maximum hoist load 450 lbs (204 kg)
OAT between -4°F (-20°C) and 32°F (0°C): Maximum hoist load 400 lbs (181 kg)

Figure 1 to Paragraph (e)(2)(i)

(ii) For 600 lb rated hoists, install a placard with the information in Figure 2 to paragraph (e)(2)(ii) of this AD in full view of the hoist operator and add the information in Figure 2 to paragraph (e)(2)(ii) of this AD to the existing RFM for your helicopter:

600 lb Rated Hoist

OAT at or above 32°F (0°C): Maximum hoist load 550 lbs (249 kg)
OAT between -4°F (-20°C) and 32°F (0°C): Maximum hoist load 500 lbs (227 kg)

Figure 2 to Paragraph (e)(2)(ii)

(iii) For 500 and 600 lb rated hoists, install a placard with the information in Figure 3 to paragraph (e)(2)(iii) of this AD in full view of the pilot and add the information in Figure 3 to paragraph (e)(2)(iii) of this AD to the existing RFM for your helicopter.

(iv) For 500 and 600 lb rated hoists, install a placard with the information in Figure 4 to paragraph (e)(2)(iv) of this AD in full view of the pilot and add the information in Figure 4 to paragraph (e)(2)(iv) of this AD to the existing RFM for your helicopter:

Hoist Operations

Warning: Excessive maneuvering with extended cable and load on the hook may cause uncommanded peel out of the cable.

Maximum sustained bank angle in turn is 20°

Figure 3 to Paragraph (e)(2)(iii)

(3) For all hoists identified in the introductory text of paragraph (a) of this AD, as of the effective date of this AD, if a partial peel out occurs, deactivate or remove the hoist from service before further flight. For purposes of this AD, a partial peel out occurs when 20 inches (0.5 meter) or more of the hoist cable reels off of the hoist cable drum in one overload clutch slip incident.

(4) For all hoists identified in the introductory text of paragraph (a) of this AD, within 30 days after the effective date of this AD, review the helicopter's hoist slip load test records. If the cable was load-tested at more than 1,500 lbs or at an unknown weight during one or more cable pulls, replace the cable with an airworthy cable before the next hoist operation.

(5) For all hoists identified in the introductory text of paragraph (a) of this AD, within 30 days after the effective date of this AD, and thereafter at intervals not to exceed 6 months, 400 lifts, or 300 cycles, whichever occurs first:

(i) Visually inspect the first 18 inches (45 cm) of the cable from the hook assembly for broken wires and necked down sections. If there is a broken wire or necked down section, replace the cable with an airworthy cable before further flight.

(ii) Within the first 18 inches (45 cm) of the cable from the hook assembly, measure the diameter of the cable at the most necked down area. If the diameter measurement is less than 0.185 inch (4.7 mm), replace the cable with an airworthy cable before further flight.

(iii) Using load check tool P/N 49900–889–104, perform a cable conditioning and a hoist

slip load test by following the Accomplishment Instructions, paragraphs 3.C.(1) through 3.C.(3)(g) of ASB 44301–10–18 Rev 6. If the average of the five test values is less than the limit shown in Table 2 for 600 lb rated hoists or Table 3 for 500 lb rated hoists of ASB 44301–10–18 Rev 6, remove the hoist from service before further flight.

(iv) Visually inspect the first 30 feet (10 meters) of the cable from the hook assembly for broken wires, necked down sections, kinks, bird-caging, flattened areas, abrasion, and gouging. It is permissible for the cable to have a slight curve immediately after performing the hoist slip load test. If there is a broken wire, necked down section, kink, or any bird-caging; or if there is a flattened area, any abrasion, or a gouge that exceeds allowable limits, replace the cable with an airworthy cable before further flight.

(v) Repeat the actions specified in paragraphs (e)(5)(i) and (ii) of this AD. If there is a broken wire or necked down section or the cable diameter measurement is less than 0.185 inch (4.7 mm), replace the cable with an airworthy cable before further flight.

(6) Within 30 days after accomplishing the hoist slip load test, report the information requested in Appendix 1 to this AD by email to *ASB.SIS-CA@utas.utc.com;* or mail to Goodrich, Collins Aerospace; 2727 E. Imperial Hwy., Brea, CA 92821.

(7) As of the effective date of this AD, do not install as a replacement part or as an original installation an externally-mounted hoist with a P/N identified in the introductory text of paragraph (a) of this AD unless it has an improved overload clutch assembly with the number ''4'' as the first digit of the S/N.

(f) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 0.25 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Kristi Bradley, Aerospace Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *kristin.bradley@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.

(h) Additional Information

The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD No. 2015–0226R5, Revision 5, dated July 23, 2020. You may view the EASA AD on the internet at *https://www.regulations.gov* in the AD Docket.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 2500, Cabin Equipment/Furnishings.

Appendix 1 to AD ####–##–##

Hoist Slip Load Test Results (Sample Format)

Provide the following information by email to *ASB.SIS-CA@utas.utc.com;* or mail to Goodrich, Collins Aerospace; 2727 E. Imperial Hwy., Brea, CA 92821.

Helicopter Owner/Operator Name:
Email Address:
Telephone Number:
Helicopter Model and Serial Number:
Hoist Part Number:
Hoist Serial Number:
Time since Last Hoist Overhaul (months):
Hoist Operating Hours:
Hoist Cycles:
Hoist Lifts:
Date and Location Test was Accomplished:
Point of Contact for Additional Information:
Air Temperature:
Gearbox Lubricant:
Hoist Slip Load Test Value 1:
Hoist Slip Load Test Value 2:
Hoist Slip Load Test Value 3:
Hoist Slip Load Test Value 4:
Hoist Slip Load Test Value 5:
Hoist Slip Load Test Averaged Test Value:
Any notes or comments:

Issued on December 4, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27105 Filed 12–10–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0727; Airspace Docket No. 20–ACE–18]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Cambridge NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace, extending upward from 700 feet above the surface. This action also proposes several administrative corrections to the airspace's legal description. This action would ensure the safety and management of instrument flight rules (IFR) operations at the airport.

DATES: Comments must be received on or before January 25, 2021.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1–800–647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0727; Airspace Docket No. 20–ACE–18, at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2020–0727; Airspace Docket No. 20–ACE–18''. The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the ''**ADDRESSES**'' section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11E, 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 service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending the Class E airspace extending upward from 700 feet above the surface. To properly contain IFR departures to 700 feet above the surface the 6.4-mile radius should be increased to a 7.5-mile radius of the airport. This area would be described as follows: That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Cambridge Municipal Airport.

Further, this action proposes to remove Harry Strunk NDB from the airspace text header and the airspace description. The FAA proposes the removal of the navigation aid (NAVAID) because it is being decommissioned. Also, the NAVAID is not needed to describe the airspace.

Lastly, this action proposes an administrative correction to the airspace legal description. The airport's geographic coordinates do not match the FAA database and should be updated to lat. 40°18′24″ N, long. 100°09′43″ W.

Class E5 airspace designations are published in paragraph 6005 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.

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

Regulatory Notices and Analyses

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

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

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

* * * * *

ACE NE E5 Cambridge, NE

Cambridge Municipal Airport, NE
(Lat. 40°18′24″ N, long. 100°09′43″ W)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Cambridge Municipal Airport.

Issued in Seattle, Washington, on December 7, 2020.

B.G. Chew,

Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2020–27207 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR 230, 239, and 240

[Release Nos. 33–10892; 34–90948; File No. S7–19–20]

RIN 3235–AM79

Temporary Rules to Include Certain ''Platform Workers'' in Compensatory Offerings Under Rule 701 and Form S–8

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing for public comment amendments to the exemption from registration under the rules of the Securities Act of 1933 (''Securities Act'') for securities issued by non-reporting companies pursuant to compensatory arrangements and to Form S–8, the registration statement for offerings by reporting companies pursuant to employee benefit plans. The amendments would establish a temporary provision under Securities Act rules that, on a trial basis, would permit a non-reporting issuer to offer and sell securities for a compensatory purpose to an expanded group of workers without having to register the offers and sales under the Securities Act, as long as certain conditions are met. Specifically, the proposed amendments would permit the issuer to offer and sell securities to those workers who provide services available through the issuer's internet-based marketplace platform or through another widespread, technology-based marketplace platform or system (''platform workers''). The amendments would similarly, on a trial basis, permit a reporting issuer to include such workers in compensatory offerings registered on Form S–8. These proposed rule amendments would expire, absent further action by the Commission, five years from the date of their effectiveness. We are also proposing to amend the rules under the Securities Exchange Act of 1934 (''Exchange Act''). The amendment would extend the exclusion from the definition of ''held of record'' and corresponding safe harbor, which currently applies to securities held by persons who received them pursuant to an employee compensation plan, to securities held by persons who received them pursuant to a compensation plan for platform workers under the proposed Securities Act rule amendment. The proposed exclusion and safe harbor for securities issued to platform workers under Exchange Act rules would not be temporary.

DATES: Comments should be received on or before February 9, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*).

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–19–20. To help us process and review your comments more efficiently, please use only one method. We will post all comments on our internet website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in our Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. 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.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Elliot Staffin, Office of Rulemaking, at (202) 551–3430, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to amend 17 CFR 230.428 (''Rule 428''), 17 CFR 230.701 (''Rule 701''), and 17 CFR 239.16b (''Form S–8'') under the Securities Act,[1] and 17 CFR 240.12g5–1 (''Rule 12g5–1'') under the Exchange Act.[2]

Table of Contents

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 78a *et seq.*

I. Introduction

A. Rule 701, Form S–8, and the Concept Release

Title 17, section 230.701 (''Rule 701'') provides an exemption from the registration requirements of Securities Act Section 5 [3] for offers and sales of securities by non-reporting companies [4] to their employees, officers, directors, trustees, consultants, or advisors [5] under written compensatory benefit plans [6] or written agreements relating to compensation.[7] The rule reflects the Commission's long-standing position that offers and sales of securities for compensatory purposes raise different issues, and therefore should be treated differently, from offers and sales that raise capital for the issuer of the securities.[8]

For example, when first proposing Rule 701, the Commission recognized that employee equity incentive arrangements are ''a potentially important tool to attract, compensate and motivate employees.'' [9] It further expressed the concern that private, smaller companies were forgoing this potentially valuable means of compensation because of the costs of complying with Securities Act registration requirements.[10] The Commission also has expressly addressed the role that equity compensation may play in the employment relationship by indicating that using equity as a component of compensation may align the incentives of employees with the success of the enterprise, facilitate recruitment and retention, and preserve cash for the issuer's operations.[11]

Form S–8 is the simplified form for the registration of securities transactions involving an issuance to a registrant's employees in a compensatory or incentive context and for a non-capital-raising purpose.[12] For purposes of Form S–8, the term ''employee'' includes consultants and advisors as long as they are natural persons and provide *bona fide* services to the registrant not in connection with a capital-raising transaction or promoting or maintaining a market for the registrant's securities.[13] Form S–8 provides for an abbreviated disclosure format, allows for updating through forward incorporation by reference of Exchange Act reports, and is effective immediately upon filing.[14] It also requires the issuer to provide disclosure to employees and others receiving securities in the offering. In addition, the full spectrum of investor protections associated with registration under the Securities Act applies to the transaction.

In July 2018, the Commission published a concept release to solicit comment on whether and how best to modernize the exemption under Rule 701 and to update Form S–8.[15] In the release, the Commission requested comment on how to address, consistent with investor protection, the significant evolution that has taken place in the types of compensatory offerings issuers make and the composition of the workforce since the Commission last substantively amended this rule and form.[16] Regarding workforce changes, the Commission focused on the new types of work relationships between companies and individuals that have

[3] 15 U.S.C. 77e.

[4] Only issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m and 78o(d)) and are not investment companies registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) are eligible to use Rule 701. *See* 17 CFR 230.701(b).

[5] When the Commission first proposed Rule 701, it initially limited the exemption to the issuer's employees, directors, trustees or officers (or those of its parents or subsidiaries). *See Regulation D Revisions; Exemption for Certain Employee Benefit Plans,* Release No. 33–6683 [52 FR 3015 (Jan. 30, 1987)] (''Rule 701 Proposing Release''). The Commission specifically excluded consultants and ''independent agents'' due to a concern that including them could lead to an exemption broader than the intended compensatory purpose. *See, e.g., Employee Benefit Plans and Compensation Contracts,* Release No. 33–6726 (July 24, 1987) [52 FR 29033 (Aug. 5, 1987)] (''Rule 701 Reproposing Release''). Eventually, however, when adopting Rule 701, the Commission included issuances to consultants and advisors within the rule's scope. The Commission noted comments pointing out that securities issuances to such persons could be for compensatory and non-capital-raising purposes and determined that there was no meaningful basis for distinguishing issuances to them and to employees. *See Compensatory Benefit Plans and Contracts,* Release No. 33–6768 [53 FR 12918–02 (Apr. 20, 1988)] (''Rule 701 Adopting Release''). In 1999, the Commission amended Rule 701, consistent with amendments to Form S–8, to prevent the misuse of that form for capital-raising transactions. *See Rule 701—Exempt Offerings Pursuant to Compensatory Arrangements,* Release No. 33–7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)] (''1999 Rule 701 Adopting Release''). Specifically, the Commission modified the definition of consultants and advisors to require that they be natural persons, provide *bona fide* services, and the services not be in connection with the offer or sale of securities in a capital-raising transaction and not directly or indirectly promote or maintain a market for the issuer's securities. *See id.*

[6] 17 CFR 230.701(c)(2) defines a ''compensatory benefit plan'' as ''any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan.''

[7] *See* 17 CFR 230.701(c). The exemption also extends to offers and sales of securities under written compensatory plans or contracts established by the issuer's parent or the issuer's or parent's majority-owned subsidiaries. *See id.* The Commission has also indicated that a person in a *de facto* employment relationship with the issuer, such as a nonemployee providing services that traditionally are performed by an employee, with compensation paid for those services being the primary source of the person's earned income, would qualify as an eligible person under the exemption. *See* 1999 Rule 701 Adopting Release, *supra* note 5.

[8] *See* Rule 701 Reproposing Release, *supra* note 5, at 29033 (stating that ''[t]he Commission historically has recognized that when transactions of this nature are primarily compensatory and incentive oriented, some accommodation should be made under the Securities Act'').

[9] *See* Rule 701 Proposing Release, *supra* note 5, at 3020.

[10] *See id.; see also* 1999 Rule 701 Adopting Release, *supra* note 5, at 11095 (stating that when adopting Rule 701, ''we determined that it would be an unreasonable burden to require these private companies, many of which are small businesses, to incur the expenses and disclosure obligations of public companies when their only public securities sales were to employees,'' and further noting that ''these sales are for compensatory and incentive purposes, rather than for capital-raising'').

[11] *See Executive Compensation and Related Person Disclosure,* Release No. 33–8732A (Aug. 29, 2006) [71 FR 53158 (Sept. 6, 2006)] (''2006 Executive Compensation Adopting Release'') (stating that unlike salary and bonus compensation, stock option compensation does not require the payment of cash by the registrant, and therefore can be particularly attractive to registrants for which cash is a scarce resource; noting that stock option compensation may also provide an incentive for employees to work to increase the registrant's stock price; and additionally indicating that some registrants may be able to use stock option compensation to help retain employees, because an employee with unvested in-the-money options forfeits his potential value if he leaves the registrant's employ.).

[12] *See Registration of Securities on Form S–8,* Release No. 33–7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] (''1999 Form S–8 Adopting Release'').

[13] *See* Form S–8, General Instruction A.1.(a)(1). *See also* 1999 Form S–8 Adopting Release (stating that issuers may continue to use securities registered on Form S–8 to compensate persons who have a de facto employment relationship with them. Such a relationship may exist where a person not employed by a registrant provides the registrant with *bona fide* services that traditionally are performed by an employee, and the compensation paid by the registrant for those services is the primary source of the person's earned income.).

[14] *See Registration and Reporting Requirements for Employee Benefit Plans,* Release No. 33–6867 (June 6, 1990) [55 FR 23909 (June 13, 1990)] (''1990 Form S–8 Adopting Release'').

[15] *See Concept Release on Compensatory Securities Offerings and Sales,* Release No. 33–10521 (July 18, 2018) [83 FR 34958 (July 24, 2018)] (''Concept Release''). Unless otherwise indicated, comments cited in this release are to the public comments on the Concept Release, which are available at *https://www.sec.gov/comments/s7-18-18/s71818.htm.*

[16] *See id.* While the Commission amended Rule 701 in 2018 to implement the Congressional mandate to raise the Rule 701(e) disclosure threshold from $5 million to $10 million, *see* Release No. 33–10520 (Jul. 18, 2018) [83 FR 34940 (Jul. 24, 2018)], the last substantive amendment of Rule 701 prior to then was in 1999. *See* 1999 Rule 701 Adopting Release *supra* note 5. The Commission last substantively amended Form S–8 in 2005. *See* Release No. 33–8587 (Jul. 15, 2005) [70 FR 42234 (Jul. 21, 2005)].

emerged in the so-called ''gig economy.'' [17]

These new types of work relationships have arisen in large part due to the internet and reductions in the costs of communication and information processing. They typically involve an individual's use of an internet ''platform'' provided by a company (the ''platform provider'') to find a particular type of work, or ''gig'' (*i.e.,* task or job). The work could involve the individual providing services to end users, such as ride-sharing, food delivery, household repairs, dog-sitting, or tech support, or using the platform to sell goods or lease property to third parties.[18] Other new work relationships may involve individuals using the platform to perform tasks or services for the platform provider itself.[19]

A significant characteristic of these new work relationships is that the individual worker may have greater flexibility in determining when and how much he or she works than in a traditional employment relationship where those determinations are typically made by the issuer. In addition, these new work relationships can be, and often are, on a short-term, part-time, or freelance basis. Another significant characteristic is that an individual who provides services or goods through these platforms may have similar relationships with multiple companies through which the individual may engage in the same or different business activities. Given the characteristics of these new work relationships, the individual workers might not be employees, consultants, advisors, or de-facto employees [20] eligible to receive securities in compensatory arrangements under Rule 701.

Numerous commenters on the Concept Release who addressed issues relating to ''gig economy'' workers supported including them within the scope of Rule 701 and Form S–8.[21] Several noted that they did not believe or were uncertain that ''gig economy'' workers would fall within Rule 701's current categories of employees, consultants, or advisors, and recommended adding a new category of worker to include them.[22]

The new work relationships of the gig economy have become increasingly significant to the broader U.S. economy.[23] They also raise some of the same considerations that led the Commission to adopt Rule 701. For example, ''gig economy'' issuers may have the same compensatory and incentive motivations to offer equity compensation to individuals participating in the companies' platform-based businesses. Permitting gig economy issuers to utilize the Rule 701 exemption on a temporary basis would allow the Commission to assess the appropriateness of the exemption for these new work relationships and thus should help inform the Commission's ongoing efforts to modernize its rules in light of changing economic and market conditions.

For the above reasons, we propose to include a new category of worker, the ''platform worker,'' within the scope of Rule 701 and Form S–8.[24] As we stated in the Concept Release, any such expansion of Rule 701 and Form S–8 must be consistent with the Commission's mandate to protect investors.[25] It should not facilitate offers and sales of unregistered securities under the guise of being compensatory when in fact they are undertaken for capital-raising purposes. Therefore, we are proposing to expand Rule 701 and the use of Form S–8 to facilitate compensatory transactions with platform workers while also proposing conditions designed to limit the possibility that the rule changes could result in offers and sales for capital-raising purposes.[26]

We are also proposing these changes on a temporary basis [27] to allow us to assess whether unregistered issuances of securities to platform workers under expanded Rule 701, or issuances registered on expanded Form S–8, are being made for appropriate compensatory purposes and not for capital-raising purposes. Similarly, we intend to assess whether such issuances have the expected beneficial effects for issuers in the ''gig economy,'' their platform workers, and ultimately their investors and whether such issuances have resulted in any unintended consequences. This assessment, in turn, should help us determine whether to modify or expand the scope of Rule 701 and Form S–8 on a permanent basis.

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed rule amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

B. Summary of the Proposed Amendments

We propose to amend Rule 701 by adding a temporary rule provision that, for five years, would enable issuers to use Rule 701 to compensate certain ''platform workers,'' subject to specified conditions. Under the amendments, an issuer would be able to use the Rule 701 exemption to offer and sell its securities on a compensatory basis to platform workers who, pursuant to a written contract or agreement, provide *bona fide* services by means of an internet-based platform or other widespread, technology-based marketplace platform or system provided by the issuer if:

- The issuer operates and controls the platform, as demonstrated by its ability to provide access to the platform, to establish the principal terms of service for using the platform and terms and

[17] *See id.,* at Section I.B. Other names for the ''gig economy'' include the ''on-demand economy'' and the ''sharing economy.'' *See, e.g.,* Alex Kirven, ''Comment: *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy,* 89 U. Colo. L. Rev. 249, 253 (Winter 2018), available at *http://lawreview.colorado.edu/wp-content/uploads/2018/05/Kirven-Whose-Gig-Is-It-Anyway-Technological-Change-Workplace-Control-and-Supervision-and-Workers-Rights-in-the-Gig-Economy.pdf.*

[18] *See id.*

[19] *See, e.g., Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry,* 32 Berkeley J. Emp. & Lab. L. 143 (2011) (providing examples of crowdsourcing, such as a platform provider's use of multiple workers to tag photographs according to their content, or to build the back-end of a platform provider's interactive website).

[20] *See supra* note 7.

[21] *See* the letters from Airbnb, Inc. (Sept. 21, 2018) (''Airbnb''), the American Bar Association, Business Law Section (Nov. 28, 2018) (''ABA''), Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Sept. 24, 2018) (''Chamber''), Davis Polk & Wardwell, LLP (''Davis Polk''), Indigo Ag, Inc. (Jul. 8, 2019) (''Indigo''), Postmates (Oct. 17, 2018), Brian Sament (Oct. 14, 2018) (''Sament''), Sullivan & Cromwell LLP (Sept. 24, 2018) (''Sullivan''), and Uber Technologies, Inc. (Oct. 11, 2018) (''Uber'').

[22] *See, e.g.,* letters from ABA, Chamber, Indigo, and Postmates.

[23] *See, e.g., The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,* Lawrence F. Katz and Alan B.Krueger, National Bureau of Economic Research, available at *http://www.nber.org/papers/w22667* (finding a substantial rise in the incidence of alternative work arrangements for U.S. workers from 2005 to 2015, and defining alternative work arrangements as including temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers); *see also Contingent Workforce,* U.S. Government Accountability Office, GAO–15–168R (2015), available at *https://www.gao.gov/assets/670/669766.pdf* (finding that, while the size of the U.S. contingent workforce varies by definition and data source, using an expansive definition of alternative work arrangements, 40.4% of the U.S. employed labor force in 2010 was in an alternative work arrangement).

[24] *See* proposed Rule 701(h) and proposed 17 CFR 239.16b(c). As explained below, the proposed expanded scope of Rule 701 and Form S–8 would be temporary while we examine whether to adopt the rules or similar rules on a more permanent basis.

[25] *See* Concept Release, *supra* note 15, at Section II.A.

[26] *See, e.g.,* proposed Rule 701(h)(3) and proposed 17 CFR 239.16b(c)(1).

[27] *See infra* Section II.G.

conditions by which the platform worker receives payment for the services provided through the platform, and to accept and remove platform workers participating in the platform;

- The issuance of securities to participating platform workers is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract, or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the issuer's securities;
- No more than 15 percent of the value of compensation received by a participating worker from the issuer for services provided by means of the platform during a 12-month period, and no more than $75,000 of such compensation received from the issuer during a 36-month period, shall consist of securities, with such value determined at the time the securities are granted;
- The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and
- The issuer must take reasonable steps to prohibit the transfer of the securities issued to a platform worker pursuant to this exemption, other than a transfer to the issuer or by operation of law.[28]

The proposed amendments also would permit an Exchange Act reporting issuer to register the offer and sale of its securities to its platform workers using Form S–8. The same conditions proposed for Rule 701 issuances would apply to issuances to platform workers that are registered on Form S–8, except for the proposed transferability restriction. Like the proposed amendments to Rule 701, the proposed Form S–8 amendments would be temporary and would expire, absent further Commission action, on the same date as the Rule 701 amendments.

In order to help in our evaluation of the proposed expanded scope of Rule 701 and Form S–8, we are also proposing that any issuer that issues securities to platform workers would be required to furnish information to the Commission at six-month intervals (each, an ''interval''), regarding:

1. The criteria used to determine eligibility for awards, whether those criteria are the same as for other compensatory transactions, and whether those criteria, including any revisions to the criteria, are communicated to platform workers in advance as an incentive;
2. The type and terms of securities issued and whether they are the same as for other compensatory transactions by the issuer during that interval;
3. If pursuant to Rule 701, the reasonable steps taken to prohibit the transfer of the securities sold pursuant to this temporary rule;
4. The percentage of overall outstanding securities that the amount issued cumulatively under this temporary rule represents;
5. During the interval, the number of platform workers, the number of non-platform workers, the number of platform workers who received securities pursuant to the temporary rule, and the number of non-platform workers who received securities pursuant to the issuer's Rule 701 or Form S–8 issuances;
6. Both in absolute amounts and as a percentage of the issuer's total Rule 701 or Form S–8 issuances during the interval:
   a. The aggregate number of securities issued to platform workers; and
   b. The aggregate dollar amount of securities issued to platform workers.

II. Description of the Proposed Amendments

A. Proposed Inclusion and Definition of ''Platform Worker'' Under Rule 701 and Form S–8

We propose to amend Rule 701 and Form S–8 to permit an issuer on a temporary basis to offer and sell securities to certain platform workers. Under the proposed definition of ''platform worker,'' [29] eligible workers would be those persons unaffiliated with the issuer who meet two conditions. First, the worker must provide *bona fide* services through or by means of the issuer's internet-based or other widespread, technology-based marketplace platform or system (''platform''). Workers providing services to third-party end-users would qualify, as long as the issuer benefits from such services (*e.g.,* by receiving a fee for the worker's use of the platform or a percentage of the compensation received from the end-user for the worker's services).[30] Consistent with the treatment of persons eligible for the current exemption under 17 CFR 230.701(c) (''Rule 701(c)''), platform workers providing services to the issuer, or the issuer's parents, subsidiaries,[31] or subsidiaries of the issuer's parent, would also qualify.[32] Second, the services must be provided pursuant to a written contract or agreement between the issuer and the platform worker [33] and must be provided through a platform-based marketplace (or other widespread, technology-based marketplace platform or system) that the issuer operates and controls.[34]

Commenters who supported expanding the scope of Rule 701 and Form S–8 to include offers and sales of securities to platform workers stated that updating Rule 701 and Form S–8 to include such workers is necessary to keep pace with evolutions in the economy and the labor market.[35] One commenter indicated that such an update would be consistent with the goals of the Jumpstart Our Business Startups Act (''JOBS'' Act) to spur entrepreneurship and support the business startups and private companies that are vital to the U.S. economy, and that increased alignment of incentives between gig economy companies and

[28] An issuer using proposed Rule 701(h) would also be able to continue to use Rule 701 for transactions to persons eligible under 17 CFR 230.701(c).

[29] *See* proposed Rule 701(h)(1); *see also* proposed 17 CFR 239.16b(c) and proposed amended General Instruction A.1.(b)(1) to Form S–8, which reference the proposed definition of ''platform worker'' under proposed Rule 701(h)(1).

[30] *See* proposed new Rule 701(h)(2)(i) (the first prong of the proposed definition of platform worker); *see also* proposed 17 CFR 239.16b(c)(1) and proposed amended General Instruction A.1.(b)(1) to Form S–8. As explained below in Section II.B., the services may not be in connection with the offer or sale of securities in a capital-raising transaction.

[31] In a companion rulemaking, we are proposing to expand the scope of coverage of the Rule 701 exemption, which currently includes compensatory issuances to employees of an issuer's or its parent's majority-owned subsidiaries, to include compensatory issuances to employees of all of an issuer's or its parent's subsidiaries. *See* Release No. 33–10891 (Nov. 24, 2020), at Section II.C.3 (proposing to amend Rule 701(c)). Our proposed inclusion of platform workers of an issuer's subsidiaries, without regard to whether they are majority-owned, would be consistent with the proposed amendment of Rule 701(c). Like this proposed amendment, the meaning of ''subsidiary'' under Rule 701(h) would be governed by the general definition of subsidiary for purposes of the Securities Act. Under that definition, a ''subsidiary'' of a specified person is an affiliate controlled by such person directly or indirectly through one or more intermediaries. *See* 17 CFR 230.405.

[32] *See* proposed Rule 701(h)(2)(i).

[33] For the purpose of Rule 701(h), the term ''written contract or agreement'' would include an electronic, internet-based contract or agreement. We believe that a similar interpretation applies to the term ''written compensation contract'' in Rule 701(c). Because the proposed Rule 701(h) definition of ''platform worker'' would also be used in Form S–8, the same meaning of ''written contract or agreement'' would apply in that context. *See* proposed General Instruction A.1.(b)(1) of Form S–8; *see also* proposed 17 CFR 239.16b(c)(1).

[34] *See* proposed Rule 701(h)(2)(ii).

[35] *See, e.g.,* letter from Chamber; *see also* letter from Airbnb.

participating platform workers would benefit both.[36]

Some commenters emphasized the potential benefits to platform workers of expanding Rule 701. Commenters stated that expanding eligibility for Rule 701 issuances would help democratize share ownership and wealth by allowing the many ordinary Americans participating in the gig economy to make significant strides toward greater wealth and financial security.[37]

Other commenters noted the potential benefits to the platform providers of expanding Rule 701. One commenter indicated that enabling privately held companies to grant equity compensation to platform workers performing services would enable those platforms to attract and retain talent.[38] Another commenter stated that the ability to grant equity compensation to platform workers would significantly enhance the growth and expansion of new economy companies and help level the playing field between private companies and public companies participating in the new economy.[39]

Some commenters, however, opposed the expansion of the scope of Rule 701 and Form S–8 to include offers and sales of securities to platform workers because of their belief that the Commission lacks the expertise to assess accurately changes in the labor market, and due to their concern that such regulatory changes to Rule 701 and Form S–8 would encourage companies to misclassify employees and undermine American workers.[40]

We agree with commenters that expanding the scope of Rule 701 and Form S–8 to include offers and sales of securities to platform workers participating in an issuer's platform-based marketplace could benefit the issuer and its investors, including those platform workers that are new equity holders. We are mindful, however, that the gig economy is evolving. We are therefore making the rule amendments temporary so that we can reassess their impact as these markets develop.[41]

Although we understand that the development of the gig economy raises a number of issues under labor, tax, and other regulatory regimes, our proposed amendments to Rule 701 and Form S–8 to include these workers solely reflect considerations relevant to the U.S. Federal securities laws. The proposed amendments are not meant, and should not be construed, to address issues raised under any other regulatory regimes. We express no opinion on whether or not these ''gig economy'' or platform workers would be considered ''employees'' for purposes of other laws or regulations.

The proposed amendments would require an eligible platform worker to be a natural person or an entity meeting specified conditions. We recognize that the ''gig economy'' is a fluid, developing market in which participating workers may be organized in various ways. In this regard, we note that some commenters recommended that platform workers should not be subject to a natural person requirement to participate in Rule 701 offerings.[42] We recognize that some platform workers may form limited liability companies or similar legal entities for a variety of reasons, such as tax planning and personal liability protection. In order to accommodate such workers and provide additional flexibility for an evolving market, the proposed rules provide that a platform worker may be an entity as long as substantially all of its activities involve the performance of *bona fide* services that meet the requirements of proposed Rule 701(h), and the ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to the proposed rule. This proposed approach would be similar to the Commission's recognition of personal services businesses as corporate alter egos of natural persons with respect to the ability to participate in Form S–8 offerings under existing employee, consultant, and advisor categories, where such businesses are wholly-owned by (or jointly owned with the spouse of) the natural person who provides services to the issuer.[43]

We also recognize that the ''gig economy'' is a multi-faceted economic phenomenon and that, in some cases, participants may sell goods or conduct other activities—beyond providing services—by means of platforms. Some commenters recommended expanding the Rule 701 exemption to include any activity where there is an issuer providing a technology-based marketplace platform as long as the activity does not include capital-raising of the type currently prohibited by Rule 701.[44] Nevertheless, we are limiting this initial expansion of Rule 701 and Form S–8 eligibility to participants who provide *bona fide* services not in connection with capital-raising or with promoting or maintaining a market for the issuer's securities. The proposed expansion would not cover the use of a platform for the sale or transfer of permanent ownership of discrete, tangible goods.[45] We view the expansion of Rule 701 and Form S–8 to include platform workers who provide services, subject to the above limitations, as an incremental

[36] *See* letter from Airbnb.

[37] *See* letter from Sament; *see also* letter from Airbnb.

[38] *See* letter from Postmates.

[39] *See* letter from Indigo.

[40] *See* letter from Sen. Sherrod Brown (Mar. 7, 2019); *see also* letter from National Employment Law Project (Mar. 4, 2019) (''NELP'') (''Expanding the rule has the potential to further muddy the waters on 'gig' workers' employment status and even legitimize their independent contractor status at a time when this issue is being examined by legislatures, courts, and agencies with expertise on employment status.''); and letter from Chairwoman Maxine Waters (Apr. 1, 2020) (opposing ''weakening Rule 701 of the Securities Act of 1933 to allow companies to compensate certain non-traditional employees with equity compensation in lieu of a traditional paycheck and without important investor protections''). *But see, e.g., infra* Section II.B for a discussion of certain investor protection conditions; and letter from Rep. Patrick McHenry (Mar. 30, 2020) (requesting that any recipient of funds under the Coronavirus, Aid, Relief, and Economic Security (CARES) Act be encouraged to provide equity compensation to its entire workforce, including non-traditional workers).

[41] The proposed amendments provide, however, that, following the expiration of temporary Rule 701(h), an issuer may continue to rely on the Rule 701(h) exemption for the sale of securities underlying options, warrants, or rights previously issued in an exempt transaction pursuant to Rule 701(h). *See* proposed Rule 701(h)(1)(ii) and *infra* Section II.G. We believe this provision is necessary in order to remove a potential disincentive to the use of the proposed exemption to issue options to platform workers. The Commission has taken a similar approach regarding securities sold by an issuer after it has become public that were initially offered pursuant to Rule 701. *See* 17 CFR 230.701(b)(2).

[42] *See* letters from Chamber and Davis Polk. In the companion rulemaking, we are proposing to eliminate the ''natural person'' requirement in connection with Rule 701 eligibility for consultants and advisors by extending such eligibility to service-providing entities meeting specified conditions (*e.g.,* limits on the number of persons owning an entity and requiring a certain percentage of those persons to provide services). *See* Release No. 33–10891 at Section II.C.1. We are also proposing a similar change regarding consultant and advisor eligibility under Form S–8. *See* Release No. 33–10891 at Section II.C.2.

[43] *See* 1999 Form S–8 Adopting Release at Section II.A.1 (''We agree with commenters that it should not matter if the consulting contract is with an entity or a natural person, as long as the securities registered are issued to the natural persons working for the consulting entity who provide bona fide services to the issuer. Where the securities are issued to these persons, contracting with a consulting entity would not abuse Form S–8. We have revised the amendments to eliminate the proposed requirement that issuers contract only with natural persons, while retaining the requirement that the securities must be issued to natural persons.''); *see also* letter from Davis Polk.

[44] *See, e.g.,* letter from ABA; *see also* letter from Sullivan (stating that to encompass the new types of alternative work arrangements, Rule 701 (and Form S–8) should encompass those individuals providing services to or on behalf of an issuer or making or distributing the products sold or provided to the issuer's consumers).

[45] *See* proposed Rule 701(h)(2)(i). For example, a platform that provided for the permanent transfer of real estate in fee simple, as opposed to the temporary rental of real estate, would not constitute bona fide services within the meaning of the rule.

evolutionary step that is consistent with the compensatory function of Rule 701 and Form S–8 while limiting the potential for abuse. Depending on the results of the initial expanded use of Rule 701 and Form S–8, if adopted, the Commission could consider expanding eligibility to other activities, such as selling goods or other non-service-providing activities in the future.

The proposed definition of platform worker would also include the condition that the issuer operates the platform for the provision of services pursuant to a written contract or agreement [46] between the issuer and the platform worker under which the issuer controls the use of the internet platform. We believe that this ''issuer control'' condition would help maintain an appropriate compensatory nexus between the issuer and participating platform workers.[47]

The appropriate nexus would be demonstrated by meeting three express requirements. First, the issuer must be able to provide access to the platform and establish the principal terms of service for using the platform. Second, the issuer must be able to establish terms and conditions by which the platform worker receives payment for the services provided through the platform. This could include an ability to establish the amount of the fees charged for using the platform. Such fees may include any fee charged to the participating worker for the use of the platform as well as any fee or percentage of payment charged to an end-user for the services provided by the worker. If there are no end-users, and multiple workers provide services directly to the issuer via the platform, the issuer must be able to determine the amount and method of payment for such services. Third, the issuer must have the authority to accept and remove the platform workers providing services through the platform.

We believe that these three requirements are necessary and appropriate to demonstrate the requisite nexus for purposes of an expanded Rule 701 and Form S–8. A written contract or agreement providing the issuer with control over the platform's terms of use, including payment terms, would evidence that the issuance of securities to the worker is for compensatory and incentive purposes relating to the services being provided. In addition, requiring that the issuer control who may provide services through its platform would help prevent participating workers from using the platform primarily for non-compensatory purposes. The proposed conditions would not, however, limit what services an issuer could facilitate through its platform or how participating workers could provide the services.

Rule 701 currently exempts offers and sales of securities to former employees, directors, general partners, trustees, officers, consultants, and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered.[48] The proposed amendment to Rule 701 would similarly exempt offers and sales to former platform workers if such workers met the conditions of § 230.701(h) at the time the securities were offered.[49]

In a companion rulemaking, at the suggestion of commenters, we are proposing to expand the eligibility of former employees under Rule 701 to include post-resignation or termination offers and sales to:

- Persons who were employed by or providing services to an issuer during a performance period ending within 12 months preceding resignation or termination of their employment or service for which the securities were issued; and
- Former employees of an acquired entity, as long as the securities are being issued in substitution or exchange for securities that were issued to the former employees of the acquired entity on a compensatory basis while such persons were employed by or providing services to the acquired entity.[50]

In the interest of providing consistent treatment, we are similarly proposing to include under Rule 701 offers and sales to former platform workers who met the conditions of § 230.701(h) during a period of service ending within 12 months preceding the termination of service for which the securities were issued.[51] We believe that exempting post-termination grants of securities to former platform workers that are made in respect of prior service during the specified 12-month period would benefit both issuers and platform workers by facilitating compensatory transactions. Moreover, because we believe that expanding the use of Form S–8 to former platform workers would be consistent with the compensatory purposes of Form S–8, we are similarly proposing to amend Form S–8 to include securities issued to former platform workers, including post-termination grants made in respect of prior service during the 12 months preceding the cessation of service.[52]

For similar reasons, we also are proposing to include in the exemption under Rule 701(h), and to allow the registration on Form S–8 of, securities issued to former platform workers of an acquired entity in substitution or exchange for securities that were issued to the former platform workers of the acquired entity on a compensatory basis while such workers were providing *bona fide* services to the acquired entity.[53] Those persons would be able to participate in the acquiring issuer's plan with respect to equity awards granted in connection with the acquisition to replace awards issued by the acquired entity while such workers provided services to the acquired entity.[54]

In addition to former employees, Form S–8 currently includes under its scope executors, administrators, or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the estate or assets of former employees.[55]

[46] The Commission has similarly included a ''written contract or agreement'' requirement as a condition of using the Rule 701 exemption to help ensure that an issuance of securities is being undertaken for a compensatory purpose. *See* the Rule 701 Adopting Release, *supra* note 5, at 12919 (justifying the inclusion of issuances to consultants or advisors under Rule 701 in part because of the condition requiring a written plan or contract).

[47] Although one commenter stated that ''it is not necessary for a revised Rule 701 to micromanage the level of control'' over a worker, *see* letter from Chamber, we agree with another commenter that indicated that some level of control by an issuer over the use of its platform would help ensure that the issuance of securities to workers participating in its marketplace platform under an expanded Rule 701 is compensatory only. *See* letter from Airbnb.

[48] *See* Rule 701(c).

[49] *See* proposed Rule 701(h)(1)(i).

[50] *See* Release No. 33–10891 at Section II.C.2.

[51] *See* proposed Rule 701(h)(1)(i).

[52] *See* proposed General Instruction A.1.(b)(4)(i) of Form S–8.

[53] *See* proposed Rule 701(h)(1)(i); *see also* proposed General Instruction A.1.(b)(4)(ii) of Form S–8. Such treatment would be consistent with the expanded scope of Form S–8 proposed in the companion rulemaking. *See* Release No. 33–10891 at Section III.D.1.

[54] The companion release includes other proposed amendments pertaining to business combinations that could be applicable to issuances to platform workers if adopted. For example, we are proposing to amend Rule 701(e) to address the disclosure delivery obligations regarding acquired entity derivative securities that the acquiring issuer assumes in a business combination transaction. Another proposed amendment would clarify that, in determining whether the amount of securities the acquiring issuer sold during any consecutive 12-month period exceeds $10 million under Rule 701(e) [17 CFR 230.701(e)], the acquiring issuer would consider only the securities that it sold in reliance on Rule 701 during that period, and would not be required to include any securities sold by the acquired entity pursuant to the rule during the same 12-month period. *See* Release No. 33–10891 at Section II.A.6.

[55] *See* General Instruction A.1.(a)(3) of Form S–8. In the companion release, we are proposing to

Continued

We are proposing a similar provision under Rule 701 and Form S–8 for the estates of deceased platform workers and the representatives of incompetent former platform workers.[56] Although the proposed changes to Rule 701 to include platform workers would be temporary rules, we believe that this proposed provision could prove useful to the administration of the estate of a deceased platform worker or the representation of an incompetent former platform worker, particularly because, under the proposed rules, sales of securities underlying options issued pursuant to the temporary rules may occur following the rules' expiration.

Request for Comment

1. Should we expand the scope of Rule 701 and Form S–8 to include offers and sales of securities to platform workers unaffiliated with the issuer who provide *bona fide* services to an issuer by means of the issuer's internet-based platform, or through other widespread technology-based marketplace platforms, as proposed? Should the expansion of Rule 701 and Form S–8 also include services provided by such workers to the issuer's parents, majority-owned subsidiaries, or majority-owned subsidiaries of the issuer's parent, as proposed?

2. Is there a basis for treating platform workers differently than any other non-employees not covered under the current exemption? Does the use of an internet-based platform establish a sufficient basis for treating those workers differently than non-employees in a different context?

3. Should we also expand the scope of Rule 701 and Form S–8 to include offers and sales of securities to platform workers unaffiliated with the issuer who provide *bona fide* services to third-party end-users by means of the issuer's internet-based marketplace platform, or through other widespread technology-based marketplace platforms or systems, and from which the issuer benefits, as proposed?

4. Should we define or provide examples of a ''widespread, technology-based marketplace platform or system'' (other than an internet-based marketplace platform) that would fall within the scope of the proposed amendments? If so, how should we define that term, or what examples should we include?

5. Is the term ''services'' sufficiently clear? Should we define it differently? If so, what should the definition be? Should we provide additional specific guidance concerning what activities constitute ''services'' for purposes of the proposed expansion of Rule 701 and Form S–8?

6. Should we limit issuances under Rule 701(h) or an expanded Form S–8 to platform workers who are unaffiliated with the issuer, as proposed? If so, should we provide a definition of or additional guidance concerning the meaning of ''unaffiliated with the issuer''? For example, should we define ''unaffiliated'' as a person who is not an ''affiliate'' as defined by 17 CFR 230.405? Should we instead specify the types of persons that would satisfy the ''unaffiliated'' provision? For example, should ''unaffiliated'' mean persons who are not an issuer's employees, officers, directors, advisors, or consultants, or certain family members of such persons? If so, which family members would be treated as affiliates of the issuer and therefore be ineligible to receive securities under the proposed amendments to Rule 701 and Form S–8?

7. Should we limit the use of the expanded Rule 701 and Form S–8 only to workers who provide *bona fide* services through an issuer's marketplace platform, as proposed? Or should we consider other alternatives? For example:

a. Should we permit an issuer to offer or sell securities to workers who engage in other platform-based activities, such as selling goods? If so, should we limit the types of goods? For example, should we only permit an issuer to offer or sell securities to workers who engage in selling of unique or value-added goods and not workers who merely use a platform to resell goods?

b. If we were to permit an issuer to offer or sell securities to workers who engage in other platform-based activities, such as selling goods, what characteristics or factors would help ensure that the nexus between the issuer and worker is compensatory and the issuance of securities is not in connection with capital-raising or for speculative purposes? For example, should we require that the worker meets minimum annual or aggregate sales thresholds or that the worker has been engaged in performing platform-based activities for the issuer for a minimum period of time before she is eligible to receive shares under expanded Rule 701 and Form S–8. Should we only permit securities that do not have capital-raising features, such as restricted stock units, to be issued to platform workers for platform-based activities that involve the sale of goods?

c. Should we include offers and sales of securities to workers having other types of new work relationships? If so, which types of new work relationships should we include, and what characteristics or factors would help ensure that the nexus between the issuer and worker is compensatory and the issuance of securities is not in connection with capital-raising? Are there new work relationships that are not provided through an internet-based or other widespread, technology-based marketplace platform or system that we should include in the exemption?

8. Should we require that a platform worker be a natural person or an entity meeting specified criteria to be able to receive securities pursuant to an expanded Rule 701 or Form S–8, as proposed? Should we instead require a platform worker to be a natural person? Do a significant number of platform workers currently operate through a business entity? If so, would a natural person requirement impact the extent to which they would continue to perform as platform workers or continue to do so through a business entity? Should we limit the types of business entities through which a platform worker would be able to operate? Should we permit an entity to be a platform worker, as proposed, if substantially all of its activities involve the performance of *bona fide* services that meet the requirements of proposed Rule 701(h), and the ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to the proposed rule? Are there different or additional eligibility conditions that we should adopt to allow platform workers to perform services as entities pursuant to the temporary rules? For example, should we permit more than one natural person to own the entity through which the services are being performed by the platform worker? If so, should we limit the number of natural persons that may own the entity or require that a co-owner be the spouse or other family member? Should we condition allowing more than one natural person to own the entity by requiring each owner to perform the services of a platform worker?

9. Should we require that an issuer operating a platform control the platform as a condition to using the Rule 701 exemption and Form S–8 registration for issuances of securities to workers providing services through the platform, as proposed? Should we

amend Rule 701 to include a similar provision for the executors, administrators, or beneficiaries of the estates of deceased employees who may receive securities underlying options previously issued to former employees pursuant to Rule 701. *See* Release No. 33–10891 at Section II.C.2.

[56] *See* proposed General Instruction A.1.(b)(4)(iii) to Form S–8 and proposed Rule 701(h)(1)(i).

permit the use of the exemption for issuances to such workers if an issuer's affiliate controls the platform?

10. Should we require that services be provided pursuant to a written contract or agreement, as proposed? If so, should we include an express provision that the term ''written contract or agreement'' includes an electronic, internet-based contract or agreement? Should we provide the same provision for the term ''written compensation contract'' in Rule 701(c)?

11. Are the proposed conditions demonstrating control of the platform appropriate? Should we require that an issuer satisfy all of the specified conditions? Should we only require that an issuer have the ability to determine terms of use, including payment terms? Should we instead only require that an issuer have the ability to accept and remove the workers providing services through its platform?

12. Are there other conditions, in addition to or in lieu of the proposed conditions, that we should adopt?

13. Instead of, or in addition to, an issuer control requirement, are there other issuer eligibility conditions that we should adopt to help ensure that the issuance of securities to platform workers is for a compensatory purpose? For example, when the issuer's platform is used to provide services to end-users, should we require that an issuer earn a substantial amount of its annual revenues from fees or other payments resulting from platform workers using the issuer's platform? Would such a condition make it less likely that the issuance of securities to those workers would be for a capital-raising purpose?

14. Should we expand the scope of Rule 701 and Form S–8 to include offers and sales of securities to former platform workers, including former platform workers of an entity acquired by an issuer, as proposed? Should such expansion include securities issued to former platform workers, including post-termination grants made in respect of prior service during the 12 months following the cessation of service, as proposed? Should we include under Form S–8 issuances to executors, administrators, or beneficiaries of the estates of deceased platform workers, or other persons similar to those included for deceased or incompetent former employees, as proposed? Should we amend Rule 701 to include a similar provision for the estates of deceased employees or deceased platform workers and representatives of incompetent former employees or incompetent former platform workers, as proposed?

15. Would state blue-sky laws affect the operation of the proposed temporary platform worker exemption? If so, how? Are there changes we should consider to address state law issues? For example, should we provide for the preemption of state securities law registration requirements for offers made pursuant to Rule 701(h)? Are there other state law implications that would be relevant to consider in connection with the proposed amendments? For example, would the proposed temporary platform worker exemption have any implications regarding the enforceability of state laws pertaining to non-competition arrangements? Would the proposed exemption result in an increase in the use of non-compete provisions regarding issuers' arrangements with platform workers? Would the proposed exemption affect the ability of issuers under state law to provide additional benefits to platform workers, such as minimum wage guarantees, healthcare stipends, and occupational auto insurance?

B. Additional Requirements for Issuances to Platform Workers Under Rule 701 and Form S–8

We are proposing four additional requirements with which an issuer must comply in order to use the exemption for issuances to platform workers under Rule 701.[57] In addition, we are proposing that the first three of these conditions would also apply to issuances to platform workers registered on Form S–8.[58]

Because of certain structural differences between platform-based work relationships and traditional employer-employee relationships, we are mindful that compensatory offerings in this context may be more susceptible to misuse. For example, a traditional employer-employee work relationship will involve some degree of interpersonal interactions between the issuer and the employee by which the former supervises and monitors the work and conduct of the latter. In contrast, there may be no or very few interpersonal interactions in the issuer-platform worker relationship. In addition, platform workers frequently work for multiple companies and may have exclusive control over their work schedules, including how often and for how long they will work. These short-term and/or intermittent work relationships across multiple issuers may increase the likelihood that workers would establish a work relationship with a platform as a means of realizing an investment opportunity with the issuer or that issuers would use the proposed provisions to engage in capital-raising activities. The additional requirements we are proposing are designed to work together to help ensure that issuances made to platform workers pursuant to revised Rule 701 are for compensatory purposes while reducing any opportunity for a platform worker to use her relationship with the issuer to engage in speculative activity.[59]

The first condition is that the issuance must be pursuant to a compensatory arrangement that is evidenced by a written compensation plan, contract, or agreement between the issuer and the platform worker.[60] The compensatory arrangement may not be for services in connection with the offer or sale of securities in a capital-raising transaction or services that directly or indirectly promote or maintain a market for the issuer's securities. Thus, an issuer may not rely on the exemption to issue securities to a platform worker for compensation for performing services analogous to those of an underwriter or promoter or otherwise made in connection with a capital-raising transaction. An issuer also may not rely on the exemption to issue securities to a platform worker as part of a plan or scheme to evade the compensatory purpose of Rule 701 or otherwise evade the registration requirements of the Securities Act.[61] This condition is based on the requirements under Rule 701 and Form S–8 currently applicable to consultants and advisors,[62] which were designed to prevent abuse of the rules as conduits for unregistered securities distributions to the general public and for securities issuances to stock promoters.[63]

[57] *See* proposed Rule 701(h)(3).

[58] *See* proposed 17 CFR 239.16b(c)(1) and proposed General Instruction A.1(b)(2)(i) through (iii) to Form S–8.

[59] One commenter specifically recommended imposing additional restrictions regarding the issuance of securities to platform workers beyond those typically applicable to equity issuances under Rule 701 because of the third-party, contractual relationship between the issuer and platform worker. *See* letter from Airbnb.

[60] *See* proposed Rule 701(h)(3)(i).

[61] *See* Preliminary Note 5 to Rule 701, which would remain applicable to issuances under proposed Rule 701(h).We are also proposing to add a similar note in proposed General Instruction A.1(b)(2) to Form S–8.

[62] *See* Rule 701(c)(1)(ii) and (iii) [17 CFR 230.701(c)(1)(ii) and (iii)], and General Instruction A.1(a)(1)(ii) and (iii) to Form S–8.

[63] *See* 1999 Rule 701 Adopting Release, *supra* note 5, at Section II.D., and 1999 Form S–8 Adopting Release (" at Sections I.A. and II.A. A number of commenters that addressed expanding our rules to encompass ''gig economy'' workers generally supported such a condition. *See, e.g.,* letters from ABA, Airbnb, Chamber, and Uber.

Second, as proposed, no more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period, and no more than $75,000 of such compensation received from the issuer during a consecutive 36-month period, may consist of securities issued pursuant to Rule 701 or a registration statement on Form S–8.[64] The issuer would be required to determine the value of such securities as of the time the securities are granted.[65] For the purpose of assessing compliance with these limits, an issuer would be able to use any reasonable, recognized valuation methodology [66] as long as the methodology is consistently applied during the same 12-month or 36-month period.[67]

This proposed cap on the amount of compensation that a platform worker may receive as securities from the issuer is designed to limit an issuer's incentive and ability to use the new exemptive rule as a conduit for a public distribution of its securities, contrary to the compensatory purpose of Rule 701 and Form S–8.[68] In addition, we believe the proposed cap would reduce any incentive for platform workers to use the exemption primarily for realizing speculative investment opportunities and would limit the risk that issuances would be for capital-raising or other non-compensatory purposes.[69]

Third, we are proposing that the amount and terms of any securities issued to a platform worker may not be subject to individual bargaining. Similarly, as proposed, platform workers would not be permitted to elect between payment in securities or cash.[70] We believe this proposed requirement would also reduce any incentive for platform workers to use the exemption as a means of realizing speculative investment opportunities rather than receiving the securities as a compensatory grant.[71]

The preceding three conditions would apply equally to securities issuances to platform workers under both Rule 701 and Form S–8.[72] For purposes of Rule 701, however, we are proposing a fourth condition that would require the issuer to take reasonable steps to prohibit the transferability of securities issued to platform workers pursuant to the exemption except for transfers to the issuer or by operation of law.[73] Such reasonable steps could include the placement of special legends on the securities to be issued to platform workers or appropriate instructions to transfer agents that would provide adequate notice of the transfer prohibition to platform workers. The purpose of this provision is to help ensure that the shares are obtained for compensatory and not speculative purposes. Specifically, it would prevent the development of a market in such securities until after the issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, which would in turn greatly reduce, if not eliminate, any incentive for a worker to seek out securities issued pursuant to Rule 701 for speculative purposes.

Currently, all securities issued pursuant to Rule 701 are ''restricted securities,'' and any resales must comply with Securities Act registration requirements or qualify for an exemption therefrom.[74] As proposed, the additional transferability prohibition on Rule 701 securities issued to platform workers would preclude any transfers, except transfers back to the issuer or by operation of law.[75] Transfers by operation of law would include, for example, transfers pursuant to the laws of descent and distribution and domestic relations orders in divorces. One commenter recommended the adoption of enhanced transfer restrictions for securities issued to gig economy workers beyond those applicable to equity currently issuable pursuant to Rule 701 because of the third-party contractual relationship between gig economy participants and gig economy companies.[76] As noted earlier, we agree that applying enhanced transfer restrictions is appropriate in light of the more remote contractual relationship between an issuer and its platform workers, compared to the relationship with its employees.[77] As with other securities issued pursuant to Rule 701, however, ninety days after the issuer becomes subject to Exchange Act reporting requirements, securities issued to platform workers would become available for resale under 17 CFR 230.701(g)(3).[78]

We are not proposing similar transfer restrictions for securities issued to platform workers pursuant to a Form S–8 registration statement. Securities Act and Exchange Act protections for such securities would already exist, making the use of the issued securities for speculative purposes by a platform worker less likely.[79]

Request for Comment

16. Would the proposed conditions for issuances to platform workers under Rule 701 or Form S–8 help ensure that the issuances are for a compensatory purpose? Should we adopt only some of the conditions? If so, which ones? For example, should we require only that the issuance be pursuant to a compensatory arrangement for services

[64] For example, if a platform worker received $1,000 in total compensation during a 12-month period from Issuer X for services provided to or for the benefit of Issuer X, no more than $150 of that compensation could consist of securities. These proposed annual limits on the amount of securities a platform worker could receive as compensation from an issuer are in addition to the limits on the aggregate sales price or amount of securities that an issuer can sell in reliance on Rule 701 during any consecutive 12-month period. *See* 17 CFR 230.701(d). As discussed below, the Rule 701(d) limits would continue to apply, and an issuer would be required to aggregate issuances to platform workers with all other issuances under Rule 701 during a 12-month period for the purpose of complying with Rule 701(d). *See infra* Section II.C.

[65] *See* proposed Rule 701(h)(3)(ii).

[66] We expect that issuers would use the same valuation methods that they currently use to make valuations for compensatory issuances under Rule 701(c).

[67] In this regard, an issuer's use of multiple, different valuation methodologies during the same period could raise concerns that the issuer was doing so as part of a plan or scheme to evade the compensatory purpose of Rule 701.

[68] Some commenters supported imposing a limitation on the amount of equity compensation a ''gig economy'' worker could receive to prevent abuses under an expanded Rule 701 and Form S–8. *See* letters from ABA and Airbnb.

[69] The Commission has historically expressed concern about the potential for abuse in the area of issuances of securities for compensation. *See, e.g.,* 1999 Rule 701 Adopting Release, 64 FR at 11098; *see also* Rule 701 Reproposing Release, 52 FR at 29034.

[70] *See* proposed Rule 701(h)(3)(iii).

[71] One commenter recommended the adoption of this type of condition in order to prevent abuses from occurring under any expanded rules. *See* letter from Airbnb. This proposed condition is also consistent with the ''no sale'' position taken by the staff that, where securities are awarded to employees at no direct cost through broad-based bonus plans, there has been no sale, and therefore no public distribution of the securities, since employees do not individually bargain to contribute cash or other tangible or definable consideration to such plans. *See Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act,* Release No. 33–10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)].

[72] *See* proposed 17 CFR 239.16b(c)(1) and proposed General Instruction A.1.(a)(3) to Form S–8.

[73] *See* proposed Rule 701(h)(3)(iv).

[74] *See* 17 CFR 230.701(g)(1) and (2).

[75] *See* proposed Rule 701(h)(3)(iv).

[76] Letter from Airbnb.

[77] *See supra* note 59 and accompanying text.

[78] *See* proposed Rule 701(h)(3)(iv). Following that 90-day period, persons who are not affiliates may resell Rule 701 securities in reliance on 17 CFR 230.144 without compliance with the current public information requirements under 17 CFR 230.144(c) and holding period requirements under 17 CFR 230.144(d), and affiliates may resell such securities without compliance with the holding period requirements.

[79] For example, to be eligible to use Form S–8, the issuer must be a reporting issuer and must have filed all reports and other materials required to be filed during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

not in connection with the offer or sale of securities in a capital-raising transaction?

17. Should we impose a cap on the amount of compensation that a platform worker may receive as securities from the issuer on an annual basis under Rule 701 and Form S–8 to limit the potential that the issuance to platform workers would be used for capital-raising or speculative purposes, as proposed? If so, should we require that no more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a 12-month period be in securities, as proposed? Should the annual cap be less than or greater than 15 percent of the compensation received by the platform worker during a 12-month period? Should the annual cap apply only to issuances under Rule 701 rather than both Rule 701 and Form S–8? Should the annual cap apply only to issuances under Form S–8?

18. Should we impose a cap on the amount of compensation that a platform worker may receive as securities from the issuer during a 36-month period (under Rule 701 and registered on Form S–8) to limit the potential that the issuance to platform workers would be used for capital-raising or speculative purposes, as proposed? Should we require that no more than $75,000 of such compensation received from the issuer during a 36-month period may consist of securities, as proposed? Should this cap be less than or greater than $75,000, and/or apply to a shorter or longer period than 36 months? For example, should we limit the amount of securities a platform worker may receive as compensation from an issuer to no more than $50,000 for a consecutive 24-month period? Instead of, or in addition to, the 36-month cap, should there be an aggregate limit on the dollar amount of securities that a platform worker may ever receive from an issuer? If so, what should that cap be? Should the $75,000 cap apply only to issuances under Rule 701? Should the $75,000 limitation apply only for as long as the issuer is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act? Should the $75,000 cap apply only to issuances registered on Form S–8?

19. Should we impose only the proposed 12-month cap or only the proposed 36-month cap, but not both? Should we not impose any cap on the amount of compensation that a platform worker may receive as securities in light of other proposed conditions? Should either cap apply to limit the total amount of compensation issued as securities to platform workers by an issuer as well as an issuer's affiliates, or should either cap apply individually to each issuer or issuer's affiliate?

20. For purposes of the 12- and 36-month caps on the amount of compensation that a platform worker may receive as securities from the issuer, should the value of compensation be measured at the time the securities are granted, as proposed? For the same purposes, should an issuer be able to use any reasonable, recognized valuation methodology for purposes of determining the fair market value of the securities issued to platform workers under Rule 701? Should an issuer be able to change the valuation methodology used for purposes of the proposed caps as long as the change is motivated by bona fide reasons unrelated to the proposed exemption for platform workers?

21. Should we specify in Rule 701 and Form S–8 that the issuer must use the same valuation method that it currently uses to make valuations for compensatory issuances under Rule 701(c), if applicable, and apply the methodology consistently during the same period?

22. Should we require that the amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash, as proposed? If a platform worker is unable to negotiate the amount and terms of securities to be issued as compensation, should that worker be able to elect to receive payment only in cash?

23. For issuances pursuant to the Rule 701 exemption, should we require the issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers, other than to the issuer or by operation of law, as proposed? Should we limit the prohibition on transferability to a specific period, *e.g.,* for two or three years? Should we mandate the specific steps that an issuer must take to prohibit the transfer of such securities? If so, what should those steps be? For example, should we require that issuers put special legends on the securities issued to platform workers, or should we require that issuers provide appropriate instructions to transfer agents concerning the transfer prohibition on shares issued to platform workers? Are there other reasonable steps that we should require an issuer to take in connection with the proposed prohibition on transferability to help ensure that the shares issued to platform workers are for compensatory and not speculative purposes?

24. Instead of requiring an issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers, should we instead allow platform workers to resell their securities using an applicable exemption or safe harbor? For example, should platform workers be allowed to resell their securities pursuant to Rule 144? Alternatively, in Rule 701(h), should we require a different holding period than is in Rule 144, such as a two-year holding period, or is any holding period insufficient to mitigate concerns about misuse of the temporary exemption? Are there other transfer restrictions that would be more appropriate in this context?

25. Should we apply the proposed conditions only to securities that have capital-raising features (*e.g.,* stock options) and not to securities that do not have such features (*e.g.,* restricted stock units)? If so, which of the proposed conditions should not apply to such securities?

26. Should we limit the type of securities that can be issued to platform workers under Rule 701 or on Form S–8? For example, should we limit issuances to equity securities and securities convertible into or exchangeable for equity securities?

27. Are there other conditions in addition to, or instead of, the proposed conditions that we should adopt to help ensure that issuances to platform workers under Rule 701 or registered on Form S–8 are undertaken for compensatory and not capital-raising or speculative purposes? For example, should we require that a platform worker provide services through an issuer's platform (or other widespread, technology-based marketplace platform or system) for a certain period of time before the worker is eligible to receive securities from the issuer? If so, should the minimum period be six months, one year, or some other period? Should we require that the platform worker provide services for a continuous period of time? Should we require that the securities issued to a platform worker not vest until after a particular period of time? If so, should the vesting period be six months, one year, or some other period after the grant of securities?

28. Do the additional conditions for issuances to platform workers provide adequate investor protections for platform workers who receive shares pursuant to Rule 701 or registered on Form S–8? If not, what additional conditions or measures would be appropriate to provide an acceptable level of investor protection?

C. Integration of Proposed Rule 701(h) With the Existing Rule 701 Exemption

Title 17, section 230.701(d) (''Rule 701(d)'') imposes limits on the aggregate sales price or amount of securities that an issuer can sell in reliance on the rule during any consecutive 12-month period.[80] In addition, 17 CFR 230.701(e) (''Rule 701(e)'') provides that if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the issuer must deliver certain disclosure to investors a reasonable period of time before the date of sale.[81]

Proposed Rule 701(h) would not create a separate and independent ceiling on the amount of securities that could be offered or sold under Rule 701. Rather, platform workers would be an additional class of persons temporarily eligible under Rule 701(c) to participate in the issuer's Rule 701 offers and sales, and would be subject to the same Rule 701(d) limitations on the total amount of securities that an issuer may sell. In this regard, the securities sold to platform workers would be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(d) ceiling.

We believe that it is appropriate to apply the same ceiling to all Rule 701 exempt offerings rather than to provide a separate ceiling for offers to persons eligible to receive securities under the temporary provision. If we were to provide separate ceilings, issuers with technology-based marketplace platforms would be able to sell securities in excess of the amount they are permitted to sell to traditional workers, while issuers that rely only on traditional employment would be limited to the ceiling imposed under Rule 701(d). We believe it is better to propose an approach that treats all issuers equally, rather than one that favors issuers conducting their businesses through platforms as defined by the proposed rule.

Similarly, an issuer that offered and sold securities to platform workers pursuant to proposed Rule 701(h) would be subject to the same Rule 701(e) disclosure requirements. Those securities would be aggregated with all other securities offered and sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the $10 million disclosure threshold in Rule 701(e).[82]

Request for Comment

29. Should we require that the securities sold to platform workers be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(d) ceiling, as proposed? Should we instead impose a separate and independent ceiling on the amount of securities that an issuer could sell to platform workers during any consecutive 12-month period? If so, what should the ceiling be?

30. Should we require that the securities issued to platform workers be aggregated with all other securities sold by the issuer to persons meeting existing Rule 701(c) eligibility conditions for purposes of applying the Rule 701(e) disclosure threshold, as proposed? Should we instead impose a separate disclosure threshold for issuances to platform workers? If so, what should that threshold be?

D. Integration With Exchange Act Rule 12g5–1

For purposes of determining whether an issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g)(1) of the Exchange Act,[83] 17 CFR 240.12g5–1 (''Rule 12g5–1'') permits the exclusion of certain securities.[84] Specifically, 17 CFR 240.12g5–1(a)(8)(i)(A) permits the exclusion of securities held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Securities Act Section 5. Title 17, section 240.12g5–1(a)(8)(i)(B) permits the exclusion of securities held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for securities received pursuant to a compensatory plan in transactions exempt from, or not subject to, the registration requirements of Securities Act Section 5, as long as the persons were eligible to receive securities pursuant to Rule 701(c) at the time the excludable securities were originally issued to them. In addition, Rule 12g5–1 provides a non-exclusive safe harbor by which an issuer may deem a person to have received the securities pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of Rule 701(c).[85]

We are proposing similar treatment for issuances to platform workers under proposed Rule 701(h).[86] We believe that these proposed amendments to Rule 12g5–1 are appropriate because they would remove a potential disincentive to an issuer's offer and sale of securities as compensation to platform workers and would avoid favoring companies that do not have platform workers over companies that have them. Specifically, the proposed revisions would eliminate the requirement for an issuer to count platform workers who receive shares pursuant to a compensation plan[87]

[80] *See* 17 CFR 230.701(d)(2), which imposes alternative caps on the aggregate sales price or amount of securities sold under the rule during a consecutive 12-month period. In the companion Rule 701/Form S–8 release, we are proposing to raise: The cap under 17 CFR 230.701(d)(2)(i) permitting issuance from $1 million to $2 million, to reflect inflation; and the cap under 17 CFR 230.701(d)(2)(ii) from 15% to 25% of the issuer's total assets, to reflect that start-up companies may be more dependent upon human capital than fixed assets. *See* Release No. 33–10891 at Section II.B.

[81] In the companion release, we are proposing to require that Rule 701(e) enhanced disclosure be provided only for those sales that exceed the rule's $10 million threshold. *See* Release No. 33–10891 at Section II.A.1. If adopted, this provision would be applicable to all Rule 701-exempt issuances, including those granted to platform workers.

[82] In the companion release, we are proposing amendments to the disclosure requirements under Rule 701(e) that, if adopted, would be applicable to issuances to platform workers under proposed Rule 701(h). For example, we are proposing to conform the age of financial statement requirement in Rule 701(e) to the corresponding requirement in Part F/S of Form 1–A. *See* Release No. 33–10891 at Section II.A.2. In addition, we are proposing to allow issuers to provide alternative valuation information, similar to that required under Internal Revenue Code Section 409A, in lieu of financial statements, for purposes of Rule 701(e) disclosure. *See id.* at Section II.A.4.

[83] 15 U.S.C. 78l(g)(1). Section 12(g)(1) requires, among other things, that an issuer with assets exceeding $10,000,000 and a class of equity securities held of record by either 2,000 persons, or 500 persons who are not accredited investors, register such class of securities with the Commission.

[84] *See* 17 CFR 240.12g5–1(a)(8). The Commission adopted this provision of Rule 12g5–1 pursuant to Section 503 of the JOBS Act, which instructed the Commission to amend the definition of ''held of record'' to exclude securities held by persons who received them pursuant to an ''employee compensation plan'' in transactions exempted from the registration requirements of Section 5 of the Securities Act. Section 503 also instructed the Commission to adopt a safe harbor that issuers can use when determining whether holders of their securities received them pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act. The Commission adopted the term ''employee compensation plan'' and left it undefined so that ''issuers will have appropriate flexibility to make a principles based determination about securities received as employee compensation when determining their holders of record under Section 12(g)(5).'' *See* Release No. 33–10075.

[85] *See* 17 CFR 240.12g5–1(a)(8)(ii)(A).

[86] Two commenters supported excluding platform workers from the definition of record holder under Rule 12g5–1. *See* letters from Airbnb and Davis Polk.

[87] Similar to the current Rule 12g5–1 exclusion for securities issued pursuant to an employee

under Rule 701(h) as record holders for the purpose of determining its Section 12(g) registration obligations.[88] In addition, similar to the existing exclusion in 17 CFR 240.12g5–1(a)(8)(i)(B), the proposed amendment would exclude securities received in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 in substitution or exchange for securities received pursuant to Rule 701, as long as the persons were eligible to receive the securities when they were originally issued to them.[89] Finally, the proposed amendments would extend the safe harbor in 17 CFR 240.12g5–1(a)(8)(ii), for securities received in a Rule 701(c) offering, to compensatory issuances to platform workers pursuant to Rule 701(h).[90]

The proposed amendments to Rule 12g5–1 would also include a note to remind issuers of the temporary nature of Rule 701(h).[91] Upon expiration of Rule 701(h), without further Commission action, an issuer would no longer be able to issue additional Rule 701-exempt securities to its platform workers. Importantly, however, we are not proposing the Rule 12g5–1 exclusion and safe harbor for securities issued to platform workers on a temporary basis. Therefore, an issuer could continue to rely on the exclusion and safe harbor subsequent to Rule 701(h)'s expiration date.

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31. Should we permit an issuer to exclude platform workers to which it has issued securities under Rule 701(h) from the definition of ''holders of record'' for the purpose of determining its registration obligations under Section 12(g), as proposed?

32. Should we extend the Rule 12g5–1 safe harbor to cover issuances to platform workers under Rule 701(h) pursuant to a compensation plan, as proposed?

33. Should we leave ''compensation plan'' for platform workers undefined, as proposed? If not, how should we define a ''compensation plan'' for platform workers?

E. Considerations Specific to Form S–8

Form S–8 provides a number of accommodations to registrants that seek to register the offer and sale of securities to their employees, consultants, and advisors.[92] For example, to satisfy the Securities Act prospectus delivery requirements set forth in Rule 428, the form requires only abbreviated disclosure and permits the delivery of regularly prepared materials advising employees and other eligible persons about employee benefit plans, together with a statement of availability of documents containing registrant information.[93] Form S–8 also permits the incorporation by reference of a registrant's Exchange Act reports without regard to the length of the issuer's reporting history or the aggregate market value of its securities held by the non-affiliated public (its ''public float'').[94] The Commission has justified this differing treatment for Form S–8 offerings because of their compensatory, incentivizing, and non-capital-raising purpose.[95]

We propose to amend Form S–8 so that the accommodations available to registrants currently offering securities on that form to employees and other covered persons would generally be available to registrants offering securities to platform workers. We also propose to amend Rule 428 so that its prospectus content, delivery, updating, and related procedural requirements are applicable to offerings to platform workers pursuant to a written compensation plan, contract, or agreement. Thus, a registrant registering an offering of securities to platform workers on Form S–8 would be able to deliver a Section 10(a) prospectus consisting of plan or compensation contract information, a statement of availability of registrant information, and other documents required of current Form S–8 registrants, and follow the same Form S–8 procedural requirements.[96] We believe that the proposed conditions designed to help ensure that an offering to such workers is for a compensatory purpose justify extending the same treatment to issuers seeking to register an offering of securities to platform workers on Form S–8.

Many of the substantive plan disclosure requirements for Form S–8 pertain to tax qualified defined contribution plans. We believe, however, that issuers that elect to register an offering of securities on Form S–8 for issuance to platform workers would do so to incentivize those workers in the short-term by offering options and restricted stock units, rather than pursuant to a defined contribution plan for the purpose of retirement savings. Accordingly, we are not proposing amendments to those items of Form S–8 that pertain to defined contribution plans to include platform workers.

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34. Platform workers may not be as familiar with the registrant's operations as employees and other persons currently eligible to receive securities under Form S–8 may be. As such, should registrants offering securities to platform workers be subject to different information content, prospectus delivery, or other procedural requirements than those applicable to current Form S–8 registrants? If so, what additional requirements under Form S–8 or Rule 428 or what different or additional disclosure requirements should apply to offerings to platform workers?

35. Are there circumstances in which registrants would issue securities to platform workers pursuant to defined contribution plans? If so, should we amend those items of Form S–8 that pertain to defined contribution plans to include platform workers?

F. Requirement To Furnish Certain Information

As explained in detail below, the proposed expansion of Rule 701 and Form S–8 to include securities issuances to platform workers would be temporary.[97] Related to this, we are also proposing a requirement that an issuer furnish certain information to the Commission. If the proposed amendments are adopted, we plan to use this information to assist us in evaluating the expanded use of Rule 701

compensation plan, we propose to use and leave undefined the term ''compensation plan'' to provide issuers with the appropriate flexibility to make a principles based determination about securities issued as compensation to their platform workers when determining their holders of record under Section 12(g)(5). Not defining a ''compensation plan'' for platform workers would also avoid unnecessary complexity and potential conflict with existing terms, such as ''compensatory benefit plan.'' *See* Release No. 33–10075, 81 FR at 28694.

[88] *See* proposed Exchange Act Rule 12g5–1(a)(8)(i)(A).

[89] *See* proposed Exchange Act Rule 12g5–1(a)(8)(i)(B).

[90] *See* proposed Exchange Act Rule 12g5–1(a)(8)(ii)(A)(*2*). The Rule 12g5–1 safe harbor would continue to provide that an issuer may, solely for the purposes of Exchange Act Section 12(g), deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Securities Act Section 5 if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction. *See* 17 CFR 240.12g5–1(a)(8)(ii)(B).

[91] *See* proposed Note 1 to paragraph (a)(8)(ii) of Rule 12g5–1.

[92] *See* 1999 Form S–8 Adopting Release, *supra* note 12, at 11103; *see also* 1990 Form S–8 Adopting Release, *supra* n. 14.

[93] *See* Form S–8, Part I, Item 2.

[94] *See* Form S–8, Part II, Item 3.

[95] *See, e.g.,* 1999 Form S–8 Adopting Release, *supra* note 12, at 11103. The Commission has also justified the abbreviated disclosure format of Form S–8 because of ''employees' familiarity with the issuer's business through the employment relationship.'' *Id.*

[96] *See* proposed Rule 428(d).

[97] *See infra* Section II.G.

and Form S–8, in order to help determine whether to permit such use on a permanent basis and under the same or different conditions. The information should provide insight into how, and to what extent, the exemptions are being used, as well as the extent and type of benefits provided to issuers, platform workers, and other investors. This would enable us to assess the utility of the issuances of securities to platform workers under Rule 701 or Form S–8 and to assess whether the proposed conditions have achieved their purpose of helping to prevent non-compensatory issuances. Although the proposed rule would require issuers to furnish certain information, furnishing the identified information would not be a condition to rely on Rule 701 or Form S–8. Thus, a failure to furnish the information would not result in the loss of the proposed exemption in Rule 701 or Form S–8 eligibility for issuances to platform employees. The information would, however, be important for determining whether the exemptions should expire, be extended, or be made permanent.

The required information would be furnished, rather than filed, and therefore would not be subject to potential liability under Section 18 of the Exchange Act.[98] The information would be intended only for the Commission's use and would be non-public. It would not be furnished through the Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. Rather, it would be furnished in a non-public manner designated by the Division of Corporation Finance for this purpose, for example, electronically by email or by some other means of electronic communication.

As proposed, the issuer would be required to provide the following information concerning its issuances to platform workers to the Commission at six-month intervals commencing six months after the first such issuance:

1. The criteria used to determine eligibility for securities awards to platform workers, whether they are the same as for other compensatory transactions, and whether those criteria, including any revisions to such criteria, are communicated to workers in advance as an incentive;

2. The type and terms of securities issued to platform workers during the prior six months, and whether they are the same as for other securities issued in compensatory transactions by the issuer during that interval;

3. If issuing securities pursuant to Rule 701(h), the steps taken to ensure that the securities sold are non-transferable;

4. The percentage of overall outstanding securities that the amount issued to platform workers cumulatively under Rule 701(h) or pursuant to a registration statement on Form S–8 (pursuant to § 239.16b(c)), as applicable, represents;

5. During the interval, the number of platform workers, the number of non-platform workers, the number of platform workers receiving securities pursuant to the temporary rule, and the number of non-platform workers who received securities pursuant to the issuer's Rule 701 or Form S–8 sales; and

6. The number and dollar amount of securities issued to platform workers under Rule 701 or pursuant to a registration statement on Form S–8, both in absolute amounts and as a percentage of the issuer's total sales under Rule 701 or total sales pursuant to a registration statement on Form S–8, as applicable during the interval.[99]

We recognize that some non-reporting issuers may view certain information concerning compensation practices for platform workers as privileged or confidential. For that reason, the proposed rules would provide that to the extent that the issuer treats such information as privileged or confidential, it may submit a confidential treatment request pursuant to 17 CFR 200.83 [100] for the furnished information.[101]

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36. Should the temporary rules require an issuer to furnish certain information to the Commission if it seeks to register issuances to platform workers on Form S–8, as proposed? If so, should an issuer be required to furnish the information at six-month intervals, as proposed? Should the issuer be required to furnish the information annually or on another periodic basis? If so, which periodic basis would be appropriate?

37. Should the same reporting interval apply to issuances of securities both under Rule 701 and pursuant to a registration statement on Form S–8?

38. Is the proposed information appropriate for the purpose for which it is being sought? Should issuers be required to furnish less information or other information in addition to, or instead of, the proposed information?

39. What method should the Commission require issuers to use to furnish the information required? For example, should the information be furnished electronically via email for this purpose? Should the Commission provide a form for this purpose?

Are there other steps that the Commission should take to facilitate the reporting requirement?

40. Should we require that an issuer notify the Commission that it intends to make offers or sales to platform workers pursuant to the exemption in proposed Rule 701(h)? If so, when and how should issuers be required to provide such notice?

G. Expiration of the Temporary Rules Authorizing Issuances to Platform Workers Under Rule 701 and Form S–8

With limited exceptions, we propose to make this exemptive rule temporary in order to have an opportunity to evaluate the appropriateness of extending the Rule 701 exemption to issuances to workers in this relatively new type of work arrangement, including whether such issuances are being made for compensatory, incentive, and non-capital-raising purposes.[102] Moreover, given the rapid pace of technological change, particularly in the area of the internet and platform software, and the evolving nature of the platform worker labor market, making the expanded Rule 701 exemption temporary would also provide us with the opportunity, subject to public notice and comment, to implement amendments to this area of the

[98] 15 U.S.C. 78r.

[99] *See* proposed Rule 701(h)(4) and proposed 17 CFR 239.16b(c)(3). The amounts calculated as a percentage should compare the amount of securities issued to platform workers under Rule 701 or Form S–8 with the total amount of securities issued to all workers (both platform and non-platform) and other covered persons under Rule 701 or on Form S–8.

[100] Under Rule 83, an issuer can request that the non-public information not be disclosed pursuant to a request under the Freedom of Information Act (''FOIA''). Written requests for confidential treatment under Rule 83 relating to the furnished materials may be submitted either in paper format or electronically. If there are no FOIA requests, the information will remain non-public for 10 years. After 10 years, the confidential treatment request will expire unless an issuer requests and is granted an extension. In the event of a FOIA request, the Commission may require the issuer to provide substantiation of its confidential treatment request.

[101] *See* proposed Rule 701(h)(5) and proposed 17 CFR 239.16b(c)(4).

[102] As previously discussed, the exemption would continue to be available to issuers for the post-expiration issuance of securities underlying options previously issued in an exempt transaction pursuant to Rule 701(h). *See supra* note 41 and accompanying text. In addition, as previously noted, an issuer could continue to rely on the Rule 12g5–1 exclusion and safe harbor for securities issued to its platform workers prior to the expiration of Rule 701(h) and continue to exclude those workers as record holders subsequent to Rule 701(h)'s expiration date. *See supra* Section II.D.

exemptive framework in light of such technological and labor market changes.

As proposed, Rule 701(h) would apply only to offers and sales of securities occurring within five years following the date of the rule's effectiveness. On that date, Rule 701(h) would expire and no longer be effective.[103] Prior to the expiration date, the Commission may decide to let the exemption expire, extend the temporary exemption, or adopt the exemption on a permanent basis. If the Commission extends the exemption or adopts it on a permanent basis, it may also consider whether any revisions to the rule are appropriate. We believe that five years is an appropriate period for the temporary exemption. On the one hand, it would provide issuers with sufficient time to develop and conduct successful securities offerings to platform workers, the demand for which initially may not be readily apparent. On the other hand, the limited period would allow the Commission to evaluate the temporary exemption and make necessary adjustments in response to technological, labor market, or other changes.

The rule authorizing the temporary use of Form S–8 for issuances to platform workers (17 CFR 239.16b(c)) would also expire five years from the date of that rule's effectiveness, which we expect would be the same date as the expiration date for Rule 701(h). Rule 428(d), the temporary rule authorizing the application of the same streamlined disclosure, prospectus delivery, and related procedural requirements to issuances to platform workers as those currently applicable to other Form S–8 issuances, would expire on the same date as 17 CFR 239.16b(c).

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41. Should we adopt each of proposed Rule 701(h), the proposed amendment to Form S–8 (17 CFR 239.16b(c)), and proposed Rule 428(d) as temporary rules, as proposed? If we do, should the rules expire five years from the date of their effectiveness, as proposed? Should the rules expire on a different date (*e.g.,* one, two, three, or four years from the date of effectiveness)?

42. Should we permit an issuer, following expiration of Rule 701(h), to issue securities underlying options, warrants, or rights that were previously issued to platform workers in an exempt transaction pursuant to Rule 701(h), as proposed?

43. Should we make the expiration date for the temporary Form S–8 provisions different from the expiration date for issuances under Rule 701(h)? If so, should the effective period of the Form S–8 provisions be longer or shorter than the effective period of Rule 701(h)?

44. Should the proposed extension of Rule 701 and Form S–8 to platform workers expire absent further Commission action, as proposed? Are there any transition or related issues (*e.g.,* related to transfer restrictions) that we should address in connection with the proposed expiration of the temporary rules?

45. Rather than making the rules temporary,[104] should we adopt any of the proposed rules on a permanent basis? If so, which ones?

III. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of the proposed amendments, other matters that might have an impact on the proposed amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. Economic Analysis

The Commission is proposing amendments to Rule 701 to establish a temporary provision that, on a trial basis, would expand the scope of the rule to include a new category of worker, the platform worker, to whom an issuer would offer and sell securities, under certain conditions, without registration under the Securities Act. Similarly, the Commission is proposing amendments to permit an Exchange Act reporting issuer to register offers and sales to platform workers on Form S–8.[105] The Commission is proposing these amendments on a temporary basis for a five-year period. Permitting gig economy issuers to utilize the Rule 701 exemption on a temporary basis would allow the Commission to assess the appropriateness of the exemption for these new work relationships and thus should help inform the Commission's ongoing efforts to modernize its rules in light of changing economic and market conditions. In connection with the proposed amendments, issuers that offer and sell securities to platform workers would be required to furnish certain information to the Commission at six-month intervals to assist in evaluating the proposed expanded scope of Rule 701 and Form S–8. The Commission also is proposing to amend Rule 12g5–1 under the Exchange Act to extend the exclusion from the definition of ''held of record'' and corresponding safe harbor, for securities issued to platform workers.

We are mindful of the costs imposed by and the benefits obtained from our rules and amendments.[106] The discussion below summarizes information about the gig economy in general, various attributes of platform workers and specific information about the online platform economy. We then discuss the potential economic effects of the proposed amendments. These include the likely benefits and costs, effects on efficiency, competition, and capital formation, and reasonable alternatives. We attempt to quantify these economic effects whenever possible; however, due to data limitations, we are not able to quantify many of the economic effects.

A. Economic Baseline

The baseline for the economic analysis consists of the current regulatory requirements applicable to issuers issuing securities to their employees as part of their compensation arrangements. Non-reporting issuers are able to rely on Rule 701 to offer compensatory securities to their employees. Registrants are able to register the offer and sale of compensatory securities to their employees on Form S–8. As discussed above, these provisions currently are not available for platform workers because of their non-traditional employment status. Thus, the affected parties for the proposed amendments would consist of online platform-based businesses wishing to offer securities as compensation, their platform workers,

[103] In the event that the Commission determines to let the exemption expire, we anticipate addressing any transition or related issues at that time.

[104] *But see supra* note 102.

[105] Unlike the proposed amendment to Rule 701, the proposed amendment to Form S–8 does not include a transfer prohibition. We discuss the anticipated economic effects of this difference below.

[106] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)] and Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Further, Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

and any companies with which these businesses compete in the labor market.

1. Overview of the Gig Economy

Numerous recent studies document an evolution and expansion of the gig economy over time. These studies examine various aspects of the nature of non-traditional (or alternative) work arrangements and corresponding trends in this area. The findings across these studies may vary for multiple reasons. For example, there is no general consensus on the definition/scope of the gig economy, or its various constituents.[107] Consequently, the results of these studies may vary because they use different definitions of the gig economy. Moreover, various sources of data are utilized to study the field. The three main sources of data used in these studies are government surveys such as the Current Population Survey,[108] administrative data such as IRS filings, and private sector data. Due to the differing nature of the data analyzed, different types of errors or biases in the data may affect the findings of these studies.[109] We discuss some of the main findings of this literature below and then focus on data and statistics from studies using definitions of gig economy that are more likely to be relevant to the scope of the proposed amendments to Rule 701 and Form S–8.

A 2019 study,[110] using a broad definition of alternative work arrangements,[111] finds a significant increase in alternative work arrangements over the 2005–2015 period. It estimates that about 15.8 percent of survey participants engaged in some form of alternative work arrangement in 2015 as compared to 10.7 percent in 2005.[112] It also finds that workers providing services through an online intermediary accounted for 0.5 percent of all workers in 2015.[113]

The 2019 Abraham Study reports self-employment rates increasing from 13 percent in 2004 to 15 percent in 2016, based on published Census Bureau statistics on non-employer businesses.[114] The largest increase in non-employers between 2010 and 2016 took place in the Ground Passenger Transportation sector,[115] which grew by almost 300 percent (651,000 drivers) during the period.[116] The study also finds positive growth in non-employers for the following sectors: NAICS 488 (Support Activities for Transportation), NAICS 611 (Educational Services), NAICS 448 (Clothing and Clothing Accessories Stores), and NAICS 446 (Health and Personal Care Stores), although to a much less extent as compared to the growth observed in the Ground Passenger Transportation sector.

The 2017 Contingent Worker Supplement estimated that there were about 1.6 million electronically mediated workers in the United States,[117] accounting for one percent of total employment.

The Federal Reserve 2018 Survey of Household Economics and Decision Making (the ''2018 SHED Survey'') [118] finds that 30 percent of adults engaged in gig economy related work, including both the provision of services and the sale of goods, and using both online and offline methods, in 2018. The survey also finds that three percent of adults surveyed participated in gig economy work enabled by the internet or a mobile app to connect to customers.

Another study uses private data to examine various characteristics and trends of a subsection of the gig economy, namely the online platform economy and its participants.[119] It analyzed a sample comprised of 39 million unique checking accounts over the October 2012–March 2018 period [120] and found a significant increase in the number of families receiving income from providing goods and services using online platforms.[121] For example, in 2013, less than 0.5 percent of the sample checking accounts received income from work performed through an online platform, whereas that number increased to 1.6 percent in 2018.[122] The study further breaks down income sources from online platform utilization into four categories: (1) Transportation, (2) non-transport work (includes services such as dog walking and home repair), (3) selling of goods, and (4) leasing.[123] As of March 2018, online

[107] Katherine Abraham, John Haltiwanger, Kristin Sandusky, and James Spletzer, *The Rise of the Gig Economy: Fact or Fiction,* 109 AEA PAPERS & PROCEEDINGS 357 (2019) (the ''2019 Abraham Study'').

[108] The Current Population Survey (CPS) is conducted on a monthly basis by the United States Census Bureau on behalf of the Bureau of Labor and Statistics. The CPS may include supplementary questions/topics on a non-periodic basis. In 2005 and again in 2017 the supplementary questions focused on contingent workers. *See, e.g.,* U.S. Bureau of Labor Statistics, Electronically mediated work: New questions in the Contingent Worker Supplement, MONTHLY LAB. REV. (Sept. 2018) (the ''2017 Contingent Worker Supplement''), *https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm.*

[109] *See, e.g.,* Katherine Abraham, John Haltiwagner, Kristin Sandusky, and James Spletzer, *Measuring the gig economy: Current Knowledge and Open Issues* (Nat'l Bureau of Econ. Research Working Paper 24950, 2018) (the ''2018 Abraham Study''). The 2018 Abraham Study finds that there has been a growing discrepancy between the level of self-employment as measured in core household surveys versus the level of self-employment as measured in administrative data. The study concludes that examining integrated data sets that combine survey, administrative, and private data are likely to improve the measurement of self-employment activity.

[110] Lawrence Katz & Alan Krueger, *The Rise and Nature Of Alternative Work Arrangements in the United States, 1995–2015,* 72 ILR REV. 382 (2019) (the ''Katz Study'').

[111] The definition of alternative work arrangements used in the Katz Study includes temporary help agency workers, on-call workers, contract workers, and independent contractors or freelancers.

[112] The 2005 results in the Katz Study were based on data from the 2005 Contingent Worker Supplement and the 2015 results in the Katz Study were based on a survey conducted by RAND-Princeton as part of the RAND American Life Panel (the ''Rand-Princeton Survey'').

[113] The Katz Study does not discuss 2005 online platform participation rates.

[114] A non-employer business is defined by the Census Bureau as one that has no paid employees, has annual business receipts of $1,000 or more ($1 or more in the construction industries), and is subject to federal income taxes. Most non-employers are self-employed individuals operating very small, unincorporated businesses, which may or may not be the owner's principal source of income. *https://www.census.gov/quickfacts/fact/note/US/NES010217.*

[115] This sector corresponds to North American Industry Classification System (NAICS) code 485.

[116] *See also* Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States,* 71 ILR Review 705 (2018) (the ''Hall Study''). The Hall Study finds that the number of Uber drivers increased from a base of zero in 2012 to 460,000 active drivers by the end of 2015.

[117] The 2017 Contingent Worker Supplement defines electronically mediated work as an employment arrangement where workers: (1) Use a platform provider's website or mobile app to connect to clients or customers and obtain short jobs, projects, or tasks; (2) are paid by or through the platform provider that owns the website or mobile app, (3) choose when and whether to work, (4) may do these short jobs, projects, or tasks in person or online.

[118] The Federal Reserve has conducted the Survey of Household Economics and Decision Making on an annual basis starting in 2013.

[119] Diana Farrell, Fiona Greig & Amar Hamoudi, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors,* JPMorgan Chase Institute, (2018) (the ''Farrell Study'').

[120] The study applies multiple filters to select the accounts in the final sample. These filters are described in the Appendix of the study.

[121] In order for an online platform to be included in the Farrell Study, it had to meet the following criteria: (1) The platform connects independent suppliers to customers, (2) the platform mediates the flow of payment from customer to supplier, (3) the platform empowers participants to enter and leave the market whenever they want. The study identified 128 online platforms based on the three criteria above. We believe the definition of gig economy applied in this study most closely resembles the definition of online platform workers used in the proposed amendments to Rule 701 and Form S–8.

[122] The Farrell Study also notes that as of March 2018, about 4.5% of accounts examined received income from an online platform at some point over the prior year.

[123] Companies identified in categories (1) and (2) in the Farrell Study are likely to have a significant overlap with the companies that are likely to be included in the proposed expansion of Rule 701 and Form S–8, given the overlap between the provided definition of these categories and the

platform workers in categories (1) and (2) constituted approximately 65 percent of the workers in all four categories. Over the 2013–2018 period, the transportation services category has shown the most significant growth, increasing from less than 10 percent of online platform workers in 2013 to approximately 60 percent of online platform workers in 2018.

2. Characteristics of Gig Economy Workers

In this section, we summarize findings from studies and surveys on the gig economy with respect to the characteristics of participants in such work arrangements. In general, multiple sources lead to the conclusion that, although the frequency of participation varies, the average gig economy worker engages in such work periodically throughout the year. In addition, the average gig economy worker seems to participate in such work in order to supplement her basic source of income and is relatively younger in age than traditional employees.

The 2018 SHED Survey finds that the majority of gig economy workers tend to engage in such work to generate income in addition to their primary source of income. For example, the survey finds that about 37 percent of gig economy workers indicated that they engage in such work to supplement their income, whereas 18 percent indicated that their primary source of income comes from gig-related work. In addition, only 30 percent of gig economy workers responded that they earn income from such activities in all or most months of the year. With respect to participation rates involving the use of a website or mobile app to connect to customers, the survey documents five percent of individuals between the ages of 18 and 29 using such methods to find customers, whereas one percent of individuals aged 60 or older used such method to find work. The 2018 SHED Survey also documents that individuals younger in age tend to be more active in gig-related work. Overall participation rates ranged from 37 percent for individuals between the ages of 18 and 29 to 21 percent for individuals 60 year old or older.

The Farrell Study finds that among individuals or families participating in the gig economy through online platforms, more than 60 percent derived earnings from online platform related work between one and three months out of the year. About 10 percent of workers received payments due to online platform related work between 10 and 12 months of the year. For transportation platforms specifically, 12.5 percent of individuals generated income between 10 and 12 months of the year. These statistics indicate that the majority of online platform workers generated income from the use of these online platforms periodically throughout the year.

The Hall Study analyzes the labor market for Uber drivers in the United States based on a survey of Uber drivers in 2014 and 2015. Among other findings, the study documents that more than half of Uber drivers who started on the platform in the first half of 2013 remained active a year after starting, and one-third were still active two years after starting. In general, the study finds that the majority of Uber drivers use the platform because they value the flexibility to choose when to work and the ability to generate additional income when needed.

3. The Online Platform Economy

As discussed above, we observe that there is a trend of increased activity under all definitions of the ''gig economy,'' although the extent of that increase varies across the data analyzed in various studies. Concerning online platform work specifically, the trends are relatively clear in that there has been a significant expansion of both online platforms and individuals using these online platforms to generate income in the last few years. Moreover, the majority of users of such platforms use them to supplement their income when needed and value the flexibility of the working hours that the platform work offers.

The Rand-Princeton Survey estimates that about 0.5 percent of the workforce in 2015 used an online platform to connect to customers. The 2017 Contingent Worker Supplement estimates that 1.6 million workers, or approximately one percent of the workforce, used an online platform to connect to customers and provide services. The Farrell Study estimates that about one percent of the 37 million checking accounts examined received income from the use of an online platform to connect with customers to provide services, with a growth rate from 2016 to 2018 of 100 percent. Finally, the 2018 SHED Survey documents that three percent of adults surveyed participated in gig work enabled by the internet or a mobile app to connect to customers, a percentage that includes both the provision of services and the sale of goods. Among all sectors examined, the passenger transportation services sector is the only sector where all available evidence suggests a dramatic increase in the use of online platforms as an intermediary for such work.[124]

B. Broad Economic Considerations

Below, we discuss broad economic considerations derived from the academic literature focusing on non-executive employee incentive-based pay and identify certain limitations of the applicability of such literature to platform providers and platform workers due to their differing characteristics relative to traditional employees.

In general, economic theory suggests that variable pay, including equity-based pay,[125] can serve as a mechanism to align the incentives of agents with those of principals and can lead to enhanced agent performance.[126] Academic literature that examines compensation arrangements of Chief Executive Officers (CEOs), in general, finds a positive correlation between various forms of variable pay and future outcomes, such as issuer performance, when such forms of variable pay are used appropriately.[127] There is also academic literature that examines non-executive employee compensation arrangements. Although this stream of literature highlights the potential incentive alignment effect that equity-based pay may have on employees, it also highlights other important considerations that may drive issuers to use such compensatory benefit plans. Specifically, it finds that issuers may use non-executive employee compensation arrangements to attract and retain talent. Thus, we expect that the proposed amendments likely would enhance the ability of affected issuers to compete in the labor market. This benefit likely would be more important if these issuers compete with traditional issuers for the same pool of workers,

scope of the proposed amendments. Specifically, categories (1) and (2) represent companies that are online platforms specializing in connecting customers with independent suppliers for the provision of services. Some of the companies in the Farrell Study's leasing category may also fall within our proposed definition of services.

[124] *See* 2019 Abraham Study, *supra* note 107.

[125] Although the scope of the proposed rules is broader than ''equity-based'' compensation, we believe that most, if not all, issuances under Rule 701(h) will be equity-based securities.

[126] Academic literature usually considers the agency relationship between investors or issuer owners (principals) and issuer management (agents). Within the issuer, agency relationships can also exist between management (principal) and non-management employees (agents). *See, e.g.,* Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure,* 3 J. FIN. ECON. 305 (1976).

[127] Under certain circumstances, inappropriate structures of compensation contracts may lead to undesirable outcomes, such as inappropriate risk taking.

particularly for workers with specialized skills.

Academic literature also finds that issuers with non-executive employee option plans use funds that would otherwise be used to compensate employees in other areas of the issuer. We expect affected issuers would be able to improve their allocation of capital as a consequence of the proposed rules. The latter may be particularly important for issuers that are financially constrained.

Although academic theory and findings concerning the economic effects of the use of equity-based pay may apply to both traditional employees and platform workers up to a certain extent, there could be differences due to the differences between online platform workers and traditional employees. Specifically, platform workers may have different motives for undertaking such work and different employment horizons.[128] As such, online platform workers might respond differently to equity-based pay as compared to traditional employees, making the economic effects of equity-based pay for these workers difficult to predict. Moreover, the economic effects of the proposed amendments will be affected by the restrictions on the use of equity-based pay under the proposed amendments and will depend on how affected issuers structure compensation arrangements based on each issuer's facts and circumstances.

Equity-based pay also will introduce liquidity and valuation risks to the compensation of platform workers. Such risks are likely to be more significant for compensation offered by non-reporting issuers. For example, the transferability prohibition in the proposed amendments to Rule 701 will introduce illiquidity in the compensation of non-reporting issuers' platform workers. Further, the relatively more opaque information environment of non-reporting issuers is likely to lead to increased valuation risk in the equity-based compensation offered. These increased risks are likely to reduce the expected benefits of the proposed amendments for non-reporting issuers and their platform workers.

Below we discuss the expected benefits and costs from the proposed rules in more detail.

[128] For example, the majority of gig economy workers appear to engage in such work to supplement their basic income, and may engage in such work on a more sporadic basis, relative to traditional employees. *See supra* Section IV.A.2.

C. Expected Economic Benefits and Costs

In this section, we discuss the expected economic benefits from the proposed amendments, including potential factors that are likely to introduce some uncertainty as to the expected benefits from the proposed amendments. We then discuss how the furnished information concerning how platform providers use the provisions in the proposed amendments may serve to inform the Commission about whether to undertake further action. Finally, we discuss potential costs related to the proposed amendments.

1. Expected Economic Benefits

Providing issuers greater flexibility in the use of equity-based compensation may allow issuers to design compensation contracts or arrangements that are more efficient in aligning employee incentives with those of investors. Improved incentives could lead to increased effort and improved decision-making by platform workers.[129] Evidence in the academic literature shows a positive correlation between the use of non-executive stock option compensation and measures of operating performance and issuer innovation, but that such effect varies depending on facts and circumstances.[130] Evidence also shows that the effect of non-executive stock options tends to be stronger when such plans are broadly implemented within the issuer.[131]

The proposed amendments may provide affected companies with additional resources, which may particularly benefit issuers that face capital constraints. Permitting issuers to use securities to compensate online platform workers may free up resources. This would permit issuers to reallocate resources towards other productive uses. Academic literature that examines the use of non-executive employee stock options finds that such compensatory plans are more frequently used by issuers facing capital requirements and financing constraints.[132] We expect that capital constraints are more likely to be a concern for at least a subset of non-reporting issuers. We thus expect the proposed amendments to provide these issuers with increased flexibility in terms of available resources.

The proposed amendments would permit affected issuers to offer compensatory securities to, in addition to natural persons, entities meeting specified conditions. As stated above, the gig economy is an evolving market in which participating workers may be organized in various ways. We expect this proposed amendment to expand the set of affected issuers that would be eligible to use securities to compensate platform workers. Also, the proposed amendment may benefit platform workers as it would allow them to optimize their preferred organizational structure while being eligible to receive

[129] It should be noted that the efficiency of variable pay may be higher when the metric/signal used to determine the variable component of pay accurately reflects the agent's effort and performance. Due in part to the business model of online platforms, and in part due to technological advances, online platform workers' effort and performance may be measured with higher accuracy than in traditional business models. For example, Uber drivers have an individual rating that is based on direct inputs from multiple customers receiving the service. This characteristic of the online platform business model may facilitate more efficient contracting between the issuer and workers.

[130] *See* Xin Chang, Kangkang Fu, Angie Low & Wenrui Zhang, *Non-executive employee stock options and corporate innovation,* 115 J. FIN. ECON. 168 (2015). The study uses a sample of S&P 1500 companies over the 1998–2003 period to examine the effect of stock options granted to non-executive employees on corporate innovation, as measured by patent applications and patent citations. The study documents a positive relation between the use of stock options to compensate non-executive employees and proxies for corporate innovation. The study also finds that the effect of employee stock options on innovation is due mostly to the risk-taking incentive that stock options provide to employees rather than the incentive to exert effort. *See also* Yael Hochberg & Laura Lindsey, *Incentives, Targeting, and Firm Performance: An Analysis of Non-executive Stock Options,* 23 REV. FIN. STUD. 4148 (2010) (the ''Hochberg Study''). The study uses a sample of S&P 1500 companies over the 1997–2004 period to examine the effect of employee stock options on issuer performance. The study documents a positive relation between implied incentives from employee stock options and future operating performance, on average. The study also documents that the positive relation between employee stock options and firm performance is concentrated in smaller firms and firms with significant growth options. Moreover, the study shows that such effect is stronger for broad-based option plans as they induce a mutual monitoring effect within employees.

[131] *See* Hochberg Study, *supra* note 130.

[132] *See* John Core & Wayne Guay, *Stock Option Plans for Non-Executive Employees,* 61 J. FIN. ECON. 253 (2001). The study examines detailed information about non-executive employee stock option holdings, grants, and exercises for 756 companies during the 1994–1997 period. Among other findings, the study's results support the hypothesis that options are granted to non-executives more intensively when firms have greater financing needs and face financing constraints. *See also* Ilona Babenko, Michael Lemmon & Yuri Tserlukevich, *Employee Stock Options and Investment,* 66 J. FIN. 981 (2011). The study examines a sample of 1,773 companies over the period 2000 to 2005 with regards to their broad-based employee stock option programs. The study finds evidence consistent with the idea that stock options can mitigate financing constraints by substituting for cash wages at the time of the grant, and by providing significant cash inflows at the time of exercise, conditional on a high stock price. The study further estimates that $0.34 of each dollar of cash inflow received by the firm from the exercise of stock options is allocated to increasing capital and R&D expenditures.

compensatory securities for services provided through the online platform.

Finally, to the extent that issuers that use platform workers—*i.e.,* ''platform providers''—compete for labor with issuers that offer traditional employment, the use of equity-based compensation could permit platform providers to be more competitive in the labor market. Currently, platform providers cannot rely on Rule 701 or use Form S–8 to issue securities as compensation to their platform workers. They are thus at a disadvantage in terms of offering compensation contracts that are likely to attract and retain platform workers. Facilitating platform providers' efforts to attract and retain platform workers could increase their competitiveness.

To the extent that platform providers require platform workers with specialized skills, the academic literature provides evidence that issuers are more likely to use employee stock option plans when they need to attract employees with skills that may be critical for an issuer's success.[133] Relatedly, to the extent that platform providers benefit from having exclusive access to platform workers, we expect the proposed amendments to facilitate such efforts.

There are, however, potential factors that likely introduce some uncertainty as to the expected benefits from the proposed amendments. First, issuing securities as compensation would introduce liquidity and valuation risks. These risks are likely to create uncertainty in the value of platform workers' compensation. This may partially offset benefits arising from greater incentive alignment. Specifically, depending on the facts and circumstances, this uncertainty could lead platform workers to discount the value of such pay to varying extents. We expect the liquidity and valuation risks to be relatively more pronounced for non-reporting issuers, as their information environment is more opaque and the compensatory securities would not be sellable. If platform workers demand additional pay as compensation for bearing these risks, equity-based pay would be a more costly form of compensation for the issuer (relative to cash).[134] Thus, issuers may need to provide increased amounts of equity-based pay to be able to offer an overall compensation value that would attract and retain employees.[135]

In addition, the motives of workers that choose to engage in platform work differs from those of workers that engage in traditional forms of employment. As discussed above, surveys of the online platform economy show that the majority of online platform workers (1) earn secondary income from such work and (2) tend to participate selectively in such work during times when their demand for immediate income is high. As such, it may be reasonable to assume that the majority of online platform workers place particular value on the ability to generate immediate income from platform-based work. Therefore, the transfer prohibitions in the proposed amendments [136] may limit the benefit of the amendments in terms of platform worker attraction and retention, and platform worker incentive alignment.[137]

Platform workers may benefit from the proposed amendments, depending on how affected issuers structure compensation contracts under the proposed amendment. For example, the proposed amendments would provide an opportunity for platform workers to own equity in the platform provider, possibly at an earlier stage of development. If the platform provider's value increases in the future, platform workers holding its securities would experience an increase in their wealth.

Under the proposed amendments, issuers that issue securities to platform workers would be required to furnish certain information to the Commission on a periodic basis.[138] We believe that this information would provide insight into how affected companies are using these compensatory securities. We also believe it could help inform our assessment of the potential benefits of broadening the scope of work relationships for which issuers may issue securities as compensation.[139] If, however, not all of the issuers furnish the required information, the collected information would be incomplete and could be biased, which could weaken the magnitude of this benefit.

The proposed amendments to Rule 12g5–1 would extend the exclusion from the definition of securities ''held of record,'' and the corresponding safe harbor, to securities held by platform workers who received them under the proposed amendment to Rule 701. This would allow non-reporting issuers that issue compensatory securities to platform workers to control how and when they become subject to reporting requirements. The proposed amendment to Rule 12g5–1 could be particularly beneficial for cash-constrained issuers, which would be able to issue compensatory securities to their platform workers without being subject to the compliance costs associated with the Exchange Act reporting requirements. The proposed amendment to Rule 12g5–1 would not be temporary. We expect that issuers will benefit from the non-temporary nature of this proposed amendment because it will allow them to weigh the costs and benefits of using the exemption without it causing them to become subject to Exchange Act reporting requirements and the associated compliance costs, if the exemption is not extended.

The proposed amendments would ensure that estates of deceased employees and representatives of incompetent former employees would receive securities underlying options, warrants, or rights issued to a former employee pursuant to Rule 701. Given that such options, warrants, or rights typically include a vesting period, the proposed amendment would benefit issuers and platform workers as it would provide certainty to platform workers that securities related to options, warrants, or rights would be received by executors, administrators, or beneficiaries in the future. We expect the proposed amendment to strengthen the anticipated benefits described above.

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[133] *See id.*

[134] *See* Brian Hall & Kevin Murphy, *Stock Options for Undiversified Executives,* 33 J. ACCT. & ECON. 3 (2002). The study analyzes the value of non-tradeable options held by undiversified and risk-averse executives. The study distinguishes between the value of the option to the executive, and the cost of the option to the issuer. Intuitively, the paper provides evidence that risk-aversion and non-diversification create a difference between the issuer cost and the executive value of stock options. *See also* Lisa Meulbroek, *The Efficiency of Equity-Linked Compensation: Understanding the Full Cost of Awarding Executive Stock Options,* 30 FIN. MGMT. 2 (2001). The study argues that undiversified managers will value stock or option-based compensation at less than its market value and derives a method to measure such deadweight costs, ultimately concluding that undiversified managers at rapidly growing, entrepreneurial-based firms heavily discount the value of these options.

[135] In economic theory, this is referred to as the reservation wage of the agent/employee. The expected value of the compensation offered must meet the minimum required compensation that the employee requires to participate in a specific job or task.

[136] Specifically, the proposed amendments to Rule 701 require the issuer to take reasonable steps to prohibit the transfer of securities issued to platform workers pursuant to the exemption, other than a transfer to the issuer or by operation of law.

[137] Transfer restrictions reduce the liquidity of equity-based compensation, leading recipients of such compensation to discount the value of the equity-based pay they are offered. Companies thus may need to provide additional pay to compensate online platform workers for the possible lack of liquidity in their compensation arrangements.

[138] Although the proposed rule would require issuers to furnish certain information, furnishing the identified information would not be a condition to rely on Rule 701 or Form S–8. *See supra* Section II.F.

[139] Relatedly, while it is too early to assess the long-term effects of the COVID–19 pandemic on the gig economy, we intend to monitor developments in this area.

2. Expected Economic Costs

To the extent that the proposed amendments result in an expanded use of Rule 701 and Form S–8 to issue compensatory securities, there would be a corresponding increase in the overall burden estimates associated with these provisions for purposes of the Paperwork Reduction Act. We discuss these increased burden estimates in Section V.C below.

Under the proposed amendments, any issuer that grants compensatory securities to platform workers would be required to furnish certain information to the Commission at six-month intervals. Furnishing this required information would impose certain costs on affected issuers to compile and submit the specified information. As discussed in Section V.C below, for purposes of the Paperwork Reduction Act, we estimate that this aspect of the proposed amendments would result in an additional 1.5 burden hours per semi-annual response for non-reporting issuers and 1 additional burden hour per semi-annual response for registrants.

Affected issuers may incur costs in establishing and administering a compensation program for platform workers. We expect such costs (including but not limited to accounting and legal costs, and costs related to preparing and filing a registration statement, if applicable) to vary based on facts and circumstances. If an affected issuer already has an established compensation plan for employees, then the incremental cost to administer a similar program for, or amend the plan to include, platform workers is likely to be relatively low. Such costs are likely to be relatively higher for issuers that do not have an existing employee compensation plan in place.[140] Similarly, the incremental costs incurred by registrants that already register offers and sales of securities on Form S–8 under their employee compensation plans would be lower than those for registrants registering securities on Form S–8 for the first time. We are not able to quantify these potential costs due to lack of data.

Affected workers could incur costs that could vary based on how issuers structure compensation packages and to the extent awards under compensation plans are substituted for cash or other compensation. As discussed above, any illiquidity and valuation risks associated with these securities could lower their value to the holder. If affected companies offer securities in lieu of cash compensation, the overall value of the compensation to the platform worker may decline. We expect such potential costs to be mitigated by the limit on the amount of compensatory securities that may be offered by affected issuers, as well as by competition for platform workers in labor markets.

D. Effects on Efficiency, Competition, and Capital Formation

The proposed amendments are expected to increase the competitiveness of affected issuers in their efforts to attract and retain workers, to the extent that the affected issuers compete with one another and with traditional issuers for the same workers. As discussed above, however, the extent of any increase in their competitiveness would depend on how affected issuers use the increased flexibility offered by the proposed amendments in designing compensation arrangements for online platform workers.

To the extent that the proposed amendments enable affected issuers to improve the quality and the incentive alignment of their workforce, it could improve these issuers' overall operational efficiency and thus enhance their ability to attract capital. Similarly, the additional flexibility to issue securities as compensation for platform workers may free up resources, particularly for capital-constrained issuers, permitting these issuers to reallocate resources to other productive uses.

E. Reasonable Alternatives

The amendments are proposed primarily on a five-year temporary basis. We could have proposed all of the amendments on a permanent basis. A permanent rule would provide more certainty to issuers and might encourage additional use of the proposed amendments, particularly if the initial set-up costs for such compensation programs are high. As noted above, however, there are uncertainties surrounding the nature of these companies' business models, and the gig economy continues to evolve. Moreover, data shows that platform workers, on average, may have different motivations than traditional employees for undertaking work. Specifically, as discussed above, platform workers appear to be driven mainly by an effort to supplement basic sources of income when additional income is needed. As such, platform workers are likely to differ from traditional employees in their time horizon for such work. Due to these uncertainties, it is challenging to predict how issuers affected by the rule would use securities for compensatory purposes and how platform workers receiving such compensation would perceive its value.

Adopting the amendments on a temporary basis would allow the Commission to assess their effectiveness and make any necessary adjustments before implementing a permanent rule. Specifically, the information furnished by issuers that choose to rely on the proposed amendments would serve to inform the Commission on any potential future adjustments. For example, information collected would inform the Commission on the extent to which gig economy companies issue compensatory securities and how they structure such compensation across the various online platforms based on their facts and circumstances. Such information could be used to assess whether and how the proposed amendments should be extended or made permanent.

The proposed amendments' scope is limited to a part of the gig economy. We could have proposed amendments that apply to all gig economy issuers and corresponding workers. Such an alternative would have allowed additional gig economy companies, for example online platforms that facilitate the sale of goods, to compensate their platform workers with securities. Under such alternative, a broader set of gig economy companies would be able to issue securities as compensation to platform workers, with the expected benefits as described above for gig economy companies with platform workers who provide services. The different nature of platform workers as compared to traditional employees introduces some uncertainty as to the effects of the proposed amendments, as discussed above. Thus, proposing the amendments with an expanded scope would likely carry increased uncertainty as to the amendments' economic impact.

Further, we could have proposed different limits, including no limits, on the amount of compensatory securities that may be offered to individual platform workers. The proposed rule would limit equity-based compensation to 15 percent of the total compensation provided on a 12-month basis and no more than $75,000 over a 36-month period. The proposed limits could have been higher or lower, or could apply to longer or shorter periods, allowing affected issuers to include different amounts of securities in compensation

[140] We expect that platform providers would incur legal costs to create the equity-based compensation contract. We do not expect plan administration costs to be material, however, as it is our understanding that most plans are not tax-qualified plans and therefore are not required to adhere to ERISA requirements, which can be costly.

arrangements. We are unable to evaluate with precision whether a higher or lower cap or a longer or shorter period would be preferable in comparison to the proposed amendments' requirements, due mostly to the lack of data and also due to uncertainty as to how affected issuers may use the new form of compensation available to them. In general, allowing for greater amounts of equity-based compensation would provide companies with additional flexibility to structure compensation arrangements that might provide stronger incentives, a potentially increased ability to compete for talent, and more flexibility in terms of internal capital-allocation options. Going further, we could have proposed no individual limit on the amount of compensatory securities that may be offered to individual platform workers. However, as discussed above, due in part to the nature of equity-based compensation and in part due to the characteristics of platform workers, equity-based compensation may be a more costly way to compensate and provide incentives. Accordingly, it is unclear to what extent issuers would take advantage of the ability to issue greater amounts of securities-based compensation. Limiting issuers to lower amounts of securities-based compensation, on the other hand, may not provide adequate flexibility to affected issuers to incorporate equity-based compensation into compensation arrangements, thus limiting the potential benefits of the proposed amendments.

The proposed changes to Rule 701 would require the issuer to take reasonable steps to prohibit the transferability of securities issued to platform workers pursuant to the exemption, except for transfers to the issuer or by operation of law, while the proposed changes to Form S–8 would not include such a requirement. As discussed above, the transferability restriction is likely to affect the perceived value of compensatory securities offered pursuant to revised Rule 701 and as a consequence weaken the magnitude of expected benefits from the proposed amendments to Rule 701. We could have proposed an extended holding period in lieu of an outright restriction on transfer, or eliminate the transfer restrictions altogether. Eliminating the transfer restriction would provide issuers issuing shares pursuant to Rule 701 and registrants registering the issuance of shares on Form S–8 with the same expected benefits in terms of their ability to attract and retain platform workers. Introducing a defined holding period would provide some certainty as to when these securities become transferable and potentially increase their value for platform workers. However, doing so could increase the risk of an informal market developing for such securities, which given the opaque information environment of non-reporting issuers, could lead to adverse consequences for platform workers and other investors.

Securities offered to platform workers under the proposed amendment to Rule 701 would be aggregated with securities offered to employees under the current Rule 701 exemption in order to determine whether the issuer is required to deliver certain disclosure under Rule 701(e), and whether the overall cap on compensatory securities offerings has been met under Rule 701(d). Alternatively, we could have proposed a separate cap for compensatory securities offered to platform workers. Such alternative would increase the amount of securities that could be issued to platform workers for issuers with a mix of traditional employees and platform workers, leading to potentially greater benefits for these issuers. However, it is possible that such an alternative could adversely affect issuers that employ traditional workers as compared to issuers that employ both traditional and platform workers.

The proposed amendments to Rule 12g5–1 would extend the exclusion from the definition of securities ''held of record,'' and corresponding safe harbor, to securities held by platform workers who receive them pursuant to a compensation plan under the proposed amendments to Rule 701. Absent such proposed amendments, platform workers holding compensatory securities of non-reporting issuers would be considered holders of record. We believe that this would weaken the expected economic benefits from the proposed amendments to Rule 701. Under such an alternative, gig economy issuers may be disinclined to issue compensatory securities to their platform workers to avoid being subject to Exchange Act reporting requirements and the associated compliance costs. The proposed amendments to Rule 12g5–1 are not temporary. We could have proposed these amendments on a five-year temporary basis. Such alternative would result in platform workers holding compensatory securities becoming holders of record at the end of the five-year period if the exemption were not extended. We believe that under such alternative, gig economy issuers would be disinclined to issue compensatory securities to their platform workers to avoid being subject to Exchange Act reporting requirements and the associated compliance costs, at the expiration of the five-year period.

Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates.

In particular, we seek comment with respect to the following questions: Are there any costs and benefits that are not identified or are misidentified in the above analysis? Are there any effects on efficiency, competition, and capital formation that are not identified or are misidentified in the above analysis? Should we consider any of the alternative approaches outlined above instead of the proposed rules? Which approach and why? Are there any other alternative approaches that we should consider? If so, what are they and what would be the associated costs or benefits of these alternative approaches?

V. Paperwork Reduction Act

A. Summary of the Collection of Information

Certain provisions of our rules and forms that would be affected by the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[141] The Commission is submitting the proposal to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[142] The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the

[141] *See* 44 U.S.C. 3501 *et seq.*

[142] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

information disclosed. The titles for the affected collections of information are:

- ''Form S–8'' (OMB Control No. 3235–0066); and
- ''Rule 701'' (OMB Control No. 3235–0522).

We adopted Form S–8 and Rule 701 pursuant to the Securities Act. Form S–8 sets forth the disclosure requirements for a registration statement for securities to be offered by a registrant under an employee benefit plan to its employees, or employees of a subsidiary or parent company, to help such investors make informed investment decisions. Rule 701 provides an exemption from registration for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation. Issuers conducting compensatory benefit plan offerings in excess of $10 million in reliance on Rule 701 during any consecutive 12-month period are required to provide plan participants with certain disclosures, including financial statement disclosures.[143] This disclosure constitutes a collection of information. A description of the proposed rule amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the proposed amendments can be found in Section IV above.

B. Summary of the Proposed Amendments' Effects on the Collections of Information

The following table summarizes the estimated effects of the proposed amendments on the paperwork burdens associated with the affected collections of information.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS

Collection of information	Proposed amendment	Expected estimated PRA effect of proposed amendment	Current number of average annual responses	Estimated increase in number of average annual respondents [1]
Form S–8	• Would temporarily expand the scope of Form S–8 to include issuances to a registrant's platform workers in addition to its employees.	• Expected to increase the average annual number of Form S–8s filed during the temporary 4-year period.	• 2,140	• 17
	• Issuers would be required to furnish certain information every six months.	• Expected to increase PRA burden by 2 hours per affected respondent annually (*i.e.,* 1 hour for each semi-annual response).	• 0	• 17
Rule 701	• Would temporarily expand the scope of Rule 701 to exempt issuances to an issuer's platform workers in addition to its employees.	• Expected to increase average annual number of issuers required to provide Rule 701(e) disclosure because offers and sales to platform workers would be integrated with offers and sales to employees for purpose of determining whether an issuer has exceeded the $10 million threshold under Rule 701(e).	• 800	• 6
	• Issuers would be required to furnish certain information every six months.	• Expected to increase PRA burden by 3 hours per affected respondent annually (*i.e.,* 1.5 hours for each semi-annual response) [2].	• 0	• 105

[1] These estimates are based on the Farrell study, which identified 106 companies making payments to online platform workers providing services during 2012–2018. *See supra* Section IV.A, note 119 and accompanying text. The staff updated this study's findings using an assumed growth rate of 15 percent for such companies in 2019, which yielded an estimate of 122 companies making payments to platform workers as of calendar year-end 2019. Upon a review of Commission filings, the staff estimated that 17 of those companies are public, and 105 private. The staff further estimated that 5 percent of those private companies (six companies) would likely exceed the $10,000,000 threshold for aggregate annual securities offerings to its employees and platform workers and would be required to provide the disclosure pursuant to Rule 701(e). In making this estimate, the staff relied on the PRA estimates in Release No. 33–10520, which increased the Rule 701(e) disclosure threshold from $5,000,000 to $10,000,000.

[2] We estimate a greater increase in the PRA burden for Rule 701(h)'s furnished disclosure provision because it would solicit more information compared to the similar proposed provision for Form S–8.

C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

Below we estimate the incremental and aggregate increase in paperwork burden as a result of the proposed amendments. These estimates represent the average burden for all issuers, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the nature of their business. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. The table below sets forth the percentage estimates we typically use for the burden allocation for each affected collection of information. We also estimate that the average cost of retaining outside professionals is $400 per hour.[144]

[143] *See* 17 CFR 230.701(e).

[144] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

PRA TABLE 2—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED COLLECTIONS OF INFORMATION

Collection of information	Internal (%)	Outside professionals (%)
Form S–8	50	50
Rule 701	25	75

We estimate that the proposed amendments would change both the frequency of responses to, and the burden per response of, the existing collections of information. The burden increase estimates were calculated by multiplying the estimated increased number of responses by the increased estimated average amount of time it would take to prepare and review the disclosure required under the affected collection of information. The table below illustrates the incremental change to the annual compliance burden of the affected collection of information, in hours and in costs.

PRA TABLE 3—CALCULATION OF THE INCREMENTAL CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES RESULTING FROM THE PROPOSED AMENDMENTS

Collection of information	Number of estimated affected respondents (A)	Burden hour annual increase per affected respondent (B)	Increase in burden hours for affected respondents (C) = (A) × (B)	Increase in internal burden hours for affected respondents (D) = (C) × 0.5 or 0.25	Increase in professional hours for affected respondents (E) = (C) × 0.5 or 0.75	Increase in professional costs for affected respondents (F) = (E) × $400
S–8 (including furnished disclosure)	17	[1] 29	493	246.5	246.5	$98,600
Rule 701(e) + Rule 701(h) furnished disclosure	6	[2] 5	30	7.5	22.5	9,000
Rule 701 (only furnished disclosure)	99	3	297	74.25	222.75	89,100
Rule 701 (total)	105		327	81.75	245.25	98,100

[1] Based on the current OMB inventory of 27 annual burden hours per response + 1 burden hour for each semi-annual required furnished disclosure (2 additional annual burden hours) = an increase of 29 burden hours per response.
[2] Based on the current OMB inventory of 2 annual burden hours per response + 1.5 burden hours for each semi- annual required furnished disclosure (3 additional annual burden hours) = an increase of 5 burden hours per response.

The table below illustrates the program change expected to result from the proposed rule amendments together with the total requested change in reporting burden and costs.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS

Collection of information	Current burden			Program change			Requested change in burden		
	Current annual responses (A)	Current burden Hours (B)	Current cost burden (C)	Number of affected responses (D)	Change in issuer hours (E)	Change in professional costs (F)	Requested annual responses (G)	Requested burden hours [1] (H) = (B) + (E)	Cost burden (I) = (C) + (F)
S–8	2,140	28,890	$11,556,000	17	246.5	$98,600	2,157	29,137	$11,654,600
Rule 701	800	400	$480,000	105	81.75	$98,100	905	[2] 482	$578,100

[1] Rounded to nearest whole number.
[2] Thus, the estimated change in internal burden would result in an annual internal burden per response of 2.13 hours, which is a slight increase in the current annual internal burden of 2 hours. 482/.25 = 1,928; 1,928/905 = 2.13.

D. Request for Comment

We request comment in order to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility;
- Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.[145]

Any member of the public may direct to us any comments about the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget,

[145] We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–19–20. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–19–20, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis (''IRFA'') has been prepared, and made available for public comment, in accordance with the Regulatory Flexibility Act (''RFA'').[146] It relates to the proposed amendments to Securities Act Rule 701 and Form S–8 to permit the offer and sale of securities to internet platform workers, subject to specified conditions, for a temporary, five-year period. The Commission also is proposing to amend Exchange Act Rule 12g5–1 to exclude from the definition of ''held of record'' securities held by platform workers who received them pursuant to a compensation plan under proposed Rule 701(h) and to provide a safe harbor for issuers in connection with such exclusion. Neither the proposed exclusion nor the corresponding safe harbor would be temporary. As required by the RFA, this IRFA describes the impact of these proposed amendments on small entities.[147]

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments would expand the scope of Rule 701 and Form S–8 to address recent changes in the workforce caused by the rise of the ''gig economy'' by permitting the issuance of securities to an issuer's platform workers, in addition to its employees, for compensatory purposes. The proposed amendments would include conditions designed to limit the possibility of the changes to Rule 701 and Form S–8 resulting in offers and sales for capital-raising purposes. The proposed amendments to Rule 701 and Form S–8 would be temporary to enable the Commission to assess whether issuances of securities to platform workers are being made for legitimate compensatory purposes, and not for capital-raising purposes, and whether such issuances have the expected beneficial effects for issuers in the ''gig economy'' and their investors.

The proposed amendments to Exchange Act Rule 12g5–1 would extend the exclusion from the definition of ''held of record'' and safe harbor, for purposes of Section 12(g), which currently applies to securities held by persons who received them pursuant to an employee compensation plan, to securities held by platform workers pursuant to a compensation plan under proposed Rule 701(h). The proposed amendments to Rule 12g5–1, which would not be temporary, are intended to remove a potential disincentive to the issuance of securities as compensation to platform workers and to avoid favoring issuers that do not have platform workers over issuers that have them. The reasons for, and objectives of, all of the proposed amendments are discussed in more detail in Sections II.A. through II.F., above.

B. Legal Basis

We are proposing the amendments contained in this release under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act, as amended.

C. Small Entities Subject to the Proposed Rules

The proposed changes would affect some issuers that are small entities. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [148] For purposes of the RFA, under 17 CFR 240.0–10(a), an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and, under 17 CFR 230.157, is also engaged or proposing to engage in an offering of securities that does not exceed $5 million.

The proposed amendments would apply only to issuers whose platform workers provide services; they would not apply to issuers whose platform workers are providing goods. We estimate that there are only a limited number of companies with platforms providing services that would be affected by the proposed rules.[149] Although it is possible that the proposed amendment to Form S–8 could cause a small entity to file a Form S–8 for the issuance of securities to its platform workers, based upon staff review of Commission filings during 2018–2019, and due to the resulting burden and expense, we do not believe that this outcome is likely.[150] There is, however, a lack of information concerning the assets of potentially affected private companies, and as such, it is difficult to estimate with certainty the number of private issuers that qualify as small entities that would be eligible to rely on the proposed amendments to Rule 701 and Rule 12g5–1 or that would choose to become public companies and then rely on the proposed amendments to Form S–8. We therefore are soliciting comment on the number of small entities that would be affected by the proposed amendments.

D. Reporting, Recordkeeping, and Other Compliance Requirements

As noted above, the purpose of the proposed amendments is to permit the issuance of securities for compensatory purposes under Rule 701 and Form S–8 to a new category of worker, the ''platform worker.'' By expanding the scope of Rule 701 to include issuances of unregistered securities to a non-reporting issuer's platform workers, the proposed amendments likely would result in cost savings for such an issuer, which would otherwise have to incur the costs of registering the securities, absent another exemption from registration, and thereby become an Exchange Act reporting issuer. In addition, by extending the current exclusion and safe harbor under Exchange Act Rule 12g5–1 to securities held by platform workers who received them pursuant to a compensation plan under the proposed Rule 701 amendment, a non-reporting issuer would benefit by not being required to count those platform workers as record holders for the purpose of determining its Section 12(g) registration obligations.

We believe that the proposed amendments to Rule 701 and Rule 12g5–1 could be of particular benefit to small entities, which may be financially constrained, by enabling them to issue securities as compensation, instead of

[146] 5 U.S.C. 601 *et seq.*

[147] 5 U.S.C. 603(a).

[148] 5 U.S.C. 601(6).

[149] Based upon a review of Commission filings and other relevant data, the staff estimated that the proposed rules would affect 122 companies, 17 of which are public and 105 of which are private. *See supra* Section V.B.

[150] None of the 17 Forms S–8 filed by issuers with service-providing platforms were small entities.

cash, within the proposed limits. This could help small entities attract potential workers and enhance their competitive position.

In contrast, we do not believe that the compliance costs of the proposed Rule 701 amendment would be significant. The most significant compliance burden under current Rule 701 is the financial disclosure requirement under Rule 701(e) for issuers that exceed the $10 million threshold during a 12-month period. Due to the $10 million threshold, this requirement would not apply to small entities.[151] Moreover, although under the proposed rules, an issuer offering securities to its platform workers pursuant to the amended Rule 701 would be required to furnish certain information every six months, we do not expect the resulting compliance burden to be significant.[152]

The proposed amendment to Form S–8 would benefit public companies with platforms offering services by permitting them to issue registered securities to their platform workers in addition to their employees, which could enhance their competitive position vis-à-vis companies that only have employees. The proposed amendments likely would result in the filing of additional Form S–8 registration statements to cover offers and sales to such workers. Those registrants would incur the compliance burden and costs typically associated with preparing and filing Form S–8. In addition, because we are proposing a requirement to furnish information every six months for Form S–8 issuers, similar to the proposal for Rule 701 issuers, those registrants would incur the compliance burden and costs associated with furnishing the required information, which we similarly estimate would not be significant.[153] Although it is possible that the proposed amendment to Form S–8 could cause a small entity to file a Form S–8 for the issuance of securities to its platform workers, based upon staff review of Commission filings during 2018–2019, and due to the resulting burden and expense, we do not believe that this outcome is likely.[154] Nevertheless, we are soliciting comment on the costs and benefits of the proposed amendments for small entities.

Compliance with the proposed amendments would require the use of professional skills, including legal skills, both to help ensure that an issuer has met the proposed conditions under Rule 701 designed to prevent the issuance of securities for a capital-raising purpose, and to enable a registrant to meet the requirements of Form S–8. We discuss the economic impact, including the estimated compliance burdens and costs, of the proposed amendments to all issuers, including small entities, in greater detail in Sections IV and V above.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap, or conflict with other Federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant economic impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The proposed amendments to Rule 701 and Form S–8 would permit the issuance of securities to platform workers subject to specified conditions. Although an issuer, including a small entity, would incur some compliance costs to ensure that it has met those conditions, issuers proceeding under the proposed amendment to Rule 701 would largely benefit due to the savings derived from not having to register the securities. In addition, we expect the increase in Form S–8 compliance costs to be limited because, although the proposed amendment to Form S–8 would likely result in more registration statements on that form being filed, we believe that the proposed amendment would only slightly increase the actual burden of preparing and filing each Form S–8. We also believe that it is unlikely that the proposed amendment would result in a small entity filing a Form S–8. We are not proposing an amendment to reduce the costs of preparing and filing a Form S–8 because we believe the requirements that result in those costs are necessary to protect investors. We also are not proposing to exempt small entities from the costs associated with the proposed requirement to furnish information on a semi-annual basis because we believe that requirement is necessary to assess fully the impact of the temporary rules. Accordingly, we do not believe it is necessary to establish different compliance or reporting requirements for small entities or to exempt small entities from all or part of the proposed amendments.

Finally, with respect to using performance rather than design standards, the proposed amendments generally contain elements similar to performance standards. For example, the proposed definition of platform worker would include the condition that the issuer operates the platform for the provision of services pursuant to a written contract or agreement between the issuer and the platform worker under which the issuer controls the use of the platform. Issuer control would be demonstrated by the issuer being able to establish the amount of the fees charged for using the platform and the terms and conditions by which the platform worker receives payment for the services provided through the platform. In addition, the issuer must have the authority to accept and remove the internet platform workers providing services through the platform. However, the proposed amendments would not require that a specific fee be charged or that a specific payment mechanism be utilized. The proposed amendments would also not limit what services an issuer could facilitate through its platform or how participating workers could provide the services.

[151] *See* 17 CFR 230.701(d), which limits the aggregate sales price or amount of securities sold under Rule 701 during any consecutive 12-month period to the greatest of $1,000,000, 15 percent of the total assets of the issuer, or 15 percent of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701. The purpose of the Rule 701(d) caps is to help curb non-compensatory sales in reliance on the rule. For example, applying the asset cap, a small entity would only be able to offer 15 percent of $5,000,000, or $750,000 during a consecutive 12-month period. Although in a companion rulemaking, the Commission is proposing to increase the asset limitation to 25 percent, under this increased limit, if adopted, a small entity would still be able to offer only 25 percent of $5,000,000, or $1,250,000. While the Commission is also proposing to raise the dollar cap, the new cap would only increase to $2,000,000. *See* Release No. 33–10891 at Section II.B.

[152] We estimate that the compliance burden associated with furnishing the required information under the proposed Rule 701 amendment would be 1.5 hours for each semi-annual disclosure per issuer, or a total of 3 hours per issuer on an annual basis. *See supra* Section V.B.

[153] We estimate that the compliance burden associated with furnishing the required information under the proposed Form S–8 amendment would be 1.0 hours for each semi-annual disclosure per issuer, or a total of 2 hours per issuer on an annual basis. *See supra* Section V.B.

[154] *See supra* note 150.

Request for Comment

We encourage the submission of comments with respect to any aspect of this IRFA. In particular, we request comments regarding:

- How the proposed rule and form amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed rule and form amendments;
- The existence or nature of the potential effects of the proposed amendments on small entity companies discussed in the analysis;
- How to quantify the effects of the proposed amendments; and
- Whether there are any federal rules that duplicate, overlap, or conflict with the proposed amendments.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of that effect. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rules are adopted, and will be placed in the same public file as comments on the proposed rules themselves.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[155] the Commission must advise OMB as to whether the proposed amendments constitute a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a ''major rule'' for purposes of SBREFA. In particular, we request comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

VIII. Statutory Authority

The amendments contained in this release are being proposed under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 230, 239, and 240

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78o–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78, 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s).

* * * * *

■ 2. Amend § 230.428 by adding paragraph (d) to read as follows:

§ 230.428 Documents constituting a section 10(a) prospectus for Form S–8 registration statement; requirements relating to offerings of securities registered on Form S–8.

* * * * *

(d)(1) Where securities are to be offered to platform workers pursuant to a registration statement on Form S–8 (§ 239.16b(c)), the documents and other information identified in paragraph (a) of this section shall, taken together, constitute a Section 10(a) prospectus for offerings to platform workers pursuant to a written compensation plan, contract, or agreement. The document retention requirements in paragraph (a)(2) of this section and the delivery, updating, and related procedural requirements in paragraph (b) of this section shall also apply to such offerings to platform workers.

(2) This paragraph (d) will expire on the same date that 17 CFR 239.16b(c) will expire pursuant to 17 CFR 239.16b(c)(4).

■ 3. Amend § 230.701 by adding Note 1 to paragraph (c) and adding paragraph (h) to read as follows:

§ 230.701 Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.

* * * * *

(c) * * *

Note 1 to paragraph (c): Refer to § 230.701(h) for the exemption under § 230.701 applicable to offers and sales of securities to platform workers. *Platform worker* is defined in § 230.701(h)(2).

* * * * *

(h)(1) *Transactions with platform workers.* (i) In addition to the transactions exempted by paragraph (c) of this section, this section exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii) of this section) under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its subsidiaries, or subsidiaries of the issuer's parent, for the participation of platform workers as defined in paragraph (h)(2) of this section. As used in this section, the term ''platform worker'' includes former platform workers, executors, administrators, or beneficiaries of the estates of deceased platform workers, guardians or members of a committee for incompetent former platform workers, or similar persons duly authorized by law to administer the estate or assets of former platform workers. This section exempts offers and sales to former platform workers only if such workers met the conditions of paragraph (h) of this section at the time the securities were offered or during a period of service ending within 12 months preceding the termination of service for which the securities were issued. This section also exempts offers and sales to former platform workers of an acquired entity of securities issued in substitution or exchange for securities issued to such workers by the acquired entity on a compensatory basis while such persons were providing services to the acquired entity.

(ii) The exemption for offers and sales of securities to platform workers under this section is temporary and will expire pursuant to paragraph (h)(6) of this section, except that, following the expiration date specified in paragraph (h)(6) of this section, an issuer may continue to rely on the exemption in this paragraph (h) for the sale of securities underlying options, warrants, or rights previously issued in an exempt transaction pursuant to this paragraph (h).

(2) *Definition of platform worker.* A platform worker is a natural person or an entity specified in paragraph (h)(2)(iii) of this section, who is unaffiliated with the issuer and meets the following conditions:

(i) The worker provides *bona fide* services to the issuer (or the issuer's parents, the issuer's subsidiaries or subsidiaries of the issuer's parent) or to third-party end-users, and such services

[155] 5 U.S.C. 801 *et seq.*

benefit the issuer. Selling or transferring permanent ownership of discrete, tangible goods would not constitute services for purposes of this section;

(ii) The services are provided pursuant to a written contract or agreement between the issuer and the worker and are provided through an internet-based platform or other widespread, technology-based marketplace platform or system that the issuer operates and controls, as demonstrated by the following:

(A) The issuer provides access to the platform and establishes the principal terms of service for using the platform;

(B) The issuer establishes the terms and conditions by which the platform worker receives payment for the services provided through the platform; and

(C) The issuer can accept and remove the platform worker.

(iii) A platform worker may be an entity if:

(A) Substantially all of its activities involve the performance of *bona fide* services that meet the requirements of paragraphs (h)(2) and (h)(3) of this section; and

(B) The ownership interest of the entity is wholly and directly held by the natural person performing the services pursuant to paragraph (h) of this section through the entity.

(3) *Additional requirements for issuances to platform workers.* Offers and sales of securities to platform workers are eligible for an exemption under this section if the following, additional requirements are met:

(i) The issuance is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract, or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the issuer's securities;

(ii) No more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period, and no more than $75,000 of the value of compensation received by the platform worker from the issuer during a consecutive 36-month period, shall consist of securities, with such value determined at the time the securities are granted;

(iii) The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and

(iv) The issuer must take reasonable steps to prohibit the transfer of the securities issued to a platform worker pursuant to this exemption, other than a transfer to the issuer or by operation of law, except that 90 days after the issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold pursuant to paragraph (g)(3) of this section.

(4) *Requirement to furnish certain information.* An issuer using the exemption under this section for the issuance of securities to platform workers is required to furnish the following information to the Commission at six-month intervals commencing six months after the first such issuance:

(i) The criteria used to determine eligibility for securities awards to platform workers, whether they are the same as for other compensatory transactions and whether those criteria, including revisions to the criteria, are communicated to workers in advance as an incentive;

(ii) The type and terms of securities issued to platform workers during each six-month interval, and whether they are the same as for other compensatory transactions by the issuer during that interval;

(iii) The reasonable steps taken to prohibit the transfer of the securities sold pursuant to this paragraph (h);

(iv) The percentage of overall outstanding securities that the amount issued cumulatively under this paragraph (h) represents;

(v) During each six-month interval, the number of platform workers, the number of non-platform workers, the number of platform workers receiving securities pursuant to this paragraph (h), and the number of non-platform workers who received securities pursuant to § 230.701; and

(vi) The number and dollar amount of securities issued to platform workers in each six-month interval, both in absolute amounts and as a percentage of the issuer's total exempt sales under § 230.701.

Instruction to § 230.701(h)(4). An issuer should furnish the required information specified in this paragraph in the manner designated by the Division of Corporation Finance for this purpose.

(5) *Request for confidential treatment.* An issuer may request confidential treatment under § 200.83 for information furnished pursuant to paragraph (h)(3) of this section. Written requests for confidential treatment under § 200.83 relating to the furnished materials may be submitted either in paper format or electronically.

(6) *Expiration of temporary exemptive rule.* Except as provided in paragraph (h)(1)(ii) of this section, the exemption for the issuance of securities to platform workers pursuant to this paragraph (h) applies only to offers or sales of securities occurring prior to five years following the date of the section's effectiveness.

(7) This paragraph (h) will expire five years from the date of effectiveness of § 230.701(h).

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 4. The general authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78o(d), 78o–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Pub. L. 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

■ 5. Amend § 239.16b by adding ''or other compensatory plans'' at the end of the title and adding paragraphs (a)(3) and (c) to read as follows:

§ 239.16b Form S–8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans or other compensatory plans.

(a) * * *

(3) Securities of the registrant to be offered to marketplace platform workers pursuant to § 239.16b(c).

* * * * *

(c) *Issuances to platform workers.* (1) A registrant may register on Form S–8 securities to be offered or sold to platform workers, as defined by § 230.701(h), for the temporary period set forth in § 239.16b(c)(4), only if:

(i) The issuance is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction or that directly or indirectly promote or maintain a market for the issuer's securities;

(ii) No more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period shall consist of securities, with such value determined at the time the securities are granted, with the remainder of compensation received by the platform worker from the issuer paid in cash, and no more than $75,000 of such compensation received from the issuer during a

consecutive 36-month period shall consist of securities, with such value determined at the time the securities are granted; and

(iii) The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash.

(2) A registrant using Form S–8 for the issuance of securities to platform workers is required to furnish the following information in the manner designated by the Division of Corporation Finance for this purpose at six-month intervals commencing six months after the first such issuance:

(i) The criteria used to determine eligibility for securities awards to platform workers, whether they are the same as the criteria for other compensatory transactions, and whether those criteria, including revisions to the criteria, are communicated to workers in advance as an incentive;

(ii) The type and terms of securities issued to platform workers during each six-month interval and whether they are the same as for other compensatory transactions by the registrant during that interval;

(iii) The percentage of overall outstanding securities that the amount issued cumulatively to platform workers under this section represents;

(iv) During each six-month interval, the number of platform workers, the number of non-platform workers, the number of platform workers receiving securities registered on Form S–8, and the number of non-platform workers who received securities registered on Form S–8;

(v) The number of platform workers, in an absolute amount and as a percentage of the total number of platform workers, employees, and other persons eligible to receive securities on Form S–8; and

(vi) The number and dollar amount of securities issued to platform workers, both in absolute amounts and as a percentage of the issuer's total sales on Form S–8 during each six-month interval.

(3) A registrant may request confidential treatment under § 200.83 for information furnished pursuant to this section. Written requests for confidential treatment under § 200.83 relating to the furnished materials may be submitted either in paper format or electronically.

(4) This paragraph (c) applies only to offers or issuances of securities occurring prior to five years from the date of the section's effectiveness.

(5) This paragraph (c) will expire five years from the date of effectiveness of § 239.16b(c).

■ 6. Amend Form S–8 (referenced in § 239.16b) by:

■ a. Redesignating paragraph (b) of General Instruction A.1. as paragraph (c);

■ b. Adding paragraph (b) of General Instruction A.1.;

■ c. Revising paragraph 1 of General Instruction G. (''Updating'');

■ d. Revising the Note immediately following the heading ''Part I—INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS;''

■ e. Revising Item 2 of Part I; and

■ f. Revising the ''Signatures'' section for ''the Plan'' by replacing the parenthetical ''or other persons who administer the employee benefit plan'' with ''or other persons who administer the plan'' in the first sentence.

The additions and revisions read as follows:

Note: The text of Form S–8 does not, and this amendment will not, appear in the Code of Federal Regulations.

United States Securities and Exchange Commission Washington, DC 20549

Form S–8 Registration Statement Under the Securities Act of 1933

* * * * *

General Instructions

A. Rule as to Use of Form S–8

1. * * *

(a) * * *

(b)(1) Securities of the registrant to be offered to platform workers pursuant to a written compensation plan, contract, or agreement. The term ''platform worker'' is defined by Rule 701(h)(2) (§ 230.701(h)(2)). As used in this form, the term ''plan'' includes a written compensation plan, contract, or agreement for the issuance of securities to platform workers.

(2) Form S–8 is available for the issuance of securities to platform workers only if, pursuant to § 239.16b(c):

(i) The issuance is pursuant to a compensatory arrangement, as evidenced by a written compensation plan, contract, or agreement, and is not for services that are in connection with the offer or sale of securities in a capital-raising transaction, or services that directly or indirectly promote or maintain a market for the issuer's securities;

(ii) No more than 15 percent of the value of compensation received by a platform worker from the issuer for services provided during a consecutive 12-month period shall consist of securities, with such value determined at the time the securities are granted, with the remainder of compensation received by the platform worker from the issuer paid in cash, and no more than $75,000 of such compensation received from the issuer during a consecutive 36-month period shall consist of securities, with such value determined at the time the securities are granted;

(iii) The amount and terms of any securities issued to a platform worker may not be subject to individual bargaining or the worker's ability to elect between payment in securities or cash; and

(iv) The offers or sales of securities occur prior to five years from the date of the effectiveness of § 239.16b(c)]. On that date, § 239.16b(c) will expire and will no longer be effective.

Note: The purpose of § 239.16b(c) is to permit the issuance of securities to platform workers for a compensatory purpose. This section is not available for plans or schemes to circumvent this purpose, such as to raise capital. This section also is not available to any transaction that is in technical compliance with § 239.16b(c) but is part of a plan or scheme to evade the compensatory purpose of this section.

(3) A registrant using Form S–8 for the issuance of securities to platform workers is required to furnish the information specified in § 239.16b(c)(3) in the manner designated by the Division of Corporation Finance for this purpose at six-month intervals commencing six months after the first issuance of securities to platform workers on this form.

Note: A registrant may request confidential treatment under § 200.83 for information furnished pursuant to § 239.16b(c)(3). Written requests for confidential treatment under § 200.83 relating to the furnished materials may be submitted either in paper format or electronically.

(4) The term ''platform worker'' includes:

(i) Former platform workers, only if such workers provided services pursuant to § 239.16b(c) of this chapter at the time the securities were offered or during a period of service ending within 12 months preceding the termination of service for which the securities were issued;

(ii) Former platform workers of an entity acquired by the issuer who may receive securities registered on this form in substitution or exchange for securities issued to them by the acquired entity on a compensatory basis

while such persons were providing services to the acquired entity; and

(iii) Executors, administrators, or beneficiaries of the estates of deceased platform workers, guardians or members of a committee for incompetent former platform workers, or similar persons duly authorized by law to administer the estate or assets of former platform workers.

(5) The inclusion of individuals described in paragraph (4) of General Instruction A.1.(b) in the term ''platform worker'' is only to permit registration on Form S–8 of the exercise of stock options issued to platform workers pursuant to a plan, and the subsequent sale of the securities, if these exercises and sales are permitted under the terms of the plan.

* * * * *

G. Updating

Updating of information constituting the Section 10(a) prospectus pursuant to Rule 428(a) (§ 230.428(a)) during the offering of the securities shall be accomplished as follows:

1. Plan information specified by Item 1 of Form S–8 required to be sent or given to employees or platform workers shall be updated as specified in Rule 428(b)(l) (§ 230.428(b)(l)) or Rule 428(d)(1) (§ 230.428(d)(1)). Such information need not be filed with the Commission.

* * * * *

Part I Information Required in the Section 10(a) Prospectus

Note: The document(s) containing the information specified in this Part I will be sent or given to employees or platform workers as specified by Rules 428(b)(1) and 428(d) (§§ 230.428(b)(1) and 428(d)). Such documents need not be filed with the Commission either as part of this registration statement or as prospectuses or prospectus supplements pursuant to Rule 424 (§ 230.424). These documents and the documents incorporated by reference in the registration statement pursuant to Item 3 of Part II of this Form, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act. *See* Rules 428(b)(1) and 428(d) (§§ 230.428(b)(1) and 428(d)).

* * * * *

Item 2. Registrant Information and Participant Plan Annual Information

The registrant shall provide a written statement to participants advising them of the availability without charge, upon written or oral request, of the documents incorporated by reference in Item 3 of Part II of the registration statement, and stating that these documents are incorporated by reference in the Section 10(a) prospectus. The statement also shall indicate the availability without charge, upon written or oral request, of other documents required to be delivered to employees pursuant to Rule 428(b) (§ 230.428(b)), and to platform workers pursuant to Rule 428(d). The statement shall include the address (giving title or department) and telephone number to which the request is to be directed.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, secs. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 8. Amend § 240.12g5–1 by revising paragraph (a)(8) to read as follows:

§ 240.12g5–1 Definition of securities ''held of record''.

(a) * * *

(8)(i) For purposes of determining whether an issuer is required to register a class of equity securities with the Commission pursuant to Section 12(g)(1) of the Act (15 U.S.C. 78l(g)(1)), an issuer may exclude securities:

(A) Held by persons who received the securities pursuant to an employee compensation plan, or a compensation plan for platform workers pursuant to § 230.701(h) of this chapter, in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act of 1933 (15 U.S.C. 77e); and

(B) Held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act (15 U.S.C. 77e) from the issuer, a predecessor of the issuer, or an acquired company in substitution or exchange for excludable securities under paragraph (a)(8)(i)(A) of this section, as long as the persons were eligible to receive securities pursuant to § 230.701 of this chapter at the time the excludable securities were originally issued to them.

(ii) As a non-exclusive safe harbor under this paragraph (a)(8):

(A) An issuer may deem a person to have received the securities:

(*1*) Pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of § 230.701(c) of this chapter; or

(*2*) Pursuant to a compensation plan for platform workers if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of § 230.701(h) of this chapter.

(B) An issuer may, solely for the purposes of Section 12(g) of the Act (15 U.S.C. 78l(g)(1)), deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act (15 U.S.C. 77e) if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

Note 1 to paragraph (a)(8)(ii): Section 230.701(h) applies only to offers or sales of securities occurring prior to five years following the date of effectiveness of § 230.701(h). On that date, § 230.701(h) will expire and will no longer be effective.

* * * * *

By the Commission.

Dated: November 24, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–26374 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 401

[Docket No. SSA–2018–0012]

RIN 0960–AI31

Anti-Fraud System

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: We separately published, in today's **Federal Register**, notice of a modified system of records entitled Anti-Fraud (AF) System. Because this system will contain some investigatory material compiled for law enforcement purposes, this proposed rule will exempt those records within this system of records from specific provisions of the Privacy Act.

DATES: To ensure that your comments are considered, we must receive them no later than January 11, 2021.

ADDRESSES: You may submit comments by any one of three methods—internet,

fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to docket number SSA–2018–0012, in order that we may associate your comments with the correct regulation.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the Search function to find docket number SSA–2018–0012. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Address your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Melissa Feldhan, Supervisory Government Information Specialist, SSA, Office of Privacy & Disclosure, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, Phone: (410) 965–1416, for information about this rule. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

In accordance with the Privacy Act,[1] we are issuing public notice of our intent to establish a modified system of records, the Anti-Fraud (AF) System (60–0388). The AF System is an agency-wide and overarching system that includes the ability to detect, prevent, and mitigate fraud in our programs. The AF System collects and maintains personally identifiable information (PII) for assisting us in identifying suspicious or potentially fraudulent activities performed by individuals across all of the agency's programs and service delivery methods.

We established the AF System to support our goal of enhancing SSA's fraud prevention and detection activities by protecting the public's data, providing secure online services, and increasing payment accuracy. The AF System provides us with access to a single repository of data that currently resides across many of our different systems of records. We use the PII in the AF System to employ advanced data analytics solutions to identify patterns indicative of fraud, improve the functionality of data-driven fraud activations, conduct real-time risk analysis, and integrate developing technology into our anti-fraud business processes. This solution also provides true business intelligence to agency leadership with assistance in data-driven anti-fraud decision-making. We use the records in the AF System to detect indications of fraud in all of our programs and operations initiated by individuals outside of SSA or internal to SSA (*e.g.,* SSA employees).

We are claiming that the AF System is exempt from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Some information in the AF System relates to our efforts to mitigate, detect, and investigate fraud in our programs and systems and to collaborate with the Office of the Inspector General in fraud investigations and prosecutions. Therefore, we need these exemptions to protect information from public access. The exemptions are required to avoid disclosure of screening techniques; to protect the identities and physical safety of confidential informants; to ensure our ability to obtain information from third parties and other sources; and to protect the privacy of third parties. Allowing an individual to access the information in the AF System could permit the individual to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of the AF System and the overall law enforcement process, we may, at our discretion, grant notification of or access to a record in the AF System. If an individual is denied any right, privilege, or benefit to which he or she is otherwise entitled under Federal law due to the maintenance of material in the AF System, we will provide such material to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to us under an express promise that the identity of the source would be held in confidence.

We are claiming exemption from Privacy Act subsection (c)(3) (Accounting and Disclosure); subsection (d) (Access and Amendment to Records); subsection (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements); and subsection (f) (Agency Rules) for this system of records. We claim exemption from these Privacy Act subsections for the AF System because release of the accounting of disclosures, access to the records, and notice to individuals with respect to existence of records could alert the individual whom might be a subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation. Disclosures of accounting would therefore present a serious impediment to law enforcement efforts. These Privacy Act subsections would permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses, or evidence, and to avoid detection or apprehension, which would undermine the investigative process. Thereby, these Privacy Act subsections would undermine SSA investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

In summary, due to the investigatory nature of information that we maintain in this system of records, we propose to add the AF System to the list of our systems that are exempt from specific provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2).

Rulemaking Analyses and Notices

We will consider all comments received on or before the close of business on the comment closing date indicated above and we will make the comments available for examination in the docket at the previously noted address. We will file comments received after the comment closing date in the docket, and we will consider them to the extent practicable. We may publish a final rule at any time after close of the comment period.

Clarity of This Rule

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this proposed rule, we invite your comments

[1] 5 U.S.C. 552a.

on how to make the rule easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, *e.g.,* grouping and order of sections, use of headings, paragraphing?

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this NPRM does not meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563.

We also determined that this NPRM meets the plain language requirement of Executive Order 12866.

Executive Order 13132 (Federalism)

We analyzed this proposed rule in accordance with the principles and criteria established by Executive Order 13132, and we determined that the proposed rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. We also determined that this proposed rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations effectuating Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed rule.

Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

These rules do not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.

List of Subjects in 20 CFR Part 401

Administrative practice and procedure, Privacy.

The Commissioner of the Social Security Administration, Andrew Saul, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

For the reasons stated in the preamble, we are revising subpart B of part 401 of title 20 of the Code of Federal Regulations as set forth below:

PART 401—PRIVACY AND DISCLOSURE OF OFFICIAL RECORDS AND INFORMATION

Subpart B—[Amended]

■ 1. The authority citation for subpart B of part 401 continues to read as follows:

Authority: Secs. 205, 702(a)(5), 1106, and 1141 of the Social Security Act (42 U.S.C. 405, 902(a)(5), 1306, and 1320b–11); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 26 U.S.C. 6103; 30 U.S.C. 923.

■ 2. In § 401.85, add paragraph (b)(2)(ii)(H) to read as follows.

* * * * *

(b)(2) * * *

(ii) * * *

(H) Anti-Fraud, SSA.

* * * * *

[FR Doc. 2020–26754 Filed 12–10–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 150

[201A2100DD, AAKC001030, A0A501010.999900]

RIN 1076–AF56

Indian Land Title and Records

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is proposing a rule to modernize the current regulations governing the Land Title and Records Office (LTRO). The LTRO maintains title documents for land held in trust or restricted status for individual Indians and Tribes (Indian land). This proposed rule would replace outdated provisions and allow for more widespread efficiencies by reflecting current practices, while creating a framework for future LTRO operations.

DATES: Please submit written comments by February 9, 2021. If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this proposed rule in the **Federal Register**. Therefore, comments should be submitted to OMB by January 11, 2021. See the **SUPPLEMENTARY INFORMATION** section of this rulemaking for dates of Tribal consultation sessions.

ADDRESSES: You may send comments, identified by RIN number 1076–AF56 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for sending comments.
- *Email: consultation@bia.gov.* Include RIN number 1076–AF56 in the subject line of the message.
- *Mail or Hand-Delivery/Courier:* Office of Regulatory Affairs & Collaborative Action—Indian Affairs (RACA), U.S. Department of the Interior, 1849 C Street NW, Mail Stop 4660, Washington, DC 20240.

All submissions received must include the Regulatory Information Number (RIN) for this rulemaking (RIN 1076–AF56). All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Comments on the Paperwork Reduction Act information collections contained in this document are separate from comments on the substance of the rulemaking. Send your comments and suggestions on the information collection requirements to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to *consultation@bia.gov.*

We cannot ensure that comments received after the close of the comment period (see **DATES**) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed above will not be included in the docket for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Director, Office of Regulatory Affairs & Collaborative Action, (202) 273–4680; *elizabeth.appel@bia.gov.*

SUPPLEMENTARY INFORMATION:

I. Background & Summary of Proposed Rule

The LTRO maintains title documents for land that the United States holds in trust or restricted status for individual Indians or Tribes (Indian land), roughly similar to how counties and other localities maintain title documents for fee land within their jurisdictions. Several Acts authorize BIA maintenance of these title records. *See, e.g.,* 25 U.S.C. 5, 9; 64 Stat. 1262; 34 Stat. 137; 35 Stat. 312; and 38 Stat. 582, 598.

The LTRO has several physical offices throughout the country. These LTRO offices are the successors to the ''title plants'' that were established by regulation in 1965 to serve what were then BIA ''area offices.'' *See* 30 FR 11676 (September 11, 1965). Updates to the regulations in 1981 defined the role of the LTRO and assigned each LTRO office a geographic service area, containing certain BIA area offices or Tribal reservations. *See* 46 FR 47537 (September 29, 1981), later redesignated at 47 FR 13327 (March 30, 1982).

The regulations finalized in 1981 are still in place (though redesignated from 25 CFR part 120 to 25 CFR part 150). Now, 40 years later, BIA ''area offices'' are BIA Regions, and the LTRO maintains title documents primarily through an electronic system: The Trust Asset Accounting Management System (TAAMS). Each LTRO office records land title documents that are primarily within its designated geographic area; however, it is BIA's vision that, eventually, all title documents will be electronically stored and accessible to LTRO offices regardless of geographic area.

The proposed rule modernizes the LTRO regulations to provide a framework for continued operations and future electronic maintenance of most title documents. This approach will more efficiently address title-related actions that support Indian land transactions (such as a title examination to take land into trust) by allowing workloads to be shifted among LTRO offices to promptly address each request and prevent the risk of any backlogs. The proposed rule continues to provide that each LTRO office is primarily responsible for certain geographic areas, but rather than specifying those LTRO offices in the proposed rule, it instead points to a web page where BIA can keep the list accurately updated.

The proposed rule also addresses changes that have evolved over the past 40 years that have removed requirements for Secretarial approval of certain title documents in support of Tribal self-governance and self-determination (*e.g.,* individual leases under approved Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act regulations) by clarifying that these documents must still be recorded in the LTRO because the documents affect who is authorized to use Indian land.

The proposed rule would also make more transparent the LTRO's role as a support office to BIA and, with respect to title-related matters related to probate, the Office of Hearings and Appeals (OHA). Generally, the Realty staff in BIA are the primary liaison to the LTRO, as the Realty staff are responsible for processing land transactions requested by Indian and Tribal landowners. Similarly, the proposed rule would clarify the LTRO's role with respect to any defects to title: The LTRO provides a notation of the defect in the record of title, but the originating office is responsible for providing the LTRO with a corrected title document for the LTRO to record.

Finally, the proposed rule would allow the BIA Director to delegate recording responsibilities to another office for certain transactions on an as-needed basis. This provision provides flexibility to facilitate future electronic recording capabilities for efficiency.

The following table shows changes from the current regulation to the proposed rule.

Current 25 CFR §	Proposed 25 CFR §	Description of changes
150.1 Purpose and scope	150.1 What is the purpose of this part?.	Provides more general description of responsibilities (e.g., to account for other types of reports beyond land title status reports that LTRO provides).
150.2 Definitions	150.2 What terms do I need to know?.	Alphabetizes terms. Adds definitions for ''certify,'' ''certified copy,'' ''Certifying Officer,'' ''defect'' or ''title defect,'' ''I'' or ''you'' (for plain language purposes), ''Office of Hearings and Appeals (OHA),'' ''Probate Inventory Report,'' ''record of title,'' ''Region,'' and ''title.'' Deletes definitions of ''Administrative Law Judge,'' ''Commissioner,'' ''land,'' and ''Superintendent.'' Revises definition of ''Agency'' to clarify that contracting and compacting Tribes are included. Revises definition of ''Indian land'' to limit to trust or restricted land only, in accordance with other regulatory definitions, while moving provisions regarding other categories of land to proposed § 150.201(c). Revises definition of ''recording'' to move substantive statement as to the significance of recording a document to the body of the regulation at proposed § 150.101. Revises definition of ''title document'' to provide examples. Revises definition of ''title examination'' to add detail. Revises definition of ''Tribe'' to cite the List Act of 1994.

Current 25 CFR §	Proposed 25 CFR §	Description of changes
	150.3 May Tribes administer this part on LTRO's behalf?.	New section to address that Tribes may compact or contract for LTRO functions under Tribal self-governance and self-determination compacts and contracts.
	150.101 What is the purpose of the record of title?.	New section to address the significance of recording a document in the record of title.
150.3 Maintenance of land records and title documents.	150.102 Who maintains the record of title?.	No substantive change.
	150.103 What services does the LTRO perform to maintain the record of title?.	New section to provide a list of services that the LTRO performs.
	150.104 How does the LTRO maintain the record of title?.	New section to address that the LTRO primarily maintains the record of title electronically.
150.4 Locations and service areas for land titles and records offices.	150.105 Are certain LTRO offices responsible for certain geographic areas?.	Revises to provide flexibility to allow for workload sharing across LTRO offices while noting LTRO offices have primary responsibility for certain geographic areas. Replaces the list of addresses for each LTRO office with a webpage for a more frequently updated list of each LTRO office's area of primary geographic area.
150.5 Other Bureau offices with title service responsibility.	.....	Deleted because this section is no longer necessary.
150.6 Recordation of title documents.	150.201 What is recorded in the record of title?.	Removes language assuming hard copy transmission of documents. Adds language to account for the need to record certain documents that are not subject to Secretarial approval. Adds that LTRO offices may also maintain documents demonstrating the rights of use, occupancy, and/or benefit of certain Tribes to non-Indian land and certain documents related to Indian land that are not title documents.
	150.202 Must I check with any other governmental office to find title documents for Indian land?.	New section to specify that in some instances, due diligence may require examination of other records of title for Indian land.
	150.203 Who may submit a title document for recording?.	Clarifies the role of the LTRO as a service office for BIA Agencies, Regions, and OHA, who act as the primary liaison to Indian and Tribal landowners.
	150.204 Who records title documents?.	Clarifies that the BIA Director may delegate the recording function to other Agency offices by documenting the delegation and types of transactions to which it applies in the Indian Affairs Manual.
	150.205 What are the minimum requirements for recording a title document?.	New section to clarify what must be included in a title document that is approved by the Secretary and what must be included in title documents that are deemed approved.
150.7 Curative action to correct title defects.	150.206 What actions will LTRO take if it discovers a title defect?.	Revises to provide that LTRO offices will no longer complete administrative modifications; rather they will put a notation in the record of title and contact the originating office for correction.
150.8 Title status reports	.....	Incorporated into proposed § 150.302.
150.9 Land status maps.	.....	Incorporated into proposed § 150.302.
150.10 Certification of land records and title documents.	150.301 How does LTRO certify copies of title documents?.	Revised for plain language.
	150.302 What reports does the LTRO provide?.	Lists the universe of reports that the LTRO may provide for Indian land.
150.11 Disclosure of land records, title documents, and title reports.	150.303 Who may request and receive copies of title documents in the record of title or reports from LTRO without filing a Freedom of Information Act request?.	Revises to include the categories of persons/entities that may obtain information under current laws including the American Indian Probate Reform Act of 2004, 25 U.S.C. 2204.
	150.304 Where do I request copies of title documents or reports from LTRO?.	New section to clarify that the BIA Agency or Region is the liaison to the LTRO.
	150.305 What information must I provide when requesting copies of title documents and reports?.	New section to list what information BIA will require in order to identify the land for which a report is being requested.
	150.306 Will I be charged a fee for obtaining copies of records?.	New section to provide that the LTRO may charge fees in accordance with the Freedom of Information Act fee schedule, but will not charge fees to Indian or Tribal landowners.
	150.401 Who owns the records associated with this part?.	New section to clarify what records are Federal records as opposed to Tribal records in cases where a Tribe has contracted or compacted for LTRO functions.
	150.402 How must records associated with this part be preserved?.	New section regarding preservation requirements for Federal records.
	150.403 How does the Paperwork Reduction Act affect this part?.	New section required because the regulation imposes an information collection by requiring individuals to provide certain information in order to obtain copies of records.

II. Tribal Consultation

The Department is hosting the following consultation sessions on this proposed rule:

Date	Time	Location
Tuesday, January 12, 2021	2 p.m.–4 p.m. Eastern Time	Teleconference: 888–606–8412 Passcode: "DOI" (Operator will answer)
Thursday, January 14, 2021	2 p.m.–4 p.m. Eastern Time	Teleconference: 888–606–8412 Passcode: "DOI" (Operator will answer)

III. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this proposed rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed rule addresses how Indian land title and records are maintained.

C. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

(a) Will not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This proposed rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The proposed rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This proposed rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This proposed rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this proposed rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that Tribal consultation is appropriate because the rule addresses maintenance of land held in trust or restricted status for Tribes. Tribes are invited to join the Tribal consultation sessions listed in Section II of this preamble, above.

I. Paperwork Reduction Act

This proposed rule contains new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The Department is seeking approval of a new information collection, as follows.

Brief Description of Collection: The Bureau of Indian Affairs (BIA) Land Title and Records Office (LTRO) maintains title documents for land that the United States holds in trust or restricted status for individual Indians or Tribes (Indian land), much like counties and other localities maintain title documents for fee land within their jurisdictions. Individuals or entities that are requesting information regarding title documents—either for property they own or for property they seek to lease or encumber—must provide certain information to the LTRO in order for LTRO to accurately identify the property for which they are seeking information. LTRO uses the information provided by individuals or entities in order to identify the property so that they can retrieve the appropriate title documents and produce reports for that property. The collection of information is found in § 150.305, which provides that anyone requesting title documents or reports must provide certain information, such as the name of the reservation where the land is located

and the tract number or legal description.

Title: Requests for Indian Land Title and Records Information.

OMB Control Number: 1076–NEW.

Form Number: None.

Type of Review: Existing collection in use without an OMB Control Number.

Respondents/Affected Public: Individuals, Private Sector, Government.

Total Estimated Number of Annual Respondents: 36.

Total Estimated Number of Annual Responses: 36.

Estimated Completion Time per Response: 0.5 hours.

Total Estimated Number of Annual Burden Hours: 19 hours (consisting of 10 hours for private sector respondents, 3 hours for individual respondents—rounded up from 2.5 hours, and 6 hours for government respondents—rounded up from 5.5 hours).

Respondents' Obligation: Required to obtain a benefit.

Frequency of Response: Occasionally.

Total Estimated Annual Non-Hour Burden Cost: $500.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, 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 response.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this rulemaking to *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. Please provide a copy of your comments to *consultation@bia.gov.* Please reference OMB Control Number 1076–NEW in the subject line of your comments.

J. National Environmental Policy Act

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because the environmental effects of this proposed rule are too speculative to lend themselves to meaningful analysis and will later be subject to the NEPA process, unless covered by a categorical exclusion. (For further information see 43 CFR 46.210(i)). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This proposed rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

L. Clarity of This Regulation

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:

a. Be logically organized;

b. Use the active voice to address readers directly;

c. Use clear language rather than jargon;

d. Be divided into short sections and sentences; and

e. 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 the **ADDRESSES** section. To better help us revise the rulemaking, 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 believe lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 25 CFR Part 150

Indians—lands.

■ For the reasons given in the preamble, the Department of the Interior proposes to amend 25 CFR chapter I, subchapter H by revising part 150 to read as follows:

PART 150—RECORD OF TITLE TO INDIAN LAND

Subpart A—Purpose and Definitions

Subpart B—Record of Title to Indian Land

Subpart C—Procedures and Requirements to Record Documents

Subpart D—Disclosure of Title Documents and Reports

Subpart E—Records

Authority: 5 U.S.C. 301; 5 U.S.C. 552a; 25 U.S.C. 2; 25 U.S.C. 5; 25 U.S.C. 7; 25 U.S.C. 9; 25 U.S.C. 14b; 25 U.S.C. 25; 25 U.S.C. 199; 25 U.S.C. 343; 25 U.S.C. 355; 25 U.S.C. 413; 25 U.S.C. 2201 *et. seq.*; 44 U.S.C. 2901 *et.*

seq.; 44 U.S.C. 3101 *et. seq.*; and 44 U.S.C. 3301 *et. seq.*

Subpart A—Purpose and Definitions

§ 150.1 What is the purpose of this part?

This part describes the BIA repository of title documents for Indian land and responsibilities for recording title documents, maintaining the repository, and providing reports on title to Indian land.

§ 150.2 What terms do I need to know?

Agency means the BIA agency or field office with jurisdiction over a particular tract of Indian land or another BIA office through delegation and documentation of responsibilities in the Indian Affairs Manual. This term also means any Tribe acting on behalf of the Secretary or BIA under a contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*).

BIA means the Bureau of Indian Affairs within the Department of the Interior.

Certify for the purposes of certifying Title Status Reports, probate inventory reports, title status maps, and findings of title examinations means that an LTRO Certifying Officer has determined that the report, map, or examination of land title status is complete, correct, and current, based on the record of title.

Certified copy means a copy of a title document that is a true and correct copy of the title document as recorded in the record of title and evidenced by an official seal.

Certifying Officer means the LTRO Manager or another properly authorized or delegated Federal official who certifies the status of title to Indian lands or copies of title documents.

Defect or *title defect* means an error contained within, or created by, a title document that makes the title to Indian land uncertain.

I or *you* means the person to whom these regulations directly apply.

Indian land means land, or an interest therein, that is:

(1) Held in trust by the United States for one or more individual Indians or Tribes; or

(2) Owned by one or more individual Indians or Tribes and can only be alienated or encumbered by the owner with the approval of the Secretary because of restrictions or limitations in the conveyance instrument or in Federal law.

LTRO means the Land Title and Records Office within the BIA, which is responsible for recording title documents, maintaining the record of title, and providing certified copies of title documents and reports. The term LTRO, as used herein, includes any Tribe acting on behalf of the Secretary or BIA under § 150.3.

Manager is the designated officer in charge of a LTRO office or his or her designated representative.

OHA means the Office of Hearings and Appeals within the Department of the Interior.

Probate Inventory Report means a report of Indian land owned by an individual Indian at the time of his or her death.

Record of title means the BIA's repository of title documents for Indian land.

Recording is the acceptance of a title document and entry into the record of title of a title document by LTRO. An official LTRO stamp affixed to the title document provides evidence that the title document has been recorded.

Region means a BIA regional office.

Secretary means the Secretary of the Interior or his or her authorized representative.

Title means ownership of Indian land.

Title examination means a review and evaluation by the LTRO of: (1) Title documents submitted to it for recording, and (2) the status of title for a particular tract of Indian land based on the record of title, and a finding, certified by the LTRO Manager, that title is complete, correct, current, and without defect, or identifies defects that must be corrected.

Title document means any document that affects the title to or encumbers Indian land, including but not limited to conveyances, probate orders, encumbrances (such as mortgages, liens, permits, covenants, leases, easements, rights-of-way), plats, cadastral surveys, and other surveys.

Title Status Report means a report issued after a title examination that shows the proper legal description of a tract of Indian land; current ownership, including any applicable conditions, exceptions, restrictions or encumbrances of record; and whether interests in the land are in unrestricted, restricted, trust, and/or other status as indicated by the record of title in the LTRO.

Tribe means an Indian Tribe under section 102 of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5129(a).

§ 150.3 May Tribes administer this part on LTRO's behalf?

A Tribe may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 *et seq.*) to administer on LTRO's behalf any portion of this part that is not an inherently Federal function.

Subpart B—Record of Title to Indian Land

§ 150.101 What is the purpose of the record of title?

The record of title provides the BIA with a record of title documents to Indian land and provides the public (including but not limited to future purchasers, creditors, and other interested parties) with constructive notice that the title documents exist.

§ 150.102 Who maintains the record of title?

The LTRO is designated as the office responsible for maintaining the record of title.

§ 150.103 What services does the LTRO perform to maintain the record of title?

The LTRO is responsible for performing the following services to maintain the record of title:

(a) Recording title documents submitted by an Agency, Region, or OHA;

(b) Providing certified copies of the title documents in the record of title;

(c) Examining the record of title and certifying the findings of title examinations;

(d) Providing and certifying Title Status Reports;

(e) Preparing, maintaining, and providing land status maps;

(f) Providing and certifying probate inventory reports; and

(g) Providing other services and reports based upon the information in the record of title.

§ 150.104 How does the LTRO maintain the record of title?

The LTRO maintains the record of title electronically in a system of record. However, certain title documents may exist only as physical copies and not electronically.

§ 150.105 Are certain LTRO offices responsible for certain geographic areas?

Staff at each LTRO office will have primary responsibility to maintain the record of title for Indian land under that LTRO office's assigned geographic area, based on BIA Region, Tribal reservation, or otherwise, as prescribed by BIA through internal procedures. BIA will keep an updated list of each LTRO office's assigned geographic area of responsibility on *www.bia.gov/bia/ots/dltr.* LTRO offices may assist in maintaining the record of title for Indian land not under their assigned geographic area as needed.

Subpart C—Procedures and Requirements to Record Documents

§ 150.201 What is recorded in the record of title?

(a) All title documents for Indian land must be recorded in the record of title, regardless of whether the document reflects a transaction that required Secretarial approval. For example, the following do not require Secretarial approval, but are title documents required to be recorded:

(1) Service line agreements must be recorded under 25 CFR 169.56;

(2) Individual leases under approved Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Tribal regulations must be recorded under the Indian Affairs Manual (IAM) at 52 IAM 13;

(3) Individual leases, business agreements, and rights-of-way under Tribal Energy Resource Agreements approved by the Secretary under 25 CFR part 224 must be recorded;

(4) Leases between a Tribe and a Tribal energy development organization under 25 CFR 224 must be recorded;

(5) Leases of Tribal land by a 25 U.S.C. 477 corporate entity under its charter to a third party for a period not to exceed 25 years must be recorded under 25 CFR 162.006(b)(3)(i); and

(6) Subleasehold mortgages under 25 CFR 162.009 must be recorded.

(b) The requirement in paragraph (a) of this section does not eliminate or supersede any Federal statute or regulation requiring the recording of title documents for Indian land in other records of title, including title documents for Indian land within the jurisdiction of the Five Civilized Tribes or the Osage Nation.

(c) LTRO may also record:

(1) Documents that demonstrate the rights of use, occupancy, and/or benefit of certain Tribes to U.S. Government land or other non-Indian lands; and

(2) Certain documents regarding Indian lands that are not title documents.

§ 150.202 Must I check with any other governmental office to find title documents for Indian land?

In certain circumstances, due diligence may require examination of other Federal, State, and local records of title.

§ 150.203 Who may submit a title document for recording?

Only an Agency, Region, or OHA may submit title documents to the LTRO for recording. All other government offices and individuals must submit title documents to the Agency, Region, or OHA, as appropriate, for that Agency, Region, or OHA to submit to the LTRO.

§ 150.204 Who records title documents?

The LTRO is the designated office to record title documents. The BIA Director may delegate the authority to record title documents to another BIA office by documenting the delegation and the types of transactions to which it applies in the Indian Affairs Manual.

§ 150.205 What are the minimum requirements for recording a title document?

(a) A title document must include the following information to be recorded in the record of title, except as provided in paragraph (b) of this section:

(1) A legal description of the Indian land and, if required, the tract number;

(2) The signatures of the parties to the document;

(3) Proper notarization or other acknowledgment of the signatures of the parties, if applicable;

(4) Signature and citation to the authority of the approving official, if applicable; and

(5) Approval date.

(b) If the title document reflects a transaction that was deemed approved under a statute or regulation providing that a transaction is deemed approved after a certain period of time without Secretarial action to approve or deny, then, at a minimum, the title document must include the following items:

(1) A legal description of the Indian land and, if required, the tract number;

(2) The signatures of the parties to the document;

(3) Proper acknowledgement or authentication of the signatures of the parties, if applicable; and

(4) A citation to the statutory or regulatory authority for the transaction to be deemed approved.

§ 150.206 What actions will the LTRO take if it discovers a title defect?

(a) If the LTRO discovers that a title document omits one or more of the items required for recording by § 150.205(a) or (b), then the LTRO will notify the originating office to request correction. Once the omission is corrected, the LTRO will record the title document.

(b) If the LTRO discovers there is an error in one or more of the items required for recording by § 150.205(a) or (b), then the LTRO will record the title document with a notation on title and notify the originating office to request correction. Once the error is corrected, the LTRO will record the corrected title document and remove the notation.

(c) If the LTRO discovers a title defect during a title examination, the LTRO will notify the originating office of the defect, request correction, and make a notation in the record of title. Once the defect is corrected, the LTRO will record the corrected title document or other legal instruments to correct the title document and remove the notation.

(d) If the defect is contained in a probate record, the LTRO will notify the Agency or Region to initiate corrective action with the OHA.

Subpart D—Disclosure of Title Documents and Reports

§ 150.301 How does the LTRO certify copies of title documents?

The Certifying Officer certifies copies of title documents in the record of title by affixing an official seal to the copy of the title document. The official seal attests that the certified copy is a true and correct copy of the recorded title document.

§ 150.302 What reports does the LTRO provide?

The LTRO provides the following types of reports for Indian land to those persons or entities authorized to receive such information:

(a) Certified reports, including a Title Status Report, Land Status Map, and, as part of the probate record, the Probate Inventory Report; and

(b) Uncertified reports or other reports based upon the information in the record of title.

§ 150.303 Who may request and receive copies of title documents in the record of title or reports from the LTRO without filing a Freedom of Information Act request?

The following individuals and entities may request and receive copies of title documents in the record of title or reports for Indian land from the LTRO without filing a Freedom of Information Act request to the extent that disclosure would not violate the Privacy Act or other law restricting access to such records, for example, 25 U.S.C. 2216(e):

(a) Owners of an interest in Indian land (or their legally authorized representative) may request copies of title documents in the record of title or reports for the Indian land in which they own an interest;

(b) The Tribe with jurisdiction over the Indian land may request title documents or reports for Indian land subject to the Tribe's jurisdiction; and

(c) Any person (or their legally authorized representative) or entity who is leasing, using, or consolidating Indian land or is applying to lease, use, or consolidate Indian land may request title documents or reports for such Indian land.

§ 150.304 Where do I request copies of title documents or reports from the LTRO?

You may request LTRO information, such as copies of title documents or reports, at any Region or Agency office with access to the record of title, regardless of geographic location. If the Region or Agency office does not have access to the title documents or the ability to generate the reports requested, it will refer the request to the office with access to the title documents or ability to generate the reports requested.

§ 150.305 What information must I provide when requesting copies of title documents and reports?

(a) Except as provided in paragraph (b) of this section, to request title documents or reports, you must provide only one of the following items of information:

(1) If you are inquiring about your own interest in the tract, then your name and date of birth, or identification number; or

(2) The name of the reservation where the land is located and either the tract number or legal description; or

(3) The Agency name and either the tract number or legal description; or

(4) A legal description of the tract; or

(5) A title document number pertaining to the tract; or

(6) The allotment number including the Tribe or land area code; or

(7) The name of the original allottee.

(b) Individuals and entities described in § 150.303(c) must also provide documents showing that they are entitled to the information they are requesting from the LTRO because they are leasing, using, or consolidating Indian land or the interests in Indian land, or because they are applying to lease, use, or consolidate Indian land or the interests in Indian land.

§ 150.306 Will I be charged a fee for obtaining copies of records?

(a) The LTRO may charge a fee to any of the parties listed in § 150.303(b) and (c) for each copy of recorded title documents, Title Status Reports, and land status maps to cover the costs in reviewing, preparing, or processing the documents.

(b) The fee will be at the rate established by 43 CFR part 2, Appendix A.

(c) The LTRO may waive all or part of these fees, at its discretion.

(d) Paid fees are non-refundable.

Subpart E—Records

§ 150.401 Who owns the records associated with this part?

(a) The records associated with this part are the property of the United States if they:

(1) Are made or received by the Secretary or a Tribe or Tribal organization in the conduct of a Federal trust function under 25 U.S.C. 5301 *et seq.,* including the operation of a trust program; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a Federal trust function under this part.

(b) Records not covered by paragraph (a) of this section that are made or received by a Tribe or Tribal organization in the conduct of business with the Department of the Interior under this part are the property of the Tribe.

§ 150.402 How must records associated with this part be preserved?

(a) Tribes, Tribal organizations, and any other organization that make or receives records described in § 150.401(a) must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. chapters 29, 31 and 33. These records and related records management practices and safeguards required under the Federal Records Act are subject to inspection by the Secretary and the Archivist of the United States.

(b) A Tribe or Tribal organization should preserve the records identified in § 150.401(b) for the period of time authorized by the Archivist of the United States for similar Department of the Interior records in accordance with 44 U.S.C. chapter 33.

§ 150.403 How does the Paperwork Reduction Act affect this part?

The information collections contained in this part have been approved by the Office of Management and Budget under 44 U.S.C 3301 *et seq.* and assigned OMB Control Number 1076-. Response is required to obtain a benefit. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless the form or regulation containing the collection of information has a currently valid OMB Control Number.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–26721 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 282

[EPA–R01–UST–2020–0207; FRL–10016–70-Region 1]

Rhode Island: Final Approval of State Underground Storage Tank Program Revisions, Codification, and Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Resource Conservation and Recovery Act (RCRA or Act), the Environmental Protection Agency (EPA) is proposing to approve revisions to the State of Rhode Island's Underground Storage Tank (UST) program submitted by the Rhode Island Department of Environmental Management (RIDEM). This action is based on EPA's determination that these revisions satisfy all requirements needed for program approval. This action also proposes to codify EPA's approval of Rhode Island's State program and to incorporate by reference those provisions of the State regulations that we have determined meet the requirements for approval. The provisions will be subject to EPA's inspection and enforcement authorities under sections 9005 and 9006 of RCRA subtitle I and other applicable statutory and regulatory provisions.

DATES: Send written comments by January 11, 2021.

ADDRESSES: Submit any comments, identified by EPA–R01–UST–2020–0207, by one of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *Email: beland.andrea@epa.gov.*

Instructions: Direct your comments to Docket ID No. EPA–R01–UST–2020–0207. EPA's policy is that all comments received will be included in the public docket without change and may be available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov,* or email. The Federal *https://www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact

information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. 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.- Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. EPA encourages electronic submittals, but if you are unable to submit electronically, please reach out to the EPA contact person listed in the notice for assistance. You can view and copy the documents that form the basis for this codification and associated publicly available materials either through *www.regulations.gov* or at the EPA Region 1 Office, 5 Post Office Square, 1st floor, Boston, MA 02109–3912. The facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Andrea Beland, RCRA Waste Management, UST, and Pesticides Section, at (617) 918–1313, before visiting the Region 1 office. Interested persons wanting to examine these documents should make an appointment with the office at least two weeks in advance.

FOR FURTHER INFORMATION CONTACT: Andrea Beland, (617) 918–1313, *beland.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Authority: This proposed rule is issued under the authority of Sections 2002(a), 9004, and 7004(b) of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

Dated: November 10, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

[FR Doc. 2020–25832 Filed 12–10–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 214

[Docket No. FRA–2019–0074]

RIN 2130–AC78

Railroad Workplace Safety

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to revise its regulations governing railroad workplace safety to: Allow for the use of alternative security standards for electronic display systems used to view track authority information for roadway worker safety, and exempt certain drone roadway maintenance machines from existing environmental control requirements. These proposals would reduce regulatory burdens on the railroad industry while maintaining the existing level of safety.

DATES: Written comments must be received by February 9, 2021. Comments received after that date will be considered to the extent practicable.

FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to January 11, 2021, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2019–0074 may be submitted by any of the following methods:

- *Website:* Federal eRulemaking Portal, *www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, W12–140, Washington, DC 20590.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *www.regulations.gov,* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *www.regulations.gov* at any time.

FOR FURTHER INFORMATION CONTACT: Lance Hawks, Track Specialist, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone: 678–633–7400, email: *Lance.Hawks@dot.gov;* or Sam Gilbert, Attorney Adviser, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone: 202–493–0270, email: *Samuel.Gilbert@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

To streamline and update existing rules, agencies periodically review and propose amendments to their regulations. Various statues and Executive Orders also encourage or require such review with an emphasis on cost-savings. *See, e.g.,* 5 U.S.C. 610; Executive Order 13771, *Reducing Regulation and Controlling Regulatory Costs,* 82 FR 9339, Jan. 30, 2017.

Increasingly, the railroad industry has also petitioned FRA to amend its safety regulations to acknowledge and reflect technological innovations that improve operational efficiencies. Within this context, FRA reviewed its 49 CFR part 214—Railroad Workplace Safety regulations. FRA identified potential amendments to subparts C and D of part 214 addressing Roadway Worker Protection and On-Track Roadway Maintenance Machines and Hi-Rail Vehicles, respectively, that would lead to operational efficiencies and cost-savings. FRA expects these amendments can be implemented without compromising safety. Accordingly, FRA is proposing to amend § 214.322 to allow the use of alternative security standards for electronic display systems to view track authority information, and amend § 214.505 to exempt certain drone roadway maintenance machines from environmental control requirements. FRA expects that these proposals would reduce regulatory burdens on the railroad industry without impacting safety.

FRA estimates that railroads would experience approximately $5,900 in cost savings over the ten-year period of this analysis. The present value (PV) [1] of this

[1] The present value of costs and cost savings flows are calculated in this analysis (over a 10-year period) because PV provides a way of converting future amounts into equivalent dollars today. The formula used to calculate these flows is: 1/(1+r)^t, where ''r'' is the discount rate, and ''t'' is the year. Discount rates of 3 and 7 percent are used in this analysis.

cost savings, when discounted at 3- and 7-percent, is approximately $5,000 and $4,100, respectively. The annualized cost savings is estimated to be approximately $590 at both discount rates. The table below presents the estimated 10-year total cost savings associated with the proposed rule.

TABLE I–1—TOTAL 10-YEAR COST SAVINGS

[2018 Dollars]

	Present value 3%	Present value 7%	Annualized 3%	Annualized 7%
Total Cost Savings	$5,045	$4,139	$591	$589

Because this proposed rulemaking provides railroads the flexibility to utilize an updated National Institute of Standards and Technology (NIST) standard for electronic display systems at their discretion, and codifies an existing waiver, FRA estimates that there will be no costs associated with this proposed rulemaking.

II. Background and Overview of the Proposals

Exclusive Track Occupancy Track Authority Electronic Display Systems

When a roadway worker or work group establishes exclusive track occupancy working limits, and an electronic display device is used to view track authority information for that worker or work group, § 214.322(h) requires the device to meet the security standards of NIST Special Publication 800–63–2, Electronic Authentication Guideline, ''Computer Security,'' August 2013 (2013 Standard).[2]

Under § 214.322(h), new electronic display systems must provide Level 3 assurance as defined by the 2013 Standard, *i.e.,* they must provide multi-factor remote network authentication (for example, a password or a biometric factor, such as a fingerprint, used in combination with a software or hardware token). FRA incorporated this 2013 Standard into part 214 based on the agency's determination that the standard ''provides technical guidelines for widely used methods of electronic authentication, and is reasonably available to all interested parties online . . . or by contacting NIST,'' and that Level 3 assurance, specifically, ''requires . . . stringent identity proofing and multi-factor authentication.'' 81 FR 37840, 37869 (June 10, 2016).

Since adoption of § 214.322(h), NIST has updated its computer security standards several times in separate documents addressing the various components of identity assurance. *See, e.g.,* SP 800–63–3 (Digital Identity Guidelines) (last updated March 2, 2020); SP 800–63A (Enrollment & Identity Proofing) (last updated March 2, 2020); SP 800–63B (Authentication & Lifecycle Management) (last updated March 2, 2020); SP 800–63C (Federation & Assertions) (last updated March 2, 2020). Recognizing that computer security standards change, and that other standards may also provide multi-factor authentication, FRA is providing additional flexibility for meeting the electronic authentication requirements of § 214.322(h). As discussed in more detail below, FRA is proposing a new paragraph (i), which provides that paragraph (h)'s requirements may be satisfied so long as an electronic display system uses multi-factor authentication.

Drone Waiver Incorporation

FRA may waive compliance with its regulations. *See* 49 U.S.C. 20103(d) (''The Secretary [of Transportation] may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety.''); *see also* 49 CFR 1.89(a). FRA implemented regulations to exercise this authority under subpart C to 49 CFR part 211, which provides a process and requirements for receiving and responding to waiver petitions. Each properly filed petition for a permanent or temporary waiver of a safety rule, regulation, or standard is referred to the FRA Railroad Safety Board (Board) for decision. *See* § 211.41(a). The Board's decision is typically rendered after a notice is published in the **Federal Register** and an opportunity for public comment is provided. *See* § 211.41(b). If the Board grants a waiver petition, the Board may impose conditions on the grant of relief to ensure the decision is in the public interest and consistent with railroad safety. *See* § 211.41(c).

Activity under a waiver of regulatory compliance may generate sufficient data and experience to support an expansion of its scope, applicability, and duration. For instance, in many cases, FRA has expanded the scope of certain waivers or issued the same or similar waivers to additional applicants. FRA has also extended various waivers' expiration dates. A waiver's success and its continued expansion may warrant consideration of regulatory codification. Codifying a waiver, and thereby making its exemptions and requirements universally applicable, can result in industry cost-savings larger than from the waiver alone.

In this NPRM, FRA proposes to incorporate a longstanding waiver for certain roadway maintenance machines (RMM) from the environmental control and protection system requirements currently found in subpart D of part 214. Part 214 defines an RMM as ''a device powered by any means of energy other than hand power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.'' Common types of RMMs include ballast regulators, tampers, mechanical brooms, rotary scarifiers, and undercutters. Each of these machines is typically operated by an individual occupying a cab mounted on the machine.

Existing § 214.505(a) requires certain types of new RMMs to be equipped with enclosed cabs with heating, air conditioning, and positive pressurized ventilation systems. In 2008, Harsco Track Technologies, a railroad equipment manufacturer, requested a waiver of § 214.505(a) for a newly developed RMM designed to function without a dedicated operator located on the machine (*i.e.,* a drone machine). *See* Docket No. FRA–2008–0070 (available at *www.regulations.gov*). Harsco's tamper machine (*i.e.,* a machine used to pack or ''tamp'' ballast under railway tracks) was designed to be operated by a person in the cab of a separate, ''leading'' machine, such that the drone machine itself would not even be equipped with a cab. In support of its request for relief, Harsco explained that the leading machine in which the operator of the drone machine would sit would have a cab fully compliant with § 214.505(a).

[2] ''Authentication'' is the process through which the identity of an individual user, or ''subject,'' is validated.

By notice in the **Federal Register**, FRA invited public comment on Harsco's waiver request. The Brotherhood of Maintenance of Way Employes Division (BMWED) expressed the view that the drone machine must be ''devoid of any operator controls or other capabilities that would allow it to be operated from a position on, beside, or in proximity to,'' the machine. FRA granted Harsco the requested relief from 214.505(a) for the operation of its drone tamper machine for an initial five-year period and conditioned the grant of relief on the following conditions:

- The drone machine could only be operated by someone located in the cab of a lead machine with a § 214.505–compliant cab and this restriction was required to be clearly identified by stenciling, marking, or other written notice in a conspicuous location on each drone machine.
- If, for maintenance and/or testing of the drone machine, the machine was operated outside of the main cab of the lead machine in a manner that would expose an employee to air contaminants, as outlined in Occupational Safety and Health Administration (OSHA) regulations defining exposure limits for various substances (29 CFR 1910.1000), the employee operating the machine was required to be protected in compliance with OSHA's personal respiratory protection regulations (29 CFR 1910.134).
- Employees were prohibited from being on the machine during operation.
- The machine was not physically equipped with controls that would allow the equipment to be operated.
- Harsco maintained a list of the equipment subject to the waiver.

Since granting the initial waiver in 2008, at Harsco's request, FRA has renewed the relief twice—in 2013 and 2018. Harsco supported each request for relief by noting that no injuries or safety issues had been reported and that ''customers are pleased with the safety and performance of the drone tamper.'' FRA has not independently received any reports of injuries related to the use of Harsco's drone RMMs.

In 2018, FRA added the condition that Harsco provide each purchaser of the drone tamper with a copy of the approved waiver. FRA estimates that approximately 30 drone RMMs have been used under the waiver.

Given this safety record, FRA is proposing to amend subpart D of part 214 to allow the use of drone RMMs similar to Harsco's drone tamping machine without the requirement for a waiver from FRA's regulations.

III. Section-by-Section Analysis

FRA seeks comments on all proposals made in this NPRM.

Section 214.322 Exclusive Track Occupancy, Electronic Display

Section 214.321(b) requires exclusive track occupancy authority to be transmitted to the roadway worker in charge by the train dispatcher or control operator in charge of the track, which may be done by data transmission. Many railroads use electronic devices to view these authorities, which must meet the requirements of § 214.322. Recognizing the importance of the integrity and secure transmission of this data, paragraph (h) of existing § 214.322 generally requires new electronic display systems used to view track authorities to meet NIST's 2013 authentication standard discussed above. Specifically, existing paragraph (h) requires new electronic display systems to provide Level 3 assurance as defined by the 2013 Standard (*i.e.,* provide multi-factor remote network authentication), while electronic display systems implemented prior to July 1, 2017, must provide Level 2 assurance as defined by the 2013 Standard (*i.e.,* single factor remote network authentication). Since FRA adopted this requirement, the 2013 Standard has been updated several times. To allow for the use of standards other than the 2013 Standard's Level 3 assurance that also provide multi-factor authentication, FRA proposes to add a new paragraph (i), which would provide that electronic display systems comply with paragraph (h) so long as they provide multi-factor authentication for digital authentication of the subject. Examples of multi-factor authentication include, but are not limited to, a password or biometric factor (*e.g.,* fingerprint or voice pattern) used in combination with a one-time PIN sent to the subject's mobile phone. FRA does not intend this proposed revision to change the substance of paragraph (h)'s current requirement, or require that the authentication standards already in use for existing electronic display systems be changed. Instead, FRA intends this revision to allow industry to adopt new and improved authentication technologies that also provide multi-factor authentication.

A railroad using an electronic display system with multi-factor authentication that employs a standard other than the 2013 Standard would not have to notify FRA of its choice or file any supporting documentation with FRA. However, in exercising its enforcement authority, FRA may request documentation or other evidence from a railroad using an alternative standard demonstrating that the standard provides multi-factor authentication to determine compliance with the requirement.

Section 214.505 Required Environmental Control and Protection Systems for New On-track Roadway Maintenance Machines With Enclosed Cabs

As discussed above, technological developments since the promulgation of § 214.505 have led to the use of drone RMMs that do not possess operator controls, or a position on the machine for an operator to be located. The purpose of the cab on an RMM is to protect the operator from the harmful airborne contaminants produced by the work operations (*e.g.,* silica ballast dust) and excessive noise produced by the machine itself. Such environmentally controlled cabs are expensive to install and maintain, but without an operator on the machine to protect, serve no purpose. Accordingly, as discussed in the *Background* section above, FRA proposes to incorporate into part 214 the longstanding waiver from the requirements of § 214.505 that allows for the use of drone RMMs. FRA is not aware of any safety issues or injuries resulting from the use of these drone machines operated under the conditions of the waiver.

Specifically, FRA proposes to add new paragraph (i) to existing § 214.505 to allow for the use of drone RMMs. The proposed requirements of new paragraph (i) are consistent with the conditions of the waiver discussed in the *Background* section above, which currently allows for the use of certain drone RMMs on a limited basis. Paragraph (i) would specify that existing paragraph (a) of § 214.505 (requiring certain RMMs to be equipped with operational heating, air conditioning, and ventilation systems) does not apply to RMMs that are not capable of performing work functions other than by remote operation and are equipped with no operating controls. Instead, proposed new paragraph (i) would require that if a drone RMM is operated from the cab of a separate machine, that cab must be compliant with paragraph (a) of § 214.505, and if a drone RMM is operated outside of the cab of a separate machine in a way that will expose the operator to air contaminants, the operator must be protected in accordance with OSHA's regulations.

Further, proposed new paragraph (i) prohibits a person from being on a drone RMM while it is operating and requires drone RMMs to be clearly marked to indicate the potential hazards

of the machine being operated from a distance or that the machine may move automatically. FRA is not prescribing a specific marking requirement, instead § 214.505(i) requires any marking to provide notice that roadway workers should stay clear of the equipment because it may move automatically, and that no person may be on the equipment while it is operating.

FRA requests comment on the proposed revisions to § 214.505 allowing for the use of drone RMMs.

IV. Regulatory Impact and Notices

Executive Order 12866, Executive Order 13771, and DOT Regulatory Policies and Procedures

This proposed rule is not a significant regulatory action within the meaning of Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' and DOT's Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. This proposed rule is expected to result in a deregulatory action under E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs.''

FRA proposes to revise its regulations governing the minimum safety requirements for railroad workplace safety. The proposed changes amend part 214 to permit the use of alternative security standards for electronic display systems used to view track authority information in § 214.322, and, consistent with an existing waiver, exempt certain drone roadway maintenance machines from environmental control requirements in § 214.505(a), which include heating, air conditioning, and ventilation systems.

Costs

Electronic Display Systems

Section 214.322(h) requires that electronic display systems used to view track authority information meet the security standards defined by NIST Special Publication 800–63–2, Electronic Authentication Guideline, ''Computer Security.'' August 2013. FRA proposes to allow electronic display systems subject to § 214.322 to use alternative standards for electronic authentication, provided those systems require stringent identity proofing through multi-factor authentication. FRA expects no additional costs for this proposed requirement as it is simply adding flexibility.

Drone Waiver Incorporation

As discussed above, FRA approved Harsco's 2008 waiver petition for a five-year period with conditions, and has since renewed waivers in 2013 and 2018. FRA expects no additional costs for this proposed requirement because FRA is codifying a long-standing waiver.

Cost Savings

The proposed rule would be beneficial for regulated entities seeking to use electronic display systems that meet alternative standards for electronic authentication and provide a comparable or better level of identity proofing and digital authentication as that required by the 2013 NIST Special Publication. The proposed rule would also reduce the regulatory burden on regulated entities by providing relief from submitting waivers to FRA for the use of certain roadway maintenance machines.

FRA has estimated that cost savings of this proposed rule will result due to waiver codification, as the proposed rule would reduce the need for industry to submit waivers. These estimates assume that, without the proposed regulation, Harsco Track Technologies would continue submitting petitions for extending the waiver, which would occur every five years. The last renewal was approved in 2018. To date, Harsco has been the sole entity requesting this waiver from FRA, and FRA does not expect any other entities to apply for similar waivers over the period of analysis.

FRA assumes that the cost for Harsco to prepare and submit each waiver would be approximately the same as it is for FRA to process it. FRA seeks comments on this assumption. To estimate the cost savings associated with this waiver, FRA estimated the labor hours required for FRA to review and approve each waiver. Table IV–1 below displays the breakdown of the waiver review and submission cost for each waiver.

TABLE IV–1—WAIVER SUBMISSION COSTS

Title	Pay grade	Wage rate	Burdened wage rate (wages × 1.75)	Hours	Total wages
FRA Field Inspector	GS–12	$47.82	$83.69	8	$669.48
Administrative Assistant (Field Office)	GS–12	47.82	83.69	4	334.74
Administrative Assistant (DC)	GS–9	30.54	53.45	4	213.78
Motive Power and Equipment Specialist (DC)	GS–14	62.23	108.90	16	1,742.44
Total FRA Labor Cost per Renewal Waiver					2,960.44

For purposes of estimating waiver costs for this analysis, FRA estimates the associated renewals that would occur over the next 10 years. Table IV–2 shows the total cost savings for regulated entities to review and submit waivers to FRA.

TABLE IV–2—INDUSTRY WAIVER COST SAVINGS

Analysis year	Number of waivers	Cost savings (undiscounted)	Cost savings (discounted 3%)	Cost savings (discounted 7%)
1				
2				
3	1	$2,960	$2,709	$2,416
4				
5				
6				
7				

TABLE IV–2—INDUSTRY WAIVER COST SAVINGS—Continued

Analysis year	Number of waivers	Cost savings (undiscounted)	Cost savings (discounted 3%)	Cost savings (discounted 7%)
8	1	2,960	2,337	1,723
9				
10				
Total		5,920	5,045	4,139

Alternatives

FRA is proposing this rulemaking to provide relief to regulated entities by allowing the use of alternative standards for electronic display systems to comply with § 214.322(h) and by not having to submit waivers to FRA. An alternative to this rulemaking would be to maintain the status quo.

If FRA does not modify § 214.322, entities would continue to use the NIST 2013 Special Publication as the standard for securing and transmitting data for electronic display systems. Although this standard is safe, FRA recognizes that updated NIST standards after the 2013 Special Publication could allow the industry to adopt newly developed technologies and methods of data transmission that are still compliant with § 214.322(h) while providing comparable, or better, levels of security.

In addition, absent this proposal, entities would be required to continue submitting waivers for the use of approved roadway maintenance machines and, therefore, would not receive the cost savings associated with not having to submit waivers. This would continue to be an unnecessary burden. FRA views the drone tamper machines as an example of using emerging modern technology to make railroad roadway maintenance safer and more efficient. FRA has verified that waivers allowing drone RMMs do not negatively impact safety because FRA has not seen an adverse impact to safety while railroads have been operating under this waiver. This waiver has given industry some relief from unnecessary requirements and eased their burden. Therefore, issuing this proposed regulation provides cost savings from avoiding petitioning for and processing waivers.

Results

FRA has estimated the cost savings of this proposed rule. The cost savings of this proposed rule are displayed in the table below.

TABLE IV–3—TOTAL 10-YEAR COST SAVINGS

[2018 Dollars]

	Present value 3%	Present value 7%	Annualized 3%	Annualized 7%
Total Cost Savings	$5,045	$4,139	$591	$589

As noted in the table above, FRA estimates the total cost savings for this proposed rule to be approximately $5,000 (PV, 3-percent) and $4,100 (PV, 7-percent). The annualized cost savings is estimated to be approximately $590 (PV, 3-percent) and $590 (PV, 7-percent).

Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' which will ''describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

This proposed rule directly affects all railroads, of which there are approximately 746 on the general system, and FRA estimates that approximately 93 percent of these railroads are small entities. Therefore, FRA has determined that this proposed rule will have an impact on a substantial number of small entities.

However, FRA has determined that the impact on entities affected by the proposed rule will not be significant. The effect of the proposed rule will be to allow railroads the flexibility to choose the optimal electronic display equipment currently in the market, with the required level of security without having to notify or seek approval from FRA. Further, equipment manufacturers will no longer need to seek FRA approval to remove operator control stations to a remote piece of equipment, consistent with the established safety of a longstanding waiver. FRA expects the impact of the proposed rule will be a reduction in the paperwork burden for railroads and manufacturers, as well as future benefits from allowing continually advancing security standards to be incorporated without a regulatory change. FRA asserts that the economic impact of the reduction in paperwork, if any, will be minimal and entirely beneficial to small railroads.

Accordingly, the FRA Administrator hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. FRA invites comment from members of the public who believe there will be a significant impact on small railroads.

Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.* The sections that contain the proposed and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent [3]
Form FRA F 6180.119—Part 214 Railroad Workplace Safety Violation Report.	350 Safety Inspectors	129 forms	4 hours	516	$29,412
214.307—Railroad on-track safety programs—RR programs that comply with this part + copies at system/division headquarters.	741 railroads	276 programs + 325 copies	2 hours + 2 minutes	563	42,788
—RR notification to FRA not less than one month before on-track safety program takes effect.	741 railroads	276 notices	20 minutes	92	6,992
—RR amended on-track safety programs after FRA disapproval.	741 railroads	1 program	4 hours	4	304
—RR written response in support of disapproved program.	741 railroads	1 written response	20 hours	20	1,520
214.309—RR publication of bulletins/notices reflecting changes in on-track safety manual.	60 railroads	100 bulletins/notices	60 minutes	100	7,600
214.311—RR written procedure to achieve prompt and equitable resolution of good faith employee challenges.	19 railroads	5 developed procedures	2 hours	10	760
214.317—On-track safety procedures, generally, for snow removal, weed spray equipment, tunnel niche or clearing by.	19 railroads	5 operating procedures	2 hours	10	760
214.318—Procedures established by railroads for workers to perform duties incidental to those of inspecting, testing, servicing, or repairing rolling equipment.	741 railroads	19 rules/procedures	2 hours	38	2,888
214.320—Roadway maintenance machines movement over signalized non-controlled track—RR request to FRA for equivalent level of protection to that provided by limiting all train and locomotive movements to restricted speed.	741 railroads	5 requests	4 hours	20	1,520
214.322—Exclusive track occupancy, electronic display—Written authorities/printed authority copy if electronic display fails or malfunctions.	3 Class I Railroads	1,000 written authorities	10 minutes	167	9,519
214.329—Train approach warning—Written designation of watchmen/lookouts.	741 railroads	26,250 designations	30 seconds	219	16,644
214.336—Procedures for adjacent track movements over 25 mph: Notifications/watchmen/lookout warnings.	100 railroads	10,000 notices	5 seconds	14	798
—Procedures for adjacent track movements 25 mph or less: Notifications/watchmen/lookout warnings.	100 railroads	3,000 notices	5 seconds	4	228
214.339—Audible warning from trains: Written procedures that prescribe effective requirements for audible warning by horn and/or bells for trains.	19 railroads	19 written procedures	4 hours	76	5,776
214.343/345/347/349/351/353/355—Annual training for all roadway workers (RWs)—Records of training.	50,000 roadway workers	50,000 records	2 minutes	1,667	126,692
214.503—Notifications for non-compliant roadway maintenance machines or unsafe condition.	50,000 roadway workers	125 notices	10 minutes	21	1,197
—Resolution procedures	19 railroads/contractors	5 procedures	2 hours	10	760
214.505 Required environmental control and protection systems for new on-track roadway maintenance machines with enclosed cabs.	741/200 railroads/contractors.	500 lists	1 hour	500	38,000
—Designations/additions to list	692/200 railroads/contractors.	150 additions/designations	5 minutes	13	988
—Stenciling or marking of drone roadway maintenance machine (Revised requirement).	30 drones	10 stencils/displays	5 minutes	1	57
214.507—A-Built Light Weight on new roadway maintenance machines.	692/200 railroads/contractors.	1,000 stickers/stencils	5 minutes	83	4,731
214.511—Required audible warning devices for new on-track roadway maintenance machines.	692/200 railroads/contractors.	3,700 identified mechanisms.	5 minutes	308	17,556
214.515—Overhead covers for existing on-track roadway maintenance machines.	692/200 railroads/contractors.	500 + 500 requests + responses.	10 + 20 minutes	250	17,423
214.517—Retrofitting of existing on-track roadway maintenance machines manufactured on or after Jan. 1, 1991.	692/200 railroads/contractors.	500 stencils/displays	5 minutes	42	2,394
214.523—Hi-rail vehicles	692/200 railroads/contractors.	5,000 records	5 minutes	417	23,769
—Non-complying conditions	692/200 railroads/contractors.	500 tags + 500 reports	10 minutes + 15 minutes	208	11,856

CFR Section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent [3]
214.527—Inspection for compliance—Repair schedules.	692/200 railroads/contractors.	550 tags + 550 reports	5 minutes + 15 minutes	183	10,431
214.533—Schedule of repairs—Subject to availability of parts.	692/200 railroads/contractors.	250 records	15 minutes	63	4,788
Totals	741 railroads	105,751 responses	N/A	5,619	388,151

[3] Throughout the tables in this document, the dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75 percent overhead charges.

All estimates include the time for reviewing instructions, searching existing data sources, gathering or maintaining the needed data, and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Clearance Officer, at 202–493–0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells, Federal Railroad Administration, 1200 New Jersey Avenue SE, 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Ms. Wells at the following address: *Hodan.Wells@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, agencies may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation.

This proposed rule has been analyzed consistent with the principles and criteria in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any substantial direct compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule could have preemptive effect under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970 (former FRSA), repealed and re-codified at 49 U.S.C. 20106, and the former Locomotive Boiler Inspection Act (LIA) at 45 U.S.C. 22–34, repealed and re-codified at 49 U.S.C. 20701–03. The former FRSA provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''local safety or security hazard'' exception to section 20106. Moreover, the U.S. Supreme Court has held the former LIA preempts the field concerning locomotive safety. *See Napier* v. *Atl. Coast Line R.R.,* 272 U.S. 605 (1926) and *Kurns* v. *R.R. Friction Prods. Corp.,* 565 U.S. 625 (2012). Therefore, if this proposed rule is finalized, it is possible States would be preempted from addressing the subjects covered by the proposed rule (security standards for electronic display systems used to display track authority information and environmental controls in drone machines).

Environmental Impact

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321, *et seq.*), the Council of Environmental Quality's NEPA implementing regulations at 40 CFR parts 1500–1508, and FRA's NEPA implementing regulations at 23 CFR part 771, and determined that it is categorically excluded from environmental review and does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and, therefore, do not require either an EA or EIS. *See* 40 CFR 1508.4. Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), ''[p]romulgation of

rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.''

This proposed rule does not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review. *See* 23 CFR 771.116(b). FRA has concluded that no such unusual circumstances exist with respect to this proposed regulation and the proposal meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to effect historic properties. *See* 16 U.S.C. 470. FRA has also determined that this rulemaking does not approve a project resulting in use of a resource protected by Section 4(f). *See* Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531, each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act, 2 U.S.C. 1532, further requires that before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of $100,000,000 or more in any one year (adjusted annually for inflation), and thus preparation of such a statement is not required.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, FRA encourages commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR Part 214

Railroad Workplace Safety.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 214 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 214—RAILROAD WORKPLACE SAFETY

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 21301–21302, 21304, 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. In § 214.322, add paragraph (i) to read as follows:

§ 214.322 Exclusive track occupancy, electronic display.

* * * * *

(i) For purposes of complying with paragraph (h) of this section, electronic display systems may use multi-factor authentication for digital authentication of the subject.

■ 3. Amend § 214.505 by revising the introductory text of paragraph (a) and by adding paragraph (i) to read as follows:

§ 214.505 Required environmental control and protection systems for new on-track roadway maintenance machines with enclosed cabs.

(a) With the exception of machines subject to paragraph (i) of this section, the following new on-track roadway maintenance machines shall be equipped with operative heating systems, operative air conditioning systems, and operative positive pressurized ventilation systems:

* * * * *

(i) Paragraph (a) of this section is not applicable to machines that are incapable of performing work functions other than by remote operation and are equipped with no operating controls (*i.e.,* drone roadway maintenance machines) if the following conditions are met.

(1) If a drone roadway maintenance machine is operated from the cab of a separate machine, that separate machine must comply with paragraph (a) of this section.

(2) If a drone roadway maintenance machine is operated outside of the main cab of the separate machine in a manner that will expose the operator to air contaminants, as outlined in 29 CFR 1910.1000, Air contaminants, the employee shall be protected in compliance with 29 CFR 1910.134, Personal respiratory protection.

(3) No person is permitted on the drone roadway maintenance machine while the equipment is operating.

(4) Each drone roadway maintenance machine must be clearly identified by stenciling, marking, or other written notice in a conspicuous location on the machine indicating the potential hazards of the machine being operated from a distance or that the machine may move automatically.

Issued in Washington, DC.

Quintin C. Kendall,

Deputy Administrator.

[FR Doc. 2020–27096 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 201125–0320]

RIN 0648–BK00

Endangered and Threatened Species: Designation of Nonessential Experimental Population of Central Valley Spring-Run Chinook Salmon in the Upper Yuba River Upstream of Englebright Dam, CA

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

ACTION: Proposed rule; availability of a draft environmental assessment; request for comments.

SUMMARY: We, NMFS, propose a rule to designate and authorize the release of a nonessential experimental population (NEP) of Central Valley (CV) spring-run Chinook salmon (*Oncorhynchus*

tshawytscha) under the Endangered Species Act (ESA) in the upper Yuba River and its tributaries upstream of Englebright Dam, California and establish take exceptions for the NEP for particular activities. A draft environmental assessment (EA) has been prepared on this proposed action and is available for comment.

DATES: Comments on this proposed rule and EA, must be received no later than January 11, 2021.

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA–NMFS–2020–0139 by any of the following methods:

- *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0139* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Jonathan Ambrose, National Marine Fisheries Service, 650 Capitol Mall, Suite 5–100, Sacramento, California 95814.
- *Phone:* (916) 930–3717; Fax: (916) 930–3629.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

You may access a copy of the draft EA by the following:

- Visit NMFS' National Environmental Policy Act (NEPA) website at: *http://www.westcoast.fisheries.noaa.gov/publications/nepa/nepa_documents.html.*

FOR FURTHER INFORMATION CONTACT: Jonathan Ambrose, by phone at (916) 930–3717, or by mail at National Marine Fisheries Service, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814; or by mail at National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

SUPPLEMENTARY INFORMATION:

Background Information Relevant to Experimental Population Designation

NMFS listed the CV spring-run Chinook salmon Evolutionarily Significant Unit (ESU) [1] as threatened under the ESA, 16 U.S.C. 1531 *et seq.,* on September 16, 1999 (64 FR 50394), and reaffirmed this status in a final rule on June 28, 2005 (70 FR 37160) and 5-year reviews announced on August 15, 2011 (76 FR 50447) and May 26, 2016 (81 FR 33468). The listed ESU of CV spring-run Chinook salmon currently includes all naturally spawned populations of spring-run Chinook salmon in the Sacramento River and its tributaries, as well as the Feather River Hatchery (FRH) spring-run Chinook salmon program. On January 9, 2002 (67 FR 1116), NMFS issued protective regulations under section 4(d) of the ESA for CV spring-run Chinook salmon that apply the take prohibitions of section 9(a)(1) of the ESA, except for listed exceptions (see 50 CFR 223.203). Critical habitat has been designated for CV spring-run Chinook salmon (70 FR 52488, September 2, 2005), and includes most of the occupied riverine habitat within their extant range. CV spring-run Chinook salmon are also listed as a threatened species by the State of California under the California Endangered Species Act (CESA), California Fish and Game Code, Division 3, Chapter 1.5.

On December 31, 2013, a final rule was published in which NMFS designated a nonessential experimental population of CV spring-run Chinook salmon in portions of the San Joaquin River, California, under ESA section 10(j) (78 FR 79622).

In 2014, we adopted a final recovery plan for the CV spring-run Chinook salmon ESU (79 FR 42504, July 22, 2014). The Central Valley Recovery Plan identifies re-establishing populations of CV spring-run Chinook salmon above impassable barriers to unoccupied historical habitats as an important recovery action (NMFS 2014). More specifically, the Central Valley Recovery Plan explains that re-establishing populations above impassable barriers, such as Englebright Dam, would aid in recovery of the ESU by increasing abundance, spatial structure and diversity and by reducing the risk of extinction to the ESU as a whole.

To facilitate and encourage future reintroduction efforts into the upper Yuba River, NMFS is proposing a rule to (a) designate and authorize the release of an NEP of CV spring-run Chinook salmon pursuant to ESA section 10(j) in the upper Yuba River and its tributaries upstream of Englebright Dam, and (b) establish take prohibitions for the NEP and exceptions for particular activities.

Statutory and Regulatory Framework for Experimental Population Designation

Section 10(j) of the ESA (16 U.S.C. 1539(j)), allows the Secretary of Commerce to authorize the release of any population of a listed species outside their current range if the release furthers their conservation. An experimental population is a population that is geographically separate from nonexperimental populations of the same species. Before authorizing the release of an experimental population the Secretary must determine whether or not the population is essential to the continued existence of the listed species.

An experimental population is treated as a threatened species, except that non-essential populations do not receive the benefit of certain protections normally applicable to threatened species (ESA section 10(j)(2)(C)). Below we discuss the impact of treating experimental populations as threatened species and of exceptions that apply to NEPs.

For endangered species, section 9 of the ESA prohibits take of those species. For a threatened species, ESA section 9 does not specifically prohibit take of those species, but the ESA instead authorizes NMFS to adopt regulations under section 4(d) that prohibit take, or that it deems necessary and advisable for species conservation. The proposed experimental population of CV spring-run Chinook salmon must generally be treated as a threatened species. Therefore, we propose to issue tailored protective regulations under ESA section 4(d) for the proposed experimental population of CV spring-run Chinook salmon to identify take prohibitions to provide for the conservation of the species with exceptions for particular activities.

Section 7 of the ESA provides for Federal interagency cooperation and consultation on Federal agency actions. Section 7(a)(1) directs all Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities to further the purposes of the ESA by carrying out

[1] The ESA defines ''species'' to include ''any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' (16 U.S.C. 1532(16); see also 50 CFR 424.02). For Pacific salmon, NMFS determined that an ESU will be considered a distinct population segment and thus a species (56 FR 58612, November 20, 1991). A group of Pacific salmon is considered an ESU if it (1) is substantially reproductively isolated from other nonspecific population units; and (2) represents an important component in the evolutionary legacy of the species.

programs for the conservation of listed species. Section 7(a)(2) requires all Federal agencies, in consultation with NMFS as applicable depending on the species, to insure any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 applies equally to endangered and threatened species.

Although ESA section 10(j) provides that an experimental population must generally be treated as a threatened species, for the purposes of ESA section 7, if the experimental population is determined to be a NEP, section 10(j)(C)(i) requires that we treat the experimental population as a species proposed to be listed, rather than a species that is listed (except when it occurs within a National Wildlife Refuge or National Park, in which case it is treated as listed). ESA Section 7(a)(4) requires Federal agencies to confer (rather than consult under ESA section 7(a)(2)) with NMFS on actions likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory recommendations, if any, on ways to minimize or avoid adverse effects rather than mandatory terms and conditions under ESA section 7(a)(2) consultations (compare 50 CFR 402.10(c) with 50 CFR 402.14(i)(1)(iv)). ESA section 7(a)(1) also applies to nonessential experimental populations. As described above, section 7(a)(1) requires Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. ESA section 7(a)(2) consultation requirements would not apply to any Federal agency action affecting a NEP in the NEP area, except when the NEP occurs within a National Wildlife Refuge or National Park. Section 7(a)(2) consultation requirements would still apply to any Federal agency action in the NEP area that may affect CV spring-run Chinook salmon or designated critical habitat outside of the NEP area or other ESA-listed species or designated critical habitat for those species.

NMFS has designated three experimental populations (78 FR 2893, January 15, 2013; 78 FR 79622, December 31, 2013; 79 FR 40004, July 11, 2014) and promulgated regulations, codified at 50 CFR part 222, subpart E, to implement section 10(j) of the ESA (81 FR 33416, May 26, 2016). NMFS' implementing regulations include the following provisions.

50 CFR 222.501(b) defines an ''essential experimental population'' as a population whose loss would reduce the likelihood of the survival of the species in the wild.''All other experimental populations are classified as nonessential.

50 CFR 222.502(b) provides, before authorizing the release of an experimental population, the Secretary must find that such release will further the conservation of the species. In addition, 50 CFR 222.502(b) provides:

In making such a finding, the Secretary shall utilize the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

50 CFR 222.502(c) describes four components that must be provided in any NMFS regulations designating an experimental population under ESA section 10(j):

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location; actual or anticipated migration; number of specimens released or to be released; and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include, but are not limited to, measures to isolate and/or to contain the experimental population designated in the regulation from nonexperimental populations and protective regulations established pursuant to section 4(d) of the ESA; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

In addition, as described above, ESA section 10(j)(1) defines an ''experimental population'' as any population authorized for release under paragraph (2), when the population is separate geographically from the nonexperimental populations of the same species. Accordingly, we must establish that there are such times and places when the experimental population is wholly geographically separate. Similarly, the statute requires that we identify the experimental population; the legislative history indicates that the purpose of this requirement is to provide notice as to which populations of listed species are experimental (see Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep No. 97–835, at 34 (1982)).

Status of the Species

Life history and the historical population trend of CV spring-run Chinook salmon are summarized by Healy (1991), USFWS (1995), Yoshiyama *et al.,* (1998), Yoshiyama *et al.,* (2001), and Moyle (2002). Section 4(f) of the ESA requires the Secretary of Commerce to develop recovery plans for all listed species unless the Secretary determines that such a plan will not promote the conservation of a listed species. Prior to developing the Central Valley Recovery Plan (NMFS 2014), we assembled a team of scientists from Federal and State agencies, consulting firms, non-profit organizations and academia. This group, known as the Central Valley Technical Recovery Team (CVTRT), was tasked with identifying population structure and recommending recovery criteria (also known as delisting criteria) for ESA-listed salmon and steelhead in the Sacramento River and San Joaquin Rivers and their tributaries. The CVTRT recommended biological viability criteria at the ESU level and population level (Lindley *et al.,* 2007) for recovery planning consideration. The CVTRT identified the current risk level of each population based on the gap between recent abundance and productivity and the desired recovery goals. The CVTRT concluded that the greatest risk facing the ESUs resulted from the loss of historical diversity following the construction of major dams that blocked access to historical spawning and rearing habitat (Lindley *et al.,* 2007).

The CVTRT also recommended spatial structure and diversity metrics for each population (Lindley *et al.,* 2004). Spatial structure refers to the

geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (*e.g.,* a volcanic eruption) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas which allows the expression of diverse life history characteristics. Diversity is the combination of genetic and phenotypic characteristics within and between populations (McElhany *et al.,* 2000). Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity, on the other hand, provides populations with the ability to survive long-term changes in the environment by providing genetic variations that may prove successful under different situations. The combination of phenotypic and genotypic diversity, expressed in a natural setting, provides populations with the ability to utilize the full range of habitat and environmental conditions and to have the resiliency to survive and adapt to long-term changes in the environment.

In 2016, NMFS completed a periodic review as required by the ESA section 4(c)(2)(A), and concluded that the CV spring-run Chinook salmon ESU should remain listed as threatened (81 FR 33468, May 26, 2016). An analysis conducted by NMFS' Southwest Fisheries Science Center (Johnson and Lindley, 2016) indicated that the extant independent populations of the CV spring-run Chinook salmon ESU remained at a moderate to low extinction risk since the last status review (Williams *et al.,* 2011). The analysis noted some improvements in the viability of the ESU, particularly with respect to the increased spatial diversity of the dependent Battle Creek and Clear Creek populations. The analysis identified as key threats the recent catastrophic declines of many of the extant populations, high pre-spawn mortality during the 2012–2015 drought in California, uncertain juvenile survival due to drought and ocean conditions, as well as straying of CV spring-run Chinook salmon from the FRH (Johnson and Lindley, 2016).

Analysis of the Statutory Requirements

1. Will authorizing release of an experimental population further the conservation of the species?

Section 3(3) of the ESA, 16 U.S.C. 1532(3), defines ''conservation'' as ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.'' We discuss in more detail below each of the factors we considered in determining if authorizing release of an experimental population in the upper Yuba River and its tributaries upstream of Englebright Dam would further the conservation of CV spring-run Chinook salmon.

As described above, under 50 CFR 222.502(b), NMFS must consider several factors in finding whether authorizing release of an experimental population will further the conservation of the species, including any possible adverse effects on extant populations of the species as a result of removal of individuals for introduction elsewhere; the likelihood that the experimental population will become established and survive in the foreseeable future; the effects that establishment of the experimental population will have on the recovery of the species; and the extent to which the experimental populations may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area. We describe authorizing release as reintroduction below, because spring-run Chinook salmon historically used habitat in the upper Yuba River upstream of Englebright Dam (NMFS 2014).

We discuss possible adverse effects on extant populations below in relation to a donor source for reintroduction into the upper Yuba River.

Regarding the likelihood that reintroduction efforts will be successful in the foreseeable future, important questions are: What are the most appropriate sources of broodstock to establish the experimental population, and are the sources available? Reintroduction efforts have the best chance for success when the donor population has life-history characteristics compatible with the anticipated environmental conditions of the habitat into which fish will be reintroduced (Araki *et al.,* 2008). Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction. Therefore, only CV spring-run Chinook salmon populations found in Central Valley will be used in establishing the experimental populations in the NEP area.

We preliminarily identify a donor source for reintroduction into the upper Yuba River as CV spring-run Chinook salmon produced from the FRH. The Yuba River is a tributary to the Feather River, and CV spring-run Chinook salmon from the FRH are the geographically closest donor source that could be used with minimal impact to the wild population for reintroduction into the upper Yuba River. The donor stock raised at the FRH may include CV spring-run Chinook salmon from either the Feather or Yuba River. NMFS, in consultation with the California Department of Fish and Wildlife, may later consider diversifying the donor stock with CV spring-run Chinook salmon from other nearby streams if those populations can sustain removal of fish. Any collection of CV spring-run Chinook salmon would be subject to a Hatchery and Genetic Management Plan (HGMP) in relation to a hatchery source and approval of a permit under ESA section 10(a)(l)(A), which includes analysis under NEPA and ESA section 7.

Use of donor stock from the FRH for the initial phases of a reintroduction program will minimize the number of individuals needed from existing populations. Supplementation to the donor stock, if necessary, would be dependent upon genetic diversity needs and the extent of adverse effects to other populations. It is anticipated that over time, the FRH would produce juveniles and adults for a future reintroduction program in sufficient numbers to enable the return of a sufficient number of adults to establish a self-sustaining population in the upper Yuba River. Once a self-sustaining population is established, it is anticipated that the FRH contribution of CV spring-run Chinook salmon would be phased out.

We also consider the suitability of habitat available to the experimental population. NMFS initiated a habitat assessment of the upper Yuba River and determined conditions were suitable for Chinook salmon spawning, adult holding, and juvenile rearing (Stillwater Sciences 2013). The relative abundance of habitat types, habitat quality and environmental conditions vary between the North, Middle, and South Yuba Rivers. Under current conditions when compared to one another, habitat suitability is best in the North Yuba River. The Middle Yuba River maintains significant quantities of suitable habitat and habitat conditions are less suitable in the South Yuba River. Habitat conditions in the Middle and South Yuba Rivers could improve with anticipated additional instream flow releases from dams in the upper

watersheds as part of the Federal Energy Regulatory Commission's relicensing process pursuant to the Federal Power Act.

In addition, there are Federal and State laws and regulations that will help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat in the NEP area. Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, establishes a program to regulate the discharge of dredged or fill material into waters of the United States, which generally requires avoidance, minimization, and mitigation for potential adverse effects of dredge and fill activities within the nation's waterways. Under CWA section 401, 33 U.S.C. 1341, a Federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States, unless a state or authorized tribe where the discharge would originate issues a section 401 water quality certification verifying compliance with existing water quality requirements or waives the certification requirement. In addition, construction and operational storm water runoff is subject to restrictions under CWA section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System permit program, and state water quality laws.

At the state level, the California Fish and Game Code (CFGC) Fish and Wildlife Protection and Conservation provisions (CFGC section 1600, *et seq.*), the CESA (CFGC section 2050, *et seq.*), and the California Environmental Quality Act (CEQA) (Public Resources Code section 21000, *et seq.*) set forth criteria for the incorporation of avoidance, minimization, and feasible mitigation measures for on-going activities as well as for individual projects. The CFGC Fish and Wildlife Protection and Conservation provisions were enacted to provide conservation for the state's fish and wildlife resources and include requirements to protect riparian habitat resources on the bed, channel, or bank of streams and other waterways. The CESA prohibits the taking of listed species except as otherwise provided in State law. Under the CEQA, no public agency shall approve or carry out a project without identifying all feasible mitigation measures necessary to reduce impacts to a less than significant level, and public agencies shall incorporate such measures absent overriding consideration.

Regarding the effects that establishment of the experimental population will have on the recovery of the species, the Central Valley Recovery Plan characterizes the NEP area as having the potential to support a viable population of Chinook salmon (NMFS 2014). The Central Valley Recovery Plan establishes a framework for reintroduction of Chinook salmon and steelhead to historical habitats upstream of dams. The framework recommends that a reintroduction program should include feasibility studies, habitat evaluations, fish passage design studies, and a pilot reintroduction phase prior to implementation of the long-term reintroduction program. In addition, the Central Valley Recovery Plan contains specific management strategies for recovering CV spring-run Chinook salmon that include securing existing populations and reintroducing this species into historically occupied habitats above rim dams in the Central Valley of California (NMFS 2014). The Central Valley Recovery Plan concludes, and we continue to agree, that establishing an experimental population in the NEP area that persists into the foreseeable future is expected to reduce extinction risk from natural and anthropogenic factors by increasing abundance, productivity, spatial structure, and diversity within California's Central Valley. These expected improvements in the overall viability CV spring-run Chinook salmon, in addition to other actions being implemented throughout the Central Valley, which are described next, will contribute to this species' near-term viability and recovery.

Across the Central Valley, a number of actions are being undertaken to improve habitat quality and quantity for CV spring-run Chinook salmon. Collectively, implementation of the San Joaquin River Restoration Program (*http://www.restoresjr.net/*), Battle Creek Salmon and Steelhead Restoration Project (*http://www.usbr.gov/mp/battlecreek/*), and the Central Valley Flood Protection Plan (DWR 2011) will result in many projects that will improve habitat conditions. The San Joaquin River Restoration Program will improve passage survival and spatial distribution for CV spring-run Chinook salmon in the San Joaquin River corridor. The Battle Creek Salmon and Steelhead Restoration Project will improve passage and rearing survival, spawning opportunities and spatial distribution in Battle Creek. The Central Valley Flood Protection Plan (DWR 2011) will improve juvenile rearing conditions during outmigration by creating and improving access to high quality floodplain habitats.

Climate change is expected to exacerbate existing habitat stressors in California's Central Valley and increase threats to Chinook salmon and steelhead by reducing the quantity and quality of freshwater habitat (Lindley *et al.,* 2007). Significant contraction of thermally suitable habitat is predicted, and as cold water sources contract, access to cooler headwater streams is expected to become increasingly important for CV spring-run Chinook salmon in the Central Valley (Crozier *et al.,* 2018). For this reason and other reasons described above, we anticipate reintroduction of CV spring-run Chinook salmon into headwater streams upstream of Englebright Dam will contribute to their conservation and recovery.

Regarding the extent to which the experimental populations may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area, the NEP and adjacent areas are characterized by snow-covered subalpine zones near the Sierra-Nevada Mountain crest, are largely forested, and have been affected by mining, logging, dams and water diversions, with limited residential development. The NEP area is sparsely populated and ongoing State, Federal and local activities include forest management, limited mining, road maintenance, limited residential development, grazing, and tourism and recreation. These activities are anticipated to have minor impacts to CV spring-run Chinook salmon in the NEP and adjacent areas. Potential impacts are further minimized through application of the aforementioned State and Federal regulations. Dams and water diversions in the NEP area currently limit fish populations in some parts of the NEP area. NMFS anticipates a future reintroduction project will target stream reaches that are not blocked by dams or impaired from inadequate flows due to water diversions. NMFS further anticipates a reintroduction program will specifically target river reaches in the NEP area with abundant high quality habitat.

The habitat improvement actions called for in the Central Valley Recovery Plan, in combination with the protective measures proposed in this rule, as well as compliance with existing Federal, State, and local laws, statutes, and regulations, including those mentioned above, are expected to contribute to the establishment and survival of the proposed experimental population in the upper Yuba River in the foreseeable future. Although the donor source for this reintroduction effort is anticipated to include hatchery-origin individuals from the FRH, based on the factors discussed above, we conclude it is

probable that a self-sustaining experimental population of CV spring-run Chinook salmon will become established and survive in the upper Yuba River. Furthermore, we conclude that such a self-sustaining experimental population of genetically compatible individuals is likely to further the conservation of the species, as discussed above.

2. Identification of the Experimental Population and Geographic Separation From the Nonexperimental Populations of the Same Species

ESA section 10(j)(2)(B) requires that we identify experimental populations by regulation. ESA section 10(j)(1) also provides that a population is considered an experimental population only when, and at such times as, it is wholly separate geographically from the nonexperimental population of the same species. NMFS proposes that the NEP area would extend upstream from Englebright Dam and include the North, Middle, and South Yuba Rivers and their tributaries up to the ridgeline. Under this proposed rule, the experimental population would be identified as the CV spring-run Chinook salmon population when it is geographically located anywhere in the NEP area. Reintroduced CV spring-run Chinook salmon would only be part of the experimental population when they are present in the NEP area, and would not be part of the experimental population when they are outside the NEP area, even if they originated within the NEP area. When reintroduced juvenile CV spring-run Chinook salmon pass downstream of Englebright Dam into the lower Yuba River, through the lower Feather River and Sacramento River and when they migrate further downstream to the Sacramento River Delta and the Pacific Ocean, they would no longer be geographically separated from other extant CV spring-run Chinook salmon populations, and thus the ''experimental population'' designation would not apply, unless and until they return as adults and re-enter the NEP area.

The proposed NEP area provides the requisite level of geographic separation because CV spring-run Chinook salmon are currently extirpated from this area due to the presence of Englebright Dam, which blocks their upstream migration. Straying of fish from other spring-run Chinook populations into the NEP area is not possible due to the presence of this dam. As a result, the geographic description of the CV spring-run Chinook ESU does not include the NEP area. The ''experimental population'' designation is geographically based and does not travel with the fish outside of the NEP area.

NMFS anticipates that CV spring-run Chinook salmon used for the initial stages of a reintroduction program would be marked, for example, with specific fin clips and/or coded-wire tags to evaluate stray rates and allow for brood stock collection of returning adults that originated from the experimental population. Any marking of individuals of the experimental population, such as clips or tags, would be for the purpose of evaluating the effectiveness of a near-term and long-term fish passage program, and would not be for the purpose of identifying fish from the NEP area other than for brood stock collection of returning adults. As discussed above, the experimental population is identified based on the geographic location of the fish. Indeed, if the reintroduction is successful as expected, and fish begin reproducing naturally, their offspring would not be distinguishable from fish from other Chinook salmon populations. Outside of the NEP area, *e.g.,* downstream of Englebright Dam in the lower Yuba, lower Feather and Sacramento Rivers, or in the ocean, any such unmarked fish (juveniles and adults alike) would not be considered members of an experimental population. They would be considered part of the CV spring-run Chinook salmon ESU currently listed under the ESA. Likewise, any fish that were marked for reintroduction in the NEP area would not be considered part of the experimental population once they left the NEP area; rather, they would be considered part of the ESU currently listed under the ESA.

3. Is the experimental population essential to the continued existence of the species?

As discussed above, ESA section 10(j)(2)(B) requires the Secretary to determine whether experimental populations would be ''essential to the continued existence'' of the listed species. The statute does not elaborate on how this determination is to be made. However, as noted above, Congress gave some further attention to the term when it described an essential experimental population as one whose loss ''would be likely to appreciably reduce the likelihood of survival of that species in the wild.'' (Joint Explanatory Statement, supra, at 34). NMFS regulations incorporated this concept into its definition of an essential experimental population at 50 CFR 222.501(b), which provides, in relevant part, ''The term essential experimental population means an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.''

In determining whether the experimental population of CV spring-run Chinook salmon is essential, we used the best available information as required by ESA section 10(j)(2)(B). Furthermore, we considered the geographic location of the experimental population in relation to other populations of CV spring-run Chinook salmon, and the likelihood of survival of these populations without the existence of the experimental population.

The CV spring-run Chinook salmon ESU includes four independent populations and several dependent or establishing populations. Given current protections and restoration efforts, these populations are persisting without the presence of a population in the NEP area. It is expected that the experimental population will exist as a separate population from those in the Sacramento River basin and will not be essential to the survival of those populations. Based on these considerations, we conclude that the loss of the experimental population of CV spring-run Chinook in the NEP area is not likely to appreciably reduce the likelihood of the survival of the species in the wild. Accordingly, NMFS is proposing to designate this experimental population as nonessential. Under section 10(j)(2)(C)(ii) of the ESA, we cannot designate critical habitat for a nonessential experimental population.

Additional Management Restrictions, Protective Measures, and Other Special Management Considerations

As indicated above, ESA section 10(j)(2)(C) requires that experimental populations be treated as threatened species, except that for nonessential experimental populations, certain portions of ESA section 7 do not apply and critical habitat cannot be designated. Congress intended that the Secretary would issue regulations, under ESA section 4(d), deemed necessary and advisable to provide for the conservation of experimental populations as for any threatened species (Joint Explanatory Statement, supra, at 34). In addition, when amending the ESA to add section 10(j), Congress specifically intended to provide broad discretion and flexibility to the Secretary in managing experimental populations so as to reduce opposition to releasing listed species outside their current range (H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)). Therefore, we propose to exercise the authority to issue protective regulations under ESA section 4(d) for

the proposed experimental population of CV spring-run Chinook salmon to identify take prohibitions necessary to provide for the conservation of the species and otherwise provide assurances to people in the NEP area.

The ESA defines ''take'' to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). Concurrent with the proposed ESA section 10(j) experimental population designation, we propose protective regulations under ESA section 4(d) for the experimental population that would prohibit take of CV spring-run Chinook salmon that are part of the experimental population, except in the following circumstances in the NEP area:

1. Any take by authorized governmental entity personnel acting in compliance with 50 CFR 223.203(b)(3) to aid a sick, injured or stranded fish; dispose of a dead fish; or salvage a dead fish which may be useful for scientific study.

2. Any take that is incidental [2] to an otherwise lawful activity and is unintentional, not due to negligent conduct. Otherwise lawful activities include, but are not limited to, recreation, forestry, water management, agriculture, power production, mining, transportation management, rural development, or livestock grazing, when such activities are in full compliance with all applicable laws and regulations.

3. Any take that is pursuant to a permit issued by NMFS under section 10 of the ESA (16 U.S.C. 1539) and regulations in 50 CFR part 222 applicable to such a permit.

Process for Periodic Review

Evaluation of a future reintroduction program is likely to be assessed by certain new monitoring programs developed specifically for this purpose. NMFS anticipates monitoring in the NEP area, including fish passage efficiency, spawning success, adult and smolt injury and mortality rates, juvenile salmon collection efficiencies, competition with resident species, predation, disease and other types of monitoring will be necessary to gauge the success of the program. As data are collected through monitoring efforts, NMFS and other partners in a future reintroduction project can evaluate the success of the program. In addition, results of a reintroduction project will be evaluated during subsequent 5-year status reviews for the CV spring-run Chinook salmon ESU under ESA section 4(c)(2).

Proposed Experimental Population Findings

Based on the best available scientific information, we have determined that the designation and authorization for the release of a NEP of CV spring-run Chinook salmon in the NEP area upstream of Englebright Dam will further the conservation of CV spring-run Chinook salmon. CV spring-run Chinook salmon used to initiate the reintroduction are anticipated to come from the FRH using either donor stock from the Feather or Yuba Rivers, which is part of the CV spring-run Chinook salmon ESU. The collection of donor stock from the FRH will be permitted only after issuance of a permit under section 10(a)(1)(A) of the ESA, which includes analysis under NEPA and ESA section 7. The experimental population fish are expected to remain geographically separate from fish in other populations of the CV spring-run Chinook salmon ESU during the life stages in which they remain in, or are returned to, the NEP area. At all times when members of the experimental population are downstream of Englebright Dam, the experimental population designation will not apply. Establishing an experimental population of CV spring-run Chinook salmon in the NEP area would likely contribute to the viability of the ESU as a whole. Reintroduction is a recommended recovery action in the Central Valley Recovery Plan (NMFS 2014). Designation of CV spring-run Chinook salmon in the NEP area as a nonessential experimental population would ensure that their reintroduction does not impose undue regulatory restrictions on landowners and others because this proposed rule would apply only limited take prohibitions, as compared to the prohibitions that typically apply to CV spring-run Chinook salmon. In particular, the proposed rule expressly provides an exception for take of NEP fish in the NEP area provided that the take is incidental to otherwise lawful activity and unintentional, not due to negligent conduct.

We further determine, based on the best available scientific information, that the proposed experimental population would not be essential to the continued existence of the CV spring-run Chinook salmon ESU, because absence of the experimental population would not be likely to appreciably reduce the likelihood of the survival of the ESU in the wild. However, as described above, the experimental population is expected to contribute to the recovery of the CV spring-run Chinook salmon ESU if reintroduction is successful. We therefore propose that the experimental population would be a nonessential experimental population.

Public Comment

We want the final rule to be as effective and accurate as possible, and the final EA to evaluate the potential issues and reasonable range of alternatives. Therefore, we invite the public, State, Tribal, and government agencies, the scientific community, environmental groups, industry, local landowners, and all interested parties to provide comments on the proposed rule and draft EA (see **ADDRESSES** section above). We request that submitted comments be relevant to the proposed designation of an experimental population in the NEP area. The most helpful comments are as specific as possible, provide relevant information or suggested changes, the basis for the suggested changes, and any additional supporting information where appropriate. For example, comments could tell us the numbers or titles of the sections or paragraphs that are unclearly written, which sections or sentences are too long, or the sections where lists or tables would be useful.

Prior to issuing a final rule, we will take into consideration the comments and supporting materials received. We are interested in all public comments, but are specifically interested in obtaining feedback on:

(1) The best source of ESA-listed fish for establishing an experimental population of CV spring-run Chinook salmon in the NEP area and the scientific basis for such comments.

(2) The proposed NEP area (geographical scope) for the experimental population.

(3) The extent to which the experimental population would be affected by current or future Federal, State, Tribal, or private actions within or adjacent to the experimental population area.

(4) Any necessary management restrictions, protective measures, or other management measures that we may not have considered.

(5) The likelihood that the experimental population will become established in the NEP area.

(6) Whether the proposed experimental population is essential or nonessential.

(7) Whether the proposed experimental population designation and release will further the conservation of the species and whether we have

[2] Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. 50 CFR 402.02

used the best available scientific information in making this determination.

Information Quality Act and Peer Review

Pursuant to the Information Quality Act (Section 515 of Pub. L. 106–554), the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review, which was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this proposed rule that meet these criteria.

Classification

Executive Order 12866

This proposed rule has been determined to be not significant under Executive Order 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 *et seq.*), whenever a Federal 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 effect 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 an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

We are certifying that this proposed rule, if implemented, would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This proposal would designate and authorize the release of a nonessential experimental population of CV spring-run salmon in the NEP area. While in the NEP area, the experimental population would be protected from some types of take, but we would impose no prohibitions on the take of the experimental population fish that is incidental to otherwise lawful activity and unintentional, not due to negligent conduct (see below). The effect of the proposal would not increase the regulatory burdens associated with the ESA on affected entities, including small entities, to conduct otherwise lawful activities as a result of reintroduction of CV spring-run Chinook salmon to the NEP area. If this proposal is adopted, the area affected by this rule includes the entire NEP area. Land ownership includes Federal lands and private lands with the primary uses being recreation, forestry, water management, power production, mining, transportation management, rural development, and livestock grazing. Accordingly, the rule, if implemented, may impact those uses.

However, this proposed rule would apply only limited take prohibitions as compared with the prohibitions that typically apply to listed CV spring-run Chinook salmon. In particular, the proposed rule expressly provides an exception for the take of experimental population fish in the NEP area provided that the take is incidental to otherwise lawful activity and unintentional, not due to negligent conduct. Based on the nonexperimental population designation under the proposed rule, there would only be the requirement under ESA section 7 (other than section (a)(1) requiring Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species) for Federal agencies to confer with NMFS. The more burdensome requirement to consult, with respect to effects of agency actions on the experimental population is not applicable. Additionally, critical habitat cannot be designated for a nonessential experimental population. Due to the minimal regulatory overlay provided by the nonessential experimental population designation, we do not expect this rule to have any significant effect on recreation, forestry, water management, power production, mining, transportation management, rural development, livestock grazing or other lawful activities within the NEP area.

Because this proposal would require no additional regulatory requirements on small entities and would impose little to no regulatory requirements for activities within the affected area, the Chief Council for Regulation certified that this proposed rule would not have a significant economic effect on a substantial number of small entities. Accordingly, no initial regulatory flexibility analysis is required, and none has been prepared.

Executive Order 12630

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required because this proposed rule: (1) Would not effectively compel a property owner to have the government physically invade their property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Executive Order 13132

In accordance with Executive Order 13132, we have determined that this proposed rule does not have federalism implications as that term is defined in Executive Order 13132.

Executive Order 13771

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

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this proposed rule. We have prepared a draft EA on this proposed action and have made it

available for public inspection (see **ADDRESSES** section above). All appropriate NEPA documents will be finalized before this rule is finalized.

Government-to-Government Relationship With Tribes (Executive Order 13175)

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having 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), we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

There are no tribally owned or managed lands in the NEP area. As part of NMFS's obligations under the National Historic Preservation Act, NMFS inquired with federally recognized and non-federally recognized tribes with potential interest in the NEP area to inform them of the proposed rule and solicit information on cultural resources eligible for listing on the National Register of Historic Places. To date, responses have been limited and no concerns over the proposed rule have been raised. NMFS invites tribes to meet with us to have detailed discussions that could lead to government-to-government consultation meetings with tribal governments. We will continue to coordinate with potentially affected tribes as we gather public comment on this proposed rule and consider next steps.

References Cited

A complete list of all references cited in this proposed rule is available upon request from National Marine Fisheries Service office (see **FOR FURTHER INFORMATION CONTACT**).

Dated: December 2, 2020.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 is also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e) by adding, in alphabetical order, an entry under Fishes for ''Salmon, Chinook (Central Valley spring-run ESU–XN: Yuba)'' to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species [1]			Citation(s) for listing determinations(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	
FISHES					
*	*	*	*	*	
Salmon, Chinook (Central Valley spring-run ESU–XN: Yuba).	*Oncorhynchus tshawytscha.*	Central Valley spring-run Chinook salmon only when, and at such times as, they are found in the upper Yuba River watershed, upstream of Englebright Dam.	[**Federal Register** citation and date when published as a final rule].	NA	223.301
*	*	*	*	*	

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

■ 3. In § 223.301, add paragraph (d) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

* * * * *

(d) *Upper Yuba River Central Valley spring-run Chinook Salmon Experimental Population* (*Oncorhynchus tshawytscha*). (1) The Upper Yuba River Central Valley spring-run Chinook salmon population identified in paragraph (d)(2) of this section is designated as a nonessential experimental population under section 10(j) of the ESA and shall be treated as a ''threatened species'' pursuant to 16 U.S.C. 1539(j)(2)(C).

(2) Upper Yuba River Central Valley spring-run Chinook Salmon Experimental Population. All Central Valley spring-run Chinook salmon within the experimental population area in the upper Yuba River watershed upstream of Englebright Dam, as defined here, are considered part of the Upper Yuba River Central Valley spring-run Chinook salmon experimental population. The boundaries of the experimental population area include Englebright Dam and all tributaries draining into Englebright Reservoir up to the ridgeline.

(3) Prohibitions. Except as expressly allowed in paragraph (d)(4) of this section, all prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) apply to fish that are part of the Upper Yuba River Central Valley spring-run Chinook salmon nonessential experimental population identified in paragraph (d)(2) of this section.

(4) Exceptions to the Application of Section 9 Take Prohibitions in the Experimental Population Area. The following forms of take in the experimental population area identified in paragraph (d)(2) of this section are not prohibited by this section:

(i) Any taking of Central Valley spring-run Chinook salmon by authorized governmental entity personnel acting in compliance with 50 CFR 223.203(b)(3) to aid a sick, injured or stranded fish; dispose of a dead fish; or salvage a dead fish which may be useful for scientific study.

(ii) Any taking of Central Valley spring-run Chinook salmon that is unintentional, not due to negligent conduct, and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(iii) Any taking of Central Valley spring-run Chinook salmon pursuant to a permit issued by NMFS under section 10 of the ESA (16 U.S.C. 1539) and regulations in part 222 of this chapter applicable to such a permit.

* * * * *

[FR Doc. 2020–26946 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 85, No. 239
Friday, December 11, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 8, 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 January 11, 2021 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.* 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.

Rural Housing Service

Title: Single Family Housing Guaranteed Loan Program.

OMB Control Number: 0575–0179.

Summary of Collection: The Housing and Community Facilities Program (HCFP), hereinafter referred to as the ''Agency,'' is a credit agency for the Rural Housing Service of the U.S. Department of Agriculture. The Agency offers supervised credit programs to build modest housing and essential community facilities in rural areas. This regulation prescribes the policy necessary to process Rural Housing loan guarantees to low- and moderate-income applicants. Section 517 (d) of Title V of the Housing Act of 1949, as amended, provides the authority for the Secretary of Agriculture to issue loan guarantees for the acquisition of new or existing dwellings and related facilities to provide decent, safe, and sanitary living conditions and other structures in rural areas.

The purpose of the Single-Family Housing Guaranteed Loan Program (SFHGLP) is to assist low and moderate-income individuals and families in acquiring or constructing a single-family residence in designated rural areas with loans originated and serviced by private lenders. Eligibility for this program includes very low, low, and moderate-income families or persons whose income does not exceed 115 percent of the median income for the area, as determined by the Secretary.

Need and Use of the Information: Information is collected from both a potential homebuyer and lender. To participate in the program, lenders must submit to standards which ensure the loan objectives of the SFHGLP are met. The lender submits qualifications to the Agency and enters into an agreement that outlines both the lender and Agency's commitments and responsibilities under the guaranteed program. Information from a homebuyer includes financial documents such as confirmation of household income, assets and liabilities, a credit record, evidence the homebuyer has adequate repayment ability for the loan amount requested and if the condition and location of the property meet program guidelines. All information collected is vital for the Agency to determine if borrowers qualify for all assistance for which they are eligible.

Description of Respondents: Business or other for-profit; State, Local or Tribal Government.

Number of Respondents: 2,520.

Frequency of Responses: Reporting: Monthly; Quarterly; Annually.

Total Burden Hours: 1,327,476.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–27274 Filed 12–10–20; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

[Docket No. FCIC–20–0009]

Notice of Request for Renewal and Revision of the Currently Approved Information Collection

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Renewal and Revision of the Currently Approved Information Collection.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces a public comment period on the information collection requests (ICRs) associated with the Standard Reinsurance Agreement and Appendices I, II and IV administered by Federal Crop Insurance Corporation (FCIC). Appendix III is excluded because it contains the Data Acceptance System requirements.

DATES: Written comments on this notice will be accepted until close of business February 9, 2021.

ADDRESSES: We invite you to submit comments on this information collection request. In your comments, include the date, volume, and page number of this issue of the **Federal Register**, and the title of rule. You may submit comments by any of the following methods, although FCIC prefers that you submit comments electronically through the Federal eRulemaking Portal:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for Docket ID FCIC–20–0009. Follow the online instructions for submitting comments.

• *Mail:* David L. Miller, Director, Reinsurance Services Division, Federal Crop Insurance Corporation, United States Department of Agriculture (USDA), 1400 Independence Avenue SW, Stop 0801, Washington, DC 20250.

All comments received, including those received by mail, will be posted without change to *http://www.regulations.gov,* including any personal information provided, and can be accessed by the public. All comments must include the agency name and docket number or Regulatory Information Number (RIN) for this rule. For detailed instructions on submitting comments and additional information, see *http://www.regulations.gov*. If you are submitting comments electronically through the Federal eRulemaking Portal and want to attach a document, we ask that it be in a text-based format. If you want to attach a document that is a scanned Adobe PDF file, it must be scanned as text and not as an image, thus allowing FCIC to search and copy certain portions of your submissions. For questions regarding attaching a document that is a scanned Adobe PDF file, please contact the RMA Web Content Team at (816)823–4694 or by email at *rmaweb.content@rma.usda.gov*.

Privacy Act: Anyone is able to search the electronic form of all comments received for any dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the complete User Notice and Privacy Notice for *Regulations.gov* at *http://www.regulations.gov/#!privacyNotice*.

FOR FURTHER INFORMATION CONTACT: David L. Miller, Director, Risk Management Agency, at the address listed above, telephone (202) 720–9830.

SUPPLEMENTARY INFORMATION: *Title:* Standard Reinsurance Agreement; Appendices I, II and IV.

OMB Number: 0563–0069.

Type of Request: Renewal and Revision of current Information Collection.

Abstract: The Federal Crop Insurance Act (Act), Title 7 U.S.C. Chapter 36, Section 1508(k), authorizes the FCIC to provide reinsurance to insurers approved by FCIC that insure producers of any agricultural commodity under one or more plans acceptable to FCIC. The Act also states that the reinsurance shall be provided on such terms and conditions as the Board may determine to be consistent with subsections (b) and (c) of this section and sound reinsurance principles.

FCIC executes the same form of reinsurance agreement, called the Standard Reinsurance Agreement (SRA), with fourteen participating insurers approved for the 2021 reinsurance year. Appendix I of the SRA, Regulatory Duties and Responsibilities, sets forth the company's responsibilities as required by statute. Appendix I includes; a) Conflict of Interest data collection, which in addition to the insurance companies reinsured by FCIC, encompasses the insurance companies' employees and their contracted agents and loss adjusters; and b) Controlled Business data collection from all employed or contracted agents. Appendix II of the SRA, the Plan of Operations (Plan), sets forth the information the insurer is required to file with RMA for each reinsurance year they wish to participate. The Plan's information enables RMA to evaluate the insurer's financial and operational capability to deliver the crop insurance program in accordance with the Act. Estimated premiums by fund by state, and retained percentages along with current policyholders surplus are used in calculations to determine whether to approve the insurer's requested maximum reinsurable premium volume for the reinsurance year per 7 CFR 400 Subpart L. This information has a direct effect upon the insurer's amount of retained premium and associated liability and is required to calculate the insurer's underwriting gain or loss.

Appendix IV of the SRA, Quality Control and Program Integrity, establishes the minimum annual agent and loss adjuster training requirements, and quality control review procedures and performance standards required of the insurance companies. FCIC requires each insurer to submit, for each reinsurance year, a Quality Control Report to FCIC containing details of the results of their completed reviews. The insurance companies must also provide an annual Training and Performance Evaluation Report which details the evaluation of each agent and loss adjuster and reports of any remedial actions taken by the Company to correct any error or omission or ensure compliance with the SRA. The submission of these reports is included in Appendix II.

FCIC is requesting the Office of Management and Budget (OMB) to extend the approval of this information collection for an additional 3 years.

The purpose of this notice is to solicit comments from the public concerning the continuation of the current information collection activity as associated with the SRA in effect for the 2021 and subsequent reinsurance years. These comments will help us:

(1) Evaluate whether the current collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the current collection of information;

(3) Enhance the quality, utility, and clarity of the information being collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, *e.g.,* permitting electronic submission of responses.

The estimate below shows the burden that will be placed upon the following affected entities.

Appendix I—Regulatory Duties and Responsibilities

Conflict of Interest

Estimate of Burden: The public reporting burden of employees, agents and loss adjusters for the Appendix I collection of Conflict of Interest information is estimated to average 1 hour per response.

Respondents/Affected Entities: Insurance company employees and their contracted agents and loss adjusters.

Estimated annual number of respondents: 22,000.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 22,000.

Estimated total annual burden on respondents (hours): 22,000.

Estimate of Burden: The public reporting burden of the insurance companies of the Appendix I collection of Conflict of Interest information is estimated to average 24 hours per response.

Respondents/Affected Entities: Insurance companies reinsured by FCIC.

Estimated annual number of respondents: 14.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 14.

E*stimated total annual burden on respondents (hours):* 336.

Controlled Business

Estimate of Burden: The public reporting burden of agents for the Appendix I collection of Controlled Business information is estimated to average 1 hour per response.

Respondents/Affected Entities: Insurance company agents.

Estimated annual number of respondents: 14,000.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 14,000.

Estimated total annual burden on respondents (hours): 14,000.

Estimate of Burden: The public reporting burden of the insurance companies for the Appendix I collection of Controlled Business information is estimated to average 24 hours per response.

Respondents/Affected Entities: Insurance companies reinsured by FCIC.

Estimated annual number of respondents: 14.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 14.

Estimated total annual burden on respondents (hours): 336.

Appendix II—Plan of Operations

Estimate of Burden: The public reporting burden of the insurance companies for the collection of Appendix II information is estimated to average 128 hours per response.

Respondents/Affected Entities: Insurance companies reinsured by FCIC.

Estimated annual number of respondents: 14.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 14.

Estimated total annual burden on respondents (hours): 1,792.

Appendix IV—Quality Control and Program Integrity

Quality Control and Training Plan and Report

Estimate of Burden: The public reporting burden of the insurance companies for the collection of Appendix IV information is estimated to average 74 hours per response.

Respondents/Affected Entities: Insurance companies reinsured by FCIC.

Estimated annual number of respondents: 14.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 14.

Estimated total annual burden on respondents (hours): 1,036.

Agent Training Requirements

Estimate of Burden: The public reporting burden of agents the Appendix IV training requirements is estimated to average 4 hours per response.

Respondents/Affected Entities: Insurance company agents.

Estimated annual number of respondents: 14,000.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 14,000.

Estimated total annual burden on respondents (hours): 56,000.

Loss Adjuster Training Requirements

Estimate of Burden: The public reporting burden of loss adjusters for the Appendix IV training requirements is estimated to average 17 hours per response.

Respondents/Affected Entities: Insurance company loss adjusters.

Estimated annual number of respondents: 5,500.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 5,500.

Estimated total annual burden on respondents (hours): 93,500.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Martin R. Barbre,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 2020–27348 Filed 12–10–20; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket Number FSIS–2020–0033]

2021 Rate Changes for the Basetime, Overtime, Holiday, Laboratory Services, and Export Application Fees

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the 2021 rates it will charge meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services. Additionally, FSIS is announcing that there will be no changes to the fee FSIS assesses to exporters that choose to apply for export certificates electronically through the export component of the Agency's Public Health Information System.

The 2021 basetime, overtime, holiday, and laboratory services rates will be applied on January 3, 2021.

DATES: FSIS will charge the rates announced in this notice beginning January 3, 2021.

FOR FURTHER INFORMATION CONTACT: For further information contact Michael Toner, Director, Budget Division, Office of the Chief Financial Officer, FSIS, U.S. Department of Agriculture, Room 2159, South Building, 1400 Independence Avenue SW, Washington, DC 20250–3700; Telephone: (202) 690–8398, Fax: (202) 690–4155.

SUPPLEMENTARY INFORMATION:

Background

On April 12, 2011, FSIS published a final rule amending its regulations to establish formulas for calculating the rates it charges meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services (76 FR 20220).

In the final rule, FSIS stated that it would use the formulas to calculate the annual rates, publish the rates in **Federal Register** notices prior to the start of each calendar year, and apply the rates on the first FSIS pay period at the beginning of the calendar year. This notice provides the 2021 rates, which will be applied starting on January 3, 2021.

Public Health Information System Export Application Fee

On June 29, 2016, FSIS published the final rule, ''Electronic Export Application and Certification Charge; Flexibility in the Requirements for Export Inspection Marks, Devices, and Certificates; Egg Products Export Certification'' (81 FR 42225). The preamble to the final rule explained that FSIS would implement an electronic export application and certification system available through the Agency's Public Health Information System (PHIS) export component.

The electronic export application and certification process provides service options to U.S. exporters, enabling them to electronically submit, track, and manage their export applications. To cover the costs of providing this service, the final rule established a formula-based fee for electronic export applications. The final rule stated that, on an annual basis, the Agency would update the fee and publish the new fee in the **Federal Register**.

On September 6, 2017, FSIS published a **Federal Register** notice, ''Public Health Information System (PHIS) Export Component Country Implementation'' (FR 82 42056). The

notice announced the delayed implementation of the export component to ensure sufficient testing and outreach to stakeholders and that the application fee would be recalculated based on available costs and number of applications, but would not be assessed prior to January 1, 2019. In addition, FSIS announced that it would implement the PHIS Export Component with a limited number of countries and gradually expand implementation to additional countries.

On April 29, 2019, FSIS published a **Federal Register** notice, ''Public Health Information System Export Component Fee'' (84 FR 17999). This notice announced that starting June 1, 2019, FSIS would assess a fee of $4.01 to exporters that chose to apply for export certificates electronically through the export component of PHIS. As noted below, that fee remains unchanged since 2019. The 2021 export component fee will be applied starting on January 3, 2021.

2021 Rates and Calculations

The following table lists the 2021 Rates per hour, per employee, by type of service:

Service	2021 Rate (estimates rounded to reflect billable quarters)
Basetime	$66.56
Overtime	81.72
Holiday	96.88
Laboratory	84.64
Export Application	*4.01

*Per application

The regulations that cover these fees (other than the export application fee) state that FSIS will calculate the rates using formulas that include the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay and regular hours (9 CFR 391.2, 391.3, 391.4, 590.126, 590.128, 592.510, 592.520, and 592.530). In 2013, an Agency reorganization eliminated the Office of International Affairs program office and transferred all of its inspection program personnel to OFO. Therefore, inspection program personnel's pay and hours are identified in the calculations as ''OFO inspection program personnel's'' pay and hours.

FSIS determined the 2021 rates using the following calculations:

Basetime Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage of cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2021 basetime rate per hour per program employee is:

[FY 2020 OFO Regular Direct Pay divided by the previous fiscal year's Regular Hours ($434,649,264/14,468,095)] = $30.04 + ($30.04 * 1.0% (calendar year 2020 Cost of Living Increase)) = $30.34 + $11.15 (benefits rate) + $2.67 (travel and operating rate) + $22.39 (overhead rate) + $0.00 (bad debt allowance rate) = $66.55, rounded up to $66.56, so that it is divisible by 4.

Overtime Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 1.5 (for overtime), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2021 overtime rate per hour per program employee is:

[FY 2020 OFO Regular Direct Pay divided by previous fiscal year's Regular Hours ($434,649,264/14,468,065)] = $30.04 + ($30.04 * 1.0% (calendar year 2021 Cost of Living Increase)) = $30.34 * 1.5 = $45.51 + $11.15 (benefits rate) + $2.67 (travel and operating rate) + $22.39 (overhead rate) + $0.00(bad debt allowance rate) = $81.72, which is divisible by 4.

Holiday Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 2 (for holiday pay), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2021 holiday rate per hour per program employee calculation is:

[FY 2020 OFO Regular Direct Pay divided by Regular Hours ($434,649,264/14,468,095)] = $30.04 + ($30.04 * 1.0% (calendar year 2020 Cost of Living Increase)) = $30.34 * 2 = $60.68 + $11.15(benefits rate) + $2.67 (travel and operating rate) + $22.39 (overhead rate) + $0.00 (bad debt allowance rate) = $96.89, rounded down to 96.88, so that it is divisible by 4.

Laboratory Services Rate = The quotient of dividing the Office of Public Health Science (OPHS) previous fiscal year's regular direct pay by the OPHS previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2021 laboratory services rate per hour per program employee is:

[FY 2020 OPHS Regular Direct Pay/OPHS Regular hours ($24,151,169/503,692)] = $47.95 + ($47.95 * 1.0% (calendar year 2020 Cost of Living Increase)) = $48.43 + $11.15 (benefits rate) + $2.67 (travel and operating rate) + $22.39 (overhead rate) + $0.00 (bad debt allowance rate) = $84.64, which is already divisible by 4.

Calculations for the Benefits, Travel and Operating, Overhead, and Allowance for Bad Debt Rates

These rates are components of the basetime, overtime, holiday, and laboratory services rates formulas.

Benefits Rate: The quotient of dividing the previous fiscal year's direct benefits costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan basic and matching contributions.

The calculation for the 2021 benefits rate per hour per program employee is:

[FY 2020 Direct Benefits/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($197,034,144/17,848,090)] = $11.04 + ($11.04* 1.0% (calendar year 2020 Cost of Living Increase)) = $11.15.

Travel and Operating Rate: The quotient of dividing the previous fiscal year's total direct travel and operating costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2021 travel and operating rate per hour per program employee is:

[FY 2020 Total Direct Travel and Operating Costs/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($46,500,647/17,848,090)] = $2.61 + ($2.61 * 2.3% (2021 Inflation) = $2.67.

Overhead Rate: The quotient of dividing the previous fiscal year's indirect costs plus the previous fiscal year's information technology (IT) costs

in the Public Health Data Communication Infrastructure System Fund plus the provision for the operating balance less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection by the previous fiscal year's total hours (regular, overtime, and holiday) worked across all funds, plus the quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2021 overhead rate per hour per program employee is:

[FY 2020 Total Overhead/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($ 390,719,959/17,848,090)] = $21.89 + ($21.89 * 2.3% (2020 Inflation) = $22.39.

Allowance for Bad Debt Rate = Previous fiscal year's total allowance for bad debt (for example, debt owed that is not paid in full by plants and establishments that declare bankruptcy) divided by previous fiscal year's total hours (regular, overtime, and holiday) worked.

The 2021 calculation for bad debt rate per hour per program employee is:

[FY 2020 Total Bad Debt/(Total Regular hours + Total Overtime hours + Total Holiday hours) = ($49,837/17,848,090)] = $0.00.

2021 Electronic Export Application Fee The 2021 Electronic Export Application Fee:

$$\frac{\text{Labor Cost } (\$560{,}901.60 + (\$337{,}369)) + \text{IT Cost } (\$1{,}414{,}285.60 + \$0)}{576{,}192} = \$4.01$$

As published in the 2016 final rule, the Electronic Export Application Fee Formula is:

$$\frac{\text{Labor Cost (Technical Support + Export Library Maintenance) + IT Cost (Ongoing Operations and Maintenance + eAuthentication)}}{\text{Number of Export Applications}}$$

The 2021 electronic export application fee remains unchanged since 2019. FSIS stated in the 2016 final rule (81 FR 42225) and the 2017 **Federal Register** notice (FR 82 42056) that it would update and recalculate the fee based on the best available estimates for costs and number of applications; however, the number of export applications (the denominator in the formula) cannot be accurately assessed until a majority of countries are included in the export component. Therefore, because a majority of countries are not yet included in the PHIS Export component, the cost estimates and projected export applications in the final rule remain the best estimate for 2021, leaving the electronic export application fee unchanged.

Additional Public Notification

FSIS will make copies of this **Federal Register** publication available through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How to File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410, Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC.

Paul Kiecker,

Administrator.

[FR Doc. 2020–27347 Filed 12–10–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–905]

4th Tier Cigarettes From the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Negative Determination of Critical Circumstances

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that 4th tier cigarettes from the Republic of Korea (Korea) are being, or are likely to be, sold in the United States at less than fair value (LTFV) during the period of investigation (POI), October 1, 2018 through September 30, 2019. The final weighted-average dumping margins are listed below in the section entitled ''Final Determination.''

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Thomas Martin, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401

Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3936.

SUPPLEMENTARY INFORMATION:

Background

On July 22, 2020, Commerce published the *Preliminary Determination* in this investigation, and invited interested parties to comment on our findings.[1] The petitioner in this investigation is the Coalition Against Korean Cigarettes.[2] The mandatory respondent subject to this investigation is KT&G Corporation (KT&G). A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[3]

The Issues and Decision Memorandum is a public document and is available 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.

Period of Investigation

The POI is October 1, 2018 through September 30, 2019.

Scope of the Investigation

The products covered by this investigation are 4th tier cigarettes from Korea. For a complete description of the scope of this investigation, *see* Appendix I.

Analysis of Comments Received

All issues raised in the case briefs and rebuttal briefs submitted by interested parties in this proceeding are discussed in the Issues and Decision Memorandum. A list of the issues raised by parties and responded to by Commerce in the Issues and Decision Memorandum is attached to this notice as Appendix II.

Verification

Commerce normally verifies information relied upon in making its final determination, pursuant to section 782(i)(1) of the Tariff Act of 1930 amended (the Act). However, during the course of this investigation, we were unable to conduct verification.[4] Pursuant to section 776(a)(2)(D) of the Act, in situations where information has been provided but the information cannot be verified, Commerce will use ''facts otherwise available'' in reaching the applicable determination. Accordingly, we relied on facts available in making our final determination.

Changes Since the Preliminary Determination

Based on our analysis of the comments received, we made no changes to the scope of the merchandise under investigation but made one change to the margin calculation for KT&G since the *Preliminary Determination.* For a discussion of this change, *see* the Issues and Decision Memorandum.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for individually investigated exporters and producers, excluding any margins that are zero, *de minimis,* or any margins determined entirely under section 776 of the Act.

Commerce calculated a weighted-average dumping margin for KT&G, the only individually examined exporter/producer in this investigation, that is above *de minimis.* We have assigned KT&G's margin to all other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The final weighted-average dumping margins are as follows:

Exporter/producer	Weighted-average dumping margin (percent)
KT&G Corporation	5.48
All Others	5.48

Disclosure

We intend to disclose to interested parties the calculations and analysis performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of the publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct U.S. Customs and Border Protection (CBP) to continue the suspension of liquidation of all appropriate entries of 4th tier cigarettes, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after July 22, 2020, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**.

Further, Commerce will instruct CBP to require a cash deposit equal to the amount by which the normal value exceeds the U.S. price as follows: (1) For KT&G, the cash deposit rate will be equal to the weighted-average dumping margin determined in this final determination; (2) if KT&G is the producer, but not the exporter, then the cash deposit rate will be equal 5.48 percent; and (3) the cash deposit rate for all other producers and exporters will be 5.48 percent. These suspension of liquidation instructions will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission (ITC) of the final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports, or sales (or the likelihood of sales) for importation of 4th tier cigarettes no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding

[1] *See 4th Tier Cigarettes from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Negative Determination of Critical Circumstances,* 85 FR 44281 (July 22, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] The members of the Coalition Against Korean Cigarettes are Xcaliber International and Cheyenne International.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of 4th Tier Cigarettes from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Memorandum, ''Cancellation of Verification,'' dated October 21, 2020.

will be terminated, and all cash deposits will be refunded. If the ITC determines that material injury or threat of material injury does exist, Commerce will issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise, entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely 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 violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing this determination and notice in accordance with sections 735(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: December 4, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is certain tobacco cigarettes, commonly referred to as ''4th tier cigarettes.'' The subject cigarettes are composed of a tobacco blend rolled in paper, have a nominal minimum total length of 7.0 cm but do not exceed 12.0 cm in total nominal length, and have a nominal diameter of less than 1.3 cm. These sizes of cigarettes are frequently referred to as ''Kings'' and ''100's,'' but subject merchandise that meets the physical description of the scope is included regardless of the marketing description of the size of the cigarettes. Subject merchandise typically has a tobacco blend that consists of 10% or more tobacco stems.

Subject merchandise is typically sold in packs of 20 cigarettes per pack which generally includes the marking ''20 Class A Cigarettes'' but are included regardless of packaging. 4th tier cigarette packages are typically sold in boxes without a rounded internal corner and without embossed aluminum foil inside the pack.

Both menthol and non-menthol cigarettes and cigarettes with or without a filter attached are covered by the scope of this investigation.

Merchandise covered by this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 2402.20.8000. This HTSUS subheading is provided for convenience and customs purposes; the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–27308 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–840]

Forged Steel Fluid End Blocks From Italy: Final Affirmative Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that imports of forged steel fluid end blocks (fluid end blocks) from Italy are being, or are likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation October 1, 2018 through September 30, 2019.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov or Hermes Pinilla, 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) 482–0665 or (202) 482–3477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 23, 2020, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of fluid end blocks from Italy, in which we also postponed the final determination until December 7, 2020.[1] We invited interested parties to comment on the *Preliminary Determination.* A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2]

Scope of the Investigation

The products covered by this investigation are fluid end blocks from Italy. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation'' in Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Decision

[1] *See Forged Steel Fluid End Blocks from Italy: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 85 FR 44500 (July 23, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from Italy,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, '' Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination. See* Appendix I for the final scope of the investigation.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice at Appendix II. 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/.*

Verification

Commerce was unable to conduct on-site verification of the information relied upon in making its final determination in this investigation as provided for in section 782(i) of the Tariff Act of 1930, as amended (the Act). Accordingly, we took additional steps in lieu of on-site verification and requested additional documentation and information.[5]

Changes Since the Preliminary Determination

Based on our analysis of the comments received, we made certain changes to the margin calculations for Lucchini. For a discussion of these changes, *see* the ''Changes from the Preliminary Determination'' section of the Issues and Decision Memorandum.

Use of Adverse Facts Available

Companies that did not respond to our quantity and value questionnaires, IMER International S.p.A., Galperti Group, Mimest S.p.A., and P. Technologies S.r.l., failed to cooperate in this investigation. Therefore, in the *Preliminary Determination,* pursuant to sections 776(a) and (b) of the Act, Commerce assigned these companies a rate based on adverse facts available (AFA). There is no new information on the record that would cause us to revisit our determination to apply AFA to IMER International S.p.A., Galperti Group, Mimest S.p.A., and P. Technologies S.r.l. Accordingly, we continue to find that the application of AFA pursuant to sections 776(a) and (b) of the Act is warranted with respect to these companies. Commerce has assigned to these companies' exports of the subject merchandise the rate of 58.48 percent, which is Lucchini's highest comparison-specific margin.[6] Because this rate is not secondary information, but rather is based on information obtained in the course of the investigation, Commerce need not corroborate this rate pursuant to section 776(c) of the Act.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act. Commerce has determined that the estimated weighted-average dumping margin for Metalcam S.p.A. is zero. Therefore, the only rate that is not zero, *de minimis,* or based entirely on facts otherwise available, is the rate calculated for Lucchini Mame Forge S.p.A. Consequently, the rate calculated for Lucchini Mame Forge S.p.A., is assigned as the rate for all other producers and exporters.

Final Determination

The final estimated weighted-average dumping margins are as follows:

Exporter or producer	Estimated weighted-average dumping margin (percent)
Metalcam S.p.A	[7] 0.00
Lucchini Mame Forge S.p.A	[8] 7.33
IMER International S.p.A	** 58.48
Galperti Group	** 58.48
Mimest S.p.A	** 58.48
P. Technologies S.r.l	** 58.48
All Others	7.33

Disclosure

We intend to disclose the calculations performed for Lucchini in this final determination within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).[9]

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of subject merchandise, as described in Appendix I of this notice, entered, or withdrawn from warehouse, for consumption on or after July 23, 2020, the date of publication of *Preliminary Determination* in the **Federal Register** except for those entries of subject merchandise produced and exported by Metalcam S.p.A. Because the estimated weighted-average dumping margin for Metalcam S.p.A. is zero, we will not be directing CBP to suspend liquidation of entries of the subject merchandise produced and exported by this company.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), where appropriate, Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this final determination; (2) if the exporter is not a respondent identified above but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to

[4] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

[5] *See* Commerce's Letters, dated September 2, 2020; *see also* Metalcam's Letters, both titled ''Antidumping Duty Investigation of Forged Steel Fluid End Blocks from Italy: Metalcam Post-Prelim Questionnaire Response,'' and dated September 11, 2020 (submitting, separately, responses to the sales and cost portions of the questionnaire in lieu of verification); and Lucchini's Letter, ''Antidumping Duty Investigation of Forged Steel Fluid End Blocks from Italy: Lucchini Mame Forge S.p.A Post-Preliminary Questionnaire,'' dated September 11, 2020.

[6] *See* Memorandum, ''Forged Steel Fluid End Blocks from Italy—Final Determination Analysis Memorandum for Lucchini Mamè Forge S.p.A.,'' dated December 7, 2020 (Lucchini Final Analysis Memorandum) at 90 of the attached margin-calculation program output.

[7] *See* Memorandum, ''Forged Steel Fluid End Blocks from Italy—Preliminary Determination Analysis Memorandum for Metalcam S.p.A.,'' dated July 16, 2020.

[8] *See* Lucchini Final Analysis Memorandum.

[9] We are not disclosing any final margin calculations for Metalcam because we made no changes to the preliminary margin calculations for Metalcam.

the all-others estimated weighted-average dumping margin. These suspension-of-liquidation instructions will remain in effect until further notice.

Because the estimated weighted-average dumping margin for Metalcam S.p.A. is zero, entries of shipments of subject merchandise from this company will not be subject to suspension of liquidation or cash deposit requirements. In such situations, Commerce also applies the exclusion to the provisional measures to the producer/exporter combination that was examined in the investigation. Accordingly, Commerce will be directing CBP not to suspend liquidation of entries of subject merchandise produced and exported by Metalcam S.p.A. However, entries of shipments of subject merchandise from this company in any other producer/exporter combination (*i.e.,* where Metalcam S.p.A, is either the producer or the exporter, but not both), or by third parties that sourced subject merchandise from the excluded producer/exporter combination, will be subject to suspension of liquidation at the all-others rate.

Because the estimated weighted-average dumping margin is zero for the producer/exporter combination identified above, entries of shipments of subject merchandise from this producer/exporter combination will be excluded from the potential antidumping duty order. Such an exclusion will not be applicable to merchandise exported to the United States by this respondent in any other producer/exporter combinations or by third parties that sourced subject merchandise from the excluded producer/exporter combination.

While Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of export subsidies countervailed in a companion countervailing duty (CVD) proceeding when CVD provisional measures are in effect, we have not adjusted the cash deposit rates listed above because Commerce found no countervailable export subsidies in the final determination of the companion CVD investigation.[10]

International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission (ITC) of the final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of fluid end blocks from Italy no later than 45 days after this final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, and all cash deposits posted will be refunded and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an AD order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Notification Regarding Administrative Protective Orders

This notice will serve as a final reminder to the parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of 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

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

[10] *See* the Final Affirmative Countervailing Duty Determination of Forged Steel Fluid End Blocks from Italy and accompanying Issues and Decision Memorandum dated concurrently with this final determination.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–27334 Filed 12–10–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–894]

Forged Steel Fluid End Blocks from India: Final Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of forged steel fluid end blocks (fluid end blocks) from India.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: William Langley or Nicholas Czajkowski, 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) 482–3861 or (202) 482–1395, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 26, 2020, Commerce published the *Preliminary Determination* of this countervailing duty (CVD) investigation, which also aligned the final determination of this CVD investigation with the final determination in the companion antidumping duty investigation of fluid end blocks from India.[1] A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum which is hereby adopted by this notice.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov*. In addition, a complete version of the Final Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Period of Investigation

The period of investigation is April 1, 2018 through March 31, 2019.

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks from India. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination. See* Appendix I for the final scope of this investigation.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs by parties in this investigation are discussed in the Issues and Decision Memorandum. A list of the issues raised by parties is attached to this notice at Appendix II.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce 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.[5] For a full description of the methodology underlying our final determination, *see* the Issues and Decision Memorandum.

Verification

Commerce normally verifies information relied upon in making its final determination, pursuant to section 782(i)(1) of the Tariff Act of 1930, as amended (the Act). However, during the course of this investigation, we were unable to conduct on-site verification due to travel restrictions.[6] Consistent with section 776(a)(2)(D) of the Act, Commerce relied on the information submitted on the record, which we used in making our *Preliminary Determination* and Post-Preliminary Analysis,[7] as facts available in making our final determination.

Changes Since the Preliminary Determination and Post-Preliminary Analysis

Based on our review and analysis of the comments received from parties, we made certain changes to the subsidy rate calculations for Bharat Forge Limited (Bharat Forge). For a discussion of these changes, *see* the Issues and Decision Memorandum.

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[1] *See Forged Steel Fluid End Blocks from India: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination,* 85 FR 31452 (May 26, 2020) (*Preliminary Determination*).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Fluid End Blocks from India,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

[4] Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

[5] *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.

[6] *See* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fittings from India: Cancellation of Verification and Setting of Briefing Schedule,'' dated August 31, 2020.

[7] *See* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fluid End Blocks from India: Post-Preliminary Analysis,'' dated August 10, 2020 (Post-Preliminary Analysis).

All-Others Rate

We continue to calculate the all-others rate using the rate of the only mandatory respondent, Bharat Forge.[8]

Final Determination

Commerce determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate *ad valorem* (percent)
Bharat Forge Limited	5.20
All Others	5.20

Disclosure

Commerce intends to disclose to interested parties its calculations and analysis performed in this final determination within five days of its public announcement, or if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to sections 703(d)(1)(B) and (d)(2) of the Act, Commerce instructed 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 May 26, 2020, the date of publication of the *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, effective September 23, 2020, we instructed CBP to discontinue the suspension of liquidation of all entries at that time, but to continue the suspension of liquidation of all entries between May 26, 2020 and September 22, 2020.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a CVD order and require a cash deposit of estimated countervailing duties for such entries of subject merchandise in the amounts indicated above, in accordance with section 706(a) of the Act. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated, and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

[8] *See Preliminary Determination,* 85 FR at 31453.

ITC Notification

In accordance with section 705(d) of the Act, Commerce will notify the ITC of its final affirmative determination that countervailable subsidies are being provided to producers and exporters of fluid end blocks from India. As Commerce's final determination is affirmative, in accordance with section 705(b) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured or threatened with material injury. In addition, we are making available to the ITC all non-privileged and nonproprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Notification Regarding Administrative Protective Orders

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 771(i) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

APPENDIX I

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

APPENDIX II

List of Topics Discussed in the Final Decision Memorandum

[FR Doc. 2020–27333 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–822, A–301–804, A–729–804, A–421–814, A–517–806, A–583–868, A–489–842, A–520–809]

Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, the Republic of Turkey, and the United Arab Emirates: Final Affirmative Determinations of Sales at Less Than Fair Value and Final Affirmative Critical Circumstances Determinations, in Part

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that imports of prestressed concrete steel wire strand (PC strand) from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, the Republic of Turkey (Turkey), and the United Arab Emirates (UAE) are being, or are likely to be, sold in the United States at less than fair value (LTFV).

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Kabir Archuletta at (202) 482–2593 (Argentina), Hermes Pinilla at (202) 482–3477 (Colombia), David Crespo at (202) 482–3693 (Egypt), Bryan Hansen at (202) 482–3683 (the Netherlands), Drew Jackson at (202) 482–4406 (Saudi Arabia), Joy Zhang at (202) 482–1168 (Taiwan), David Goldberger at (202) 482–4136 (Turkey), and Charles Doss at (202) 482–4474 (UAE); AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 2020, Commerce published in the **Federal Register** the *Preliminary Determinations* of sales at LTFV of PC strand from: (1) Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Turkey, and the UAE; [1] and (2) Taiwan.[2] We invited interested parties to comment on the *Preliminary Determinations*. Except for PC strand from Turkey, we received no comments from interested parties on the *Preliminary Determinations*. For PC strand from Turkey, a summary of the events that occurred since Commerce published the *Preliminary Determinations,* as well as a full discussion of the issues raised by parties for the final determination, may be found in the Turkey Issues and Decision Memorandum.[3]

Period of Investigation

The period of investigation is April 1, 2019 through March 31, 2020.

Scope of the Investigations

The product covered by these investigations is PC strand. For a full description of the scope of these investigations, *see* Appendix I of this notice.

Changes Since the Preliminary Determinations

Because we received no comments, we have made no changes to our calculations with regards to Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, UAE, and Taiwan. We have considered the comments received in the PC strand from Turkey investigation, but have made no changes to our calculations for the final determination. In addition, for the final determination we have revised our critical circumstances determination with respect to Celik Halat ve Tel Sanayi A.S. (Celik Halat). *See* ''Final Affirmative Determinations of Critical Circumstances,'' below.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs submitted by parties in the PC strand from Turkey investigation are addressed in the Turkey Issues and Decision Memorandum accompanying this notice. A list of the issues addressed in the Turkey Issues and Decision Memorandum is attached to this notice as Appendix II. The Turkey 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 Turkey Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Turkey Issues and Decision Memorandum are identical in content.

Final Affirmative Determinations of Critical Circumstances

For the *Preliminary Determinations,* in accordance with section 733(e)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.206(c)(1), Commerce found that critical circumstances exist with respect to imports of PC strand exported by: (1) Knight S.A.S. from Colombia; (2) United Wires Company Elsewedy (United Wires) and all other producers/exporters from Egypt; (3) Nedri Spanstaal BV from the Netherlands; and (4) Celik Halat, Güney Çelik Hasir ve Demir (Güney

[1] *See Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, the Republic of Turkey, and the United Arab Emirates: Preliminary Affirmative Determinations of Sales at Less than Fair Value and Preliminary Affirmative Critical Circumstances Determinations, in Part,* 85 FR 61722 (September 30, 2020) (*Seven Countries Preliminary Determinations*).

[2] *See Prestressed Concrete Steel Wire Strand from Taiwan: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Negative Preliminary Determination of Critical Circumstances,* 85 FR 61726 (September 30, 2020) (*Taiwan Preliminary Determination*) (collectively, *Preliminary Determinations*).

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of PC Strand from Turkey,'' dated concurrently with, and hereby adopted by, this notice (Turkey Issues and Decision Memorandum).

Celik), and all other producers/exporters from Turkey.[4]

Our determinations of critical circumstances are unchanged for the final determinations, except with respect to Celik Halat.[5] Accordingly, pursuant to section 735(a)(3) of the Act and 19 CFR 351.206, we continue to find that critical circumstances exist for: (1) Knight S.A.S. from Colombia; (2) United Wires and all other producers/exporters from Egypt; (3) Nedri Spanstaal BV from the Netherlands; and (4) Güney Celik and all other producers/exporters from Turkey.

All-Others Rates

As discussed in the *Preliminary Determinations,* Commerce based the all-others rate for each country on the alleged dumping margin from the petition applicable to each country, in accordance with section 735(c)(5)(A) of the Act.[6] We made no changes to the selection of the all-others rates for these final determinations.

Final Determinations

Commerce determines that the estimated dumping margins are as follows:

ARGENTINA

Exporter/producer	Dumping margin (percent)
Acindar Industria (Argentina) de Sinal S.A.	60.40
All Others	60.40

COLOMBIA

Exporter/Producer	Dumping margin (percent)
Knight S.A.S.	86.09
All Others	86.09

EGYPT

Exporter/producer	Dumping margin (percent)
United Wires Company Elsewedy	29.72
All Others	29.72

THE NETHERLANDS

Exporter/producer	Dumping margin (percent)
Nedri Spanstaal BV	30.86
All Others	30.86

SAUDI ARABIA

Exporter/producer	Dumping margin (percent)
National Metal Manufacturing & Casting Co.	194.40
All Others	194.40

TAIWAN

Exporter/producer	Dumping margin (percent)
Chia Ta World Co., Ltd.	23.89
All Others	23.89

TURKEY

Exporter/producer	Dumping margin (percent)
Celik Halat ve Tel Sanayi A.S.	53.65
Güney Çelik Hasir ve Demir	53.65
All Others	53.65

UNITED ARAB EMIRATES

Exporter/producer	Dumping margin (percent)
GSS International Trading FZE	170.65
Gulf Steel Strands FZE	170.65
All Others	170.65

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with a final determination, in accordance with 19 CFR 351.224(b). However, because Commerce applied AFA to each mandatory respondent in these investigations, in accordance with section 776 of the Act, there are no calculations to disclose.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of PC strand from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, Turkey, and the UAE, as described in the ''Scope of the Investigations'' in Appendix I, which entered, or were withdrawn from warehouse, for consumption on or after the date of publication of the *Preliminary Determinations.*

In accordance with section 733(e)(2)(A) of the Act, suspension of liquidation of PC strand from Colombia, Egypt, the Netherlands, and Turkey as described in the ''Scope of the Investigations'' in Appendix I, shall continue to apply to unliquidated entries of PC strand exported by: (1) Knight S.A.S. from Colombia; (2) United Wires and all other producers/exporters from Egypt; (3) Nedri Spanstaal BV from the Netherlands; and (4) Güney Celik and all other producers/exporters from Turkey,[7] which entered, or were withdrawn from warehouse, for consumption on or after July 2, 2020, which is 90 days prior to the date of publication of the *Preliminary Determinations.*

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), we will instruct CBP to require a cash deposit for such entries of merchandise equal to the estimated dumping margin as follows: (1) The cash deposit rate for the company listed in the tables above will be equal to the company-specific estimated dumping margin identified for that company in the table; (2) if the exporter is not a company identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission (ITC) of the final affirmative determinations of sales at LTFV. Because Commerce's final determinations are affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determinations as to whether the domestic industry in the United States is materially injured, or threatened with

[4] *See Seven Countries Preliminary Determinations,* 85 FR at 61723.

[5] *See* Turkey Issues and Decision Memorandum at 2; and Memorandum, ''Final Determination Critical Circumstances Analysis,'' dated concurrently with this memorandum.

[6] *See Seven Countries Preliminary Determinations,* 85 FR at 61723–24; and *Taiwan Preliminary Determination,* 85 FR at 61726.

[7] Because we are making a negative final determination of critical circumstances for Celik Halat, we will instruct CBP to terminate suspension of liquidation, and release any cash deposits on merchandise which was entered, or withdrawn from warehouse, during the 90 day period prior to the date of publication of the *Preliminary Determinations.*

material injury, by reason of imports, or sales (or the likelihood of sales) for importation of PC strand from Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, Turkey, and the UAE no later than 45 days after these final determinations. If the ITC determines that such injury does not exist, these proceedings will be terminated, and all cash deposits will be refunded. If the ITC determines that such injury does exist, Commerce will issue antidumping duty orders directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return 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 determinations are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act, and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigations

The merchandise covered by these investigations is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to these investigations is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these investigations is dispositive.

Appendix II

List of Topics Discussed in the Turkey Issues and Decision Memorandum

[FR Doc. 2020–27311 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–893]

Forged Steel Fluid End Blocks From India: Final Negative Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that imports of forged steel fluid end blocks (fluid end blocks) from India are not being, or are not likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation (POI) October 1, 2018 through September 30, 2019.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Michael Romani or 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) 482–0198 or (202) 482–4849, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 23, 2020, Commerce published in the **Federal Register** its preliminary negative determination in the LTFV investigation of fluid end blocks from India, in which it also postponed the final determination until December 7, 2020.[1] Commerce invited interested parties to comment on the *Preliminary Determination.* A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2]

Scope of the Investigation

The products covered by this investigation are fluid end blocks from India. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination. See* Appendix I for the final scope of the investigation.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice at Appendix II. 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

[1] *See Forged Steel Fluid End Blocks from India: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 85 FR 44517 (July 23, 2020) (*Preliminary Determination*), and accompanying memorandum, ''Decision Memorandum for the Preliminary Negative Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from India,'' dated July 16, 2020 (Preliminary Decision Memorandum).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Negative Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from India,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, '' Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

directly at *http://enforcement.trade.gov/frn/.*

Verification

Commerce was unable to conduct on-site verification of the information relied upon in making its final determination in this investigation pursuant to section 782(i) of the Tariff Act of 1930, as amended (the Act). Accordingly, we took additional steps in lieu of an on-site verification and requested additional documentation and information.[5]

Changes Since the Preliminary Determination

Based on our analysis of the comments received and examination of the record, we made certain changes to the margin calculations for Bharat Forge Limited. For a discussion of these changes, *see* the ''Changes from the Preliminary Determination'' section of the Issues and Decision Memorandum. Consistent with section 776(a) and (b) of the Act, Commerce relied on partial adverse facts available in making our final determination.

Final Determination

The final estimated weighted-average dumping margins are as follows:

Exporter or producer	Estimated weighted-average dumping margin (percent)
Bharat Forge Limited	[6] 0.00

Commerce preliminarily determined that Ultra Engineers (Ultra), the only other known producer or exporter of subject merchandise identified in the *Initiation Notice,*[7] had no sales of in-scope merchandise to the United States during the POI. Therefore, we did not calculate an estimated weighted-average dumping margin for Ultra in the *Preliminary Determination*.[8] No party commented on the *Preliminary Determination* with respect to Ultra. Accordingly, for the final Determination, we continue to find that Ultra had no sales of in-scope merchandise to the United States during the POI.

Consistent with section 733(d) of the Act, Commerce has not calculated an estimated weighted-average dumping margin for all other producers and exporters because it has not made a final affirmative determination of sales at LTFV.

Disclosure

We intend to disclose the calculations performed in this final determination within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

Suspension of Liquidation

Because Commerce has made a final negative determination of sales at LTFV with regard to subject merchandise, Commerce will not direct U.S. Customs and Border Protection to suspend liquidation or to require a cash deposit of estimated antidumping duties for entries of fluid end blocks from India.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the U.S. International Trade Commission of our final negative determination.

Notification Regarding Administrative Protective Orders

This notice will serve as a final reminder to the parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of 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

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010,

[5] *See* Commerce's Letter with attached questionnaire in lieu of verification, dated September 2, 2020; *see also* Bharat Forge Limited's Letter, ''Forged Steel Fluid End Blocks from India: Submission of Bharat Forge Limited's Post-Preliminary Response,'' dated September 14, 2020.

[6] *See* Memorandum, ''Forged Steel Fluid End Blocks from India—Final Determination Analysis Memorandum for Bharat Forge Limited,'' dated December 7, 2020.

[7] *See Initiation Notice,* 85 FR at 2395.

[8] *See* Preliminary Decision Memorandum at 5–6.

7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–27332 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–489–843]

Prestressed Concrete Steel Wire Strand From the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of prestressed concrete steel wire strand (PC strand) from the Republic of Turkey (Turkey).

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Whitley Herndon or Jacob Garten, 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, or (202) 482–3342, respectively.

SUPPLEMENTARY INFORMATION:

Background

The petitioners in this investigation are Insteel Wire Products, Sumiden Wire Products Corporation, and Wire Mesh Corporation. In addition to the Government of Turkey, the mandatory respondents in this investigation are Celik Halat ve Tel San A.S. (Celik Halat) and Guney Celik Hasir ve Demir (Guney Celik).

A summary of the events that occurred since Commerce published the *Preliminary Determination,*[1] as well as a full discussion of the issues raised by parties for this final determination, are discussed in the Issues and Decision Memorandum, which is hereby adopted by this notice.[2] The Issues and Decision Memorandum is a public document and on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov*. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Period of Investigation

The period of investigation is January 1, 2019 through December 31, 2019.

Scope of the Investigation

The scope of the investigation is PC strand from Turkey. For a complete description of the scope of this investigation, *see* Appendix I.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs by parties in this investigation are discussed in the Issues and Decision Memorandum. A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is included as Appendix II.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce 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.[3] For a full description of the methodology underlying our final determination, *see* the Issues and Decision Memorandum.

Verification

Commerce was unable to conduct on-site verification of the information relied upon in making its final determination in this investigation, pursuant to section 782(i) of the Act. Accordingly, we took additional steps in lieu of on-site verification and requested additional documentation and information.[4] Consistent with section 776(a)(2)(D) of the Act, Commerce relied on the information submitted on the record as facts available in making our final determination.

Changes Since the *Preliminary Determination*

Based on our review and analysis of the information received in lieu of on-site verification and comments received from parties, we made certain changes to the respondents' subsidy rate calculations since the *Preliminary Determination* and the Post-Preliminary Analysis Memorandum.[5] As a result of these changes, Commerce has also revised the all-others rate. For a discussion of these changes, *see* the Issues and Decision Memorandum and the Final Analysis Memoranda.[6]

Final Negative Determination of Critical Circumstances

Pursuant to section 705(a)(2) of the Act, Commerce determines that critical circumstances do not exist for imports of PC strand from Turkey. For full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Issues and Decision Memorandum.

All-Others Rate

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we calculated countervailable subsidy rates for Celik Halat and Guney Celik. Section 705(c)(5)(A)(i) of the Act states that, for

[1] *See Prestressed Concrete Steel Wire from the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part,* 85 FR 59287 (September 21, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Decision Memorandum for the Final Determination of the Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey,'' dated concurrently with this determination (Issues and Decision Memorandum).

[3] *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.

[4] *See* Commerce's Letter, dated October 26, 2020; and Guney Celik's Letter, ''Prestressed Concrete Steel Wire Strand from Turkey; In Lieu of Verification Questionnaire Response,'' dated November 3, 2020.

[5] *See* Memorandum, ''Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Post-Preliminary Analysis,'' dated November 19, 2020 (Post-Preliminary Analysis Memorandum).

[6] *See* Memoranda, ''Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Final Determination Calculation Memorandum for Celik Halat ve Tel San A.S.'' and ''Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Final Determination Calculation Memorandum for Guney Celik Hasir ve Demir,'' both dated concurrently with this notice (collectively, Final Analysis Memoranda).

all exporters and producers not individually investigated, we will determine an all-others rate equal to the weighted-average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely under section 776 of the Act.

Notwithstanding the language of section 705(c)(5)(A)(i) of the Act, we have not calculated the all-others rate by weight averaging the rates of Celik Halat and Guney Celik because doing so risks disclosure of business proprietary information. Rather, we used a simple average to calculate the all-others rate.[7]

Final Determination

Commerce determines the total estimated net countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Celik Halat ve Tel San A.S.[8]	158.44
Guney Celik Hasir ve Demir	30.78
All Others	94.61

In accordance with section 705(c)(1)(B)(i) of the Act, we calculated a rate for each company respondent. Section 705(c)(5)(A)(i) of the Act states that, for companies not individually investigated, we will determine an ''all others'' rate equal to the weighted-average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and de minimis countervailable subsidy rates, and any rates determined entirely under section 776 of the Act. Notwithstanding the language of section 705(c)(5)(A)(i) of the Act, we have not calculated the ''all others'' rate by weight averaging the rates of Celik Halat and Guney Celik because doing so risks disclosure of proprietary information. Therefore, we calculated a simple average of Celik Halat and Guney Celik's rates.

Disclosure

Commerce will disclose the calculations performed in connection with this final determination within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to section 703(d)(1)(B) and (d)(2) of the Act, Commerce instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section, that was entered or withdrawn from warehouse for consumption on or after the date of publication of the *Preliminary Determination* in the **Federal Register**.

Because we find critical circumstances do not exist for Celik Halat, we will direct CBP to terminate the retroactive suspension of liquidation ordered at the *Preliminary Determination* and release any cash deposits that were required prior to September 21, 2020, the date of publication of the *Preliminary Determination* in the **Federal Register**, consistent with section 705(c)(3) of the Act.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a countervailing duty order and require a cash deposit of estimated countervailing duties for such entries of subject merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Because the final determination in this proceeding is affirmative, in accordance with section 705(b) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of welded pipe from Turkey no later than 45 days after our final determination. If the ITC determines that material injury or threat of material injury does not exist, this proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, Commerce will issue a countervailing duty order directing CBP to assess, upon further instruction by Commerce, countervailing duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Notification Regarding APO

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act.

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is prestressed concrete steel wire strand (PC strand), produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications. The product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand. PC strand is normally sold in the United States in sizes ranging from 0.25 inches to 0.70 inches in diameter. PC strand made from galvanized wire is only excluded from the scope if the zinc and/or zinc oxide coating meets or exceeds the 0.40 oz./ft2 standard set forth in ASTM–A–475.

The PC strand subject to this investigation is currently classifiable under subheadings 7312.10.3010 and 7312.10.3012 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

[7] We have calculated the simple average of the two responding firm's rates for the all-others rate using the following

calculation: (158.44 (Celik Halat's calculated rate) + 30.78 (Guney Celik's calculated rate))/2 = 94.61 (the all-others rate).

[8] Commerce found the following companies to be cross-owned with Celik Halat: Dogan Sirketler Grubu Holding A.S. and Adilbey Holding A.S. *See Preliminary Determination* PDM at ''Attribution of Subsidies.''

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–27310 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–821–827]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the Russian Federation: 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 seamless carbon and alloy steel standard, line, and pressure pipe (seamless pipe) from the Russian Federation (Russia). 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 11, 2020.

FOR FURTHER INFORMATION CONTACT: Caitlin Monks, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2670, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on August 4, 2020.[1] On September 2, 2020, Commerce postponed the preliminary determination of this investigation to December 7, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics 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.

Scope of the Investigation

The products covered by this investigation are seamless pipe from Russia. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the *Preamble* to Commerce's regulations,[4] we set aside a period of time, as stated in the *Initiation Notice,* for parties to raise issues regarding product coverage (*i.e.,* scope).[5] We received comments concerning the scope of the antidumping duty (AD) and countervailing duty (CVD) investigations of seamless pipe as it appeared in the *Initiation Notice.* We are currently evaluating the scope comments filed by the interested parties. We intend to issue our preliminary decision regarding the scope of this and the companion AD and CVD investigations no later than February 3, 2021, the deadline for the preliminary determinations in the companion AD investigations with respect to Russia, the Republic of Korea, and Ukraine.[6] We will issue a final scope decision after considering any relevant comments submitted in case and rebuttal briefs.[7]

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.[8]

Commerce notes that, in making these findings, it relied, in part, on facts available and, because it finds that the respondent did not act to the best of its ability to respond to Commerce's requests for information, Commerce drew an adverse inference where appropriate in selecting from among the facts otherwise available.[9] 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 CVD determination in this investigation with the final determination in the companion AD investigation of seamless pipe from Russia based on a request made by the petitioner.[10] Consequently, the final

[1] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea and the Russian Federation: Initiation of Countervailing Duty Investigations,* 85 FR 47170 (August 4, 2020) (*Initiation Notice*).

[2] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations,* 85 FR 54533 (September 2, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Affirmative Preliminary Determination in the Countervailing Duty Investigation of Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Russian Federation,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[5] *See Initiation Notice,* 85 FR at 47171.

[6] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea, the Russian Federation, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair Value Investigations,* 85 FR 73687 (November 19, 2020).

[7] The deadlines for interested parties to submit scope case and rebuttal briefs will be established in the preliminary scope decision memorandum.

[8] *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.

[9] *See* sections 776(a) and (b) of the Act.

[10] *See* Vallourec Star, LP (Petitioner)'s Letter, ''Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Korea and Russia: Request to Align Final Determinations,'' dated October 15, 2020.

CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than April 19, 2021, 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.

In this investigation, Commerce preliminarily calculated an individual estimated countervailable subsidy rate for PAO TMK/Volzhsky Pipe Plant JSC,[11] the only individually examined exporter/producer in this investigation. Because the only individually calculated rate is not zero, *de minimis,* or based entirely on facts otherwise available, we are preliminarily assigning the estimated countervailable subsidy rate calculated for TMK to all other producers and exporters, pursuant to section 705(c)(5)(A)(i) of the Act.

Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent)
PAO TMK/Volzhsky Pipe Plant Joint Stock Company[12]	4.39
All Others	4.39

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date of this notice in accordance with 19 CFR 351.224(b).

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required.

Public Comment

As noted above, Commerce will issue a preliminary scope decision no later than February 3, 2021. All interested parties will have the opportunity to submit case and rebuttal briefs on the preliminary scope determination by the deadline established in the memorandum. All parties filing scope briefs or rebuttals thereto, must file identical documents simultaneously on the records of all the ongoing AD and CVD seamless pipe investigations. No new factual information or business proprietary information may be included in either scope briefs or rebuttal scope briefs.

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the deadline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[13] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[14] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If Commerce's final determination is affirmative, the ITC will make its final injury determination before the later of 120 days after the date of Commerce's preliminary determination or 45 days after its final determination.

Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

[11] Commerce selected ''TMK'' and ''TMK Volzhsky'' as mandatory respondents. The TMK Group subsequently submitted a questionnaire response on behalf of both companies, explaining that they are cross-owned members of the TMK Group. The TMK Group also clarified that its registered names include: ''PAO TMK'' and ''Volzhsky Pipe Plant JSC.'' The TMK Group refers to a group of companies involved in the production, sale, and distribution of subject merchandise which meet the definition of cross-ownership pursuant to 19 CFR 351.525(b)(6). As discussed in the Preliminary Decision Memorandum, we preliminarily determine that the cross-owned companies comprising the TMK Group during the POI are: PAO TMK; Volzhsky Pipe Plant JSC; Sinarsky Pipe Plant; Taganrog Metallurgical Plant Joint Stock Company; Sinarsky Pipe Plant Joint Stock Company; Seversky Pipe Plant Joint Stock Company; TMK CHERMET LLC; TMK CHERMET LLC Volzhsky; TMK CHERMET LLC Ekaterinburg; TMK CHERMET LLC Rostov; TMK CHERMET LLC Saratov; and TMK CHERMET LLC Service.

[12] As discussed in the Preliminary Decision Memorandum, Commerce has found the following companies to be cross-owned with PAO TMK and Volzhsky Pipe Plant Joint Stock Company: Sinarsky Pipe Plant; Taganrog Metallurgical Plant Joint Stock Company; Sinarsky Pipe Plant Joint Stock Company; Seversky Pipe Plant Joint Stock Company; TMK CHERMET LLC; TMK CHERMET LLC Volzhsky; TMK CHERMET LLC Ekaterinburg; TMK CHERMET LLC Rostov; TMK CHERMET LLC Saratov; and TMK CHERMET LLC Service.

[13] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006, 17007 (March 26, 2020).

[14] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by the scope of this investigation is seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in nominal outside diameter, regardless of wall-thickness, manufacturing process (*e.g.,* hot-finished or cold-drawn), end finish (*e.g.,* plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (*e.g.,* bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or ''hollow profiles'' suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials (ASTM) or American Petroleum Institute (API) specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, ASTM A–1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application, with the exception of the exclusions discussed below.

Specifically excluded from the scope of the investigation are: (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications, including pipe produced to the ASTM A–822 standard; (2) all pipes meeting the chemical requirements of ASTM A–335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the investigations are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, *i.e.,* outside diameter and wall thickness, of ASTM A–53, ASTM A–106 or API 5L specifications.

Subject seamless standard, line, and pressure pipe are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070. The HTSUS subheadings and specifications are provided for convenience and customs purposes; the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2020–27307 Filed 12–10–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–893–001, A–400–001]

Silicon Metal From Bosnia and Herzegovina and Iceland: Preliminary Affirmative Determinations of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that silicon metal from Bosnia and Herzegovina (Bosnia) and Iceland is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is April 1, 2019 through March 31, 2020. The estimated margins of sales at LTFV are shown in the ''Preliminary Determinations'' section of this notice. Interested parties are invited to comment on these preliminary determinations.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Robert Galantucci at (202) 482–2923 (Bosnia); and Emily Halle at (202) 482–0176 (Iceland), Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the notice of initiation of these investigations on July 27, 2020.[1] R–S Silicon D.O.O. (R–S Silicon) is the sole mandatory respondent in the investigation covering silicon metal from Bosnia; PCC Bakki Silicon hf (PCC Bakki) is the sole mandatory respondent in the investigation covering silicon metal from Iceland. For a complete description of the events that followed the initiation of these investigations, *see* the Preliminary Decision Memorandum.[2] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigations

The product covered by these investigations is silicon metal. For a full description of the scope of these investigations, *see* the ''Scope of the Investigations,'' in Appendix I of this notice. *Scope Comments*

In accordance with the *Preamble* to Commerce's regulations,[3] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[4] However, Commerce received no comments on the scope of these investigations from interested parties.

Methodology

Commerce is conducting these investigations in accordance with section 731 of the Tariff Act of 1930, as amended (the Act). Pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available to assign dumping margins to R–S Silicon and PCC Bakki in these investigations because neither respondent submitted a response to Commerce's antidumping duty questionnaire. Further, Commerce is preliminarily determining that R–S Silicon and PCC Bakki failed to cooperate by not acting to the best of their abilities to comply with a request for information and is using an adverse inference when selecting from among

[1] *See Silicon Metal from Bosnia and Herzegovina, Iceland, and Malaysia: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 45177 (July 27, 2020) (*Initiation Notice*).

[2] *See* Memorandum, ''Decision Memorandum for the Preliminary Determinations in the Less-Than-Fair-Value Investigations of Silicon Metal from Bosnia and Herzegovina and Iceland,'' dated concurrently with, and hereby adopted by, this notice.

[3] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[4] *See Initiation Notice,* 85 FR at 45177.

the facts otherwise available (*i.e.,* applying adverse facts available (AFA)) to R–S Silicon and PCC Bakki, in accordance with section 776(b) of Act. For a full description of the methodology underlying our preliminary determinations, *see* the Preliminary Decision Memorandum.

Critical Circumstances

On October 20, 2020, the petitioners [5] timely filed a critical circumstances allegation, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1), alleging that critical circumstances exist with respect to imports of the subject merchandise from Iceland.[6] On November 5, 2020, Commerce determined the allegation was insufficient and informed the petitioners that we had no basis to pursue the critical circumstances allegation at that time.[7] In response, on November 11, 2020, the petitioners timely filed an updated critical circumstances allegation, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1), alleging that critical circumstances exist with respect to imports of silicon metal from Iceland.[8]

Section 733(e)(1) of the Act provides that Commerce will preliminarily determine that critical circumstances exist in an LTFV investigation if there is a reasonable basis to believe or suspect that: (A) There is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been massive imports of the subject merchandise over a relatively short period. We preliminarily determine that critical circumstances exist with respect to imports of silicon metal exported by PCC Bakki and all other producers/exporters from Iceland.[9]

All-Others Rate

Sections 733(d)(1)(ii) of the Act provides that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually investigated, in accordance with section 735(c)(5) of the Act. Section 735(c)(5)(A) of the Act states that generally the estimated rate for all-others shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. Pursuant to section 735(c)(5)(B) of the Act, if the estimated weighted-average dumping margins established for all exporters and producers individually examined are zero, *de minimis,* or determined entirely under section 776 of the Act, Commerce may use any reasonable method to establish the estimated weighted-average dumping margin for all other producers or exporters. The estimated weighted-average dumping margins in these preliminary determinations were determined entirely under section 776 of the Act. In cases where no weighted-average dumping margins other than those determined entirely under section 776 of the Act have been established for individually examined entities, in accordance with section 735(c)(5)(B) of the Act, Commerce typically averages the margins alleged in the petitions and applies the results to all other entities not individually examined.

With respect to Bosnia, in the Petitions,[10] the petitioners provided only one dumping margin, which was based on a price-to-constructed value comparison. Therefore, for the all-others rate in the investigation covering silicon metal from Bosnia, we preliminarily assigned this estimated dumping margin, which is 21.41 percent, as the all-others rate.[11]

With respect to Iceland, in the Petitions,[12] the petitioners provided dumping margins based on price-to-price comparisons. The estimated dumping margins for the price-to-price comparisons range from 28.12 percent to 47.54 percent. Therefore, for the all-others rate in the investigation covering silicon metal from Iceland, we preliminarily assigned the simple average of the range of margins alleged for subject merchandise from Iceland in the Petitions, which is 37.83 percent.[13]

Preliminary Determinations

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist during the period April 1, 2019 through March 31, 2020:

BOSNIA AND HERZEGOVINA

Exporter/producer	Dumping margin (percent)
R–S Silicon D.O.O	21.41
All Others	21.41

ICELAND

Exporter/producer	Dumping margin (percent)
PCC Bakki Silicon hf	47.54
All Others	37.83

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of silicon metal from Bosnia and Iceland, as described in the ''Scope of the Investigations'' in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

Further, section 733(e)(2) of the Act provides that, given an affirmative determination of critical circumstances, any suspension of liquidation shall apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the later of: (a) The date which is 90 days before the date on which the suspension of liquidation was first ordered; or (b) the date on which notice of initiation of the investigation was published. In accordance with section

[5] The petitioners are Globe Specialty Metals, Inc. and Mississippi Silicon LLC (collectively, the petitioners).

[6] *See* Petitioners' Letter, ''Silicon Metal from Iceland: Allegation of Critical Circumstances,'' dated October 20, 2020.

[7] *See* Commerce's Letter, ''Antidumping Duty Investigation of Silicon Metal from Iceland: Response to Petitioners' Critical Circumstances Allegation,'' dated November 5, 2020.

[8] *See* Petitioners' Letter, ''Silicon metal from Iceland: Revised Allegation of Critical Circumstances,'' dated November 11, 2020.

[9] For a full description of Commerce's preliminary critical circumstances determination, *see* Preliminary Decision Memorandum.

[10] *See* Petitioners' Letter, ''Silicon Metal from Bosnia and Herzegovina, Iceland, The Republic of Kazakhstan, and Malaysia—Petition for the Imposition of Antidumping and Countervailing Duties,'' dated June 30, 2020 (the Petitions) at Volume II; *see also* AD Investigation Initiation Checklist: Silicon Metal from Bosnia and Herzegovina, dated July 20, 2020 (AD Investigation Initiation Checklist: Bosnia).

[11] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2; and AD Investigation Initiation Checklist: Bosnia.

[12] *See* the Petitions at Volume III; *see also* AD Investigation Initiation Checklist: Silicon Metal from Iceland, dated July 20, 2020 (AD Investigation Initiation Checklist: Iceland).

[13] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2; and AD Investigation Initiation Checklist: Iceland.

733(e)(2)(A) of the Act, suspension of liquidation of silicon metal from Iceland as described in the ''Scope of the investigations'' in Appendix I, shall apply to unliquidated entries of merchandise from imports of silicon metal exported by PCC Bakki and all other producers/exporters from Iceland, that are entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the publication of this notice, the date suspension of liquidation is first ordered.

We will also instruct CBP, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d) to require a cash deposit equal to the margins indicated in the charts above. These suspension of liquidation instructions will remain in effect until further notice.

Verification

Because each mandatory respondent in these investigations did not act to the best of their abilities to provide information requested by Commerce, and Commerce preliminarily determines each of the mandatory respondents to be uncooperative, we will not conduct verifications.

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with a preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of preliminary determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because Commerce preliminarily applied AFA to each mandatory respondent in these investigations, in accordance with section 776 of the Act, there are no calculations to disclose.

Public Comment

Interested parties are invited to comment on these preliminary determinations no later than 30 days after the date of publication of these preliminary determinations.[14] Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[15] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in these proceedings 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: (1) The party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) 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.

An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[16]

Final Determinations

Section 735(a)(1) of the Act and 19 CFR 351.210(b)(1) provide that Commerce will issue the final determination within 75 days after the date of its preliminary determination. Accordingly, Commerce will make its final determinations no later than 75 days after the signature date of these preliminary determinations.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of our affirmative preliminary determinations. If our final determinations are affirmative, the ITC will determine before the later of 120 days after the date of these preliminary determinations or 45 days after our final determinations whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

These determinations are issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigations

The scope of these investigations covers all forms and sizes of silicon metal, including silicon metal powder. Silicon metal contains at least 85.00 percent but less than 99.99 percent silicon, and less than 4.00 percent iron, by actual weight. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2804.61.0000) is excluded from the scope of these investigations.

Silicon metal is currently classifiable under subheadings 2804.69.1000 and 2804.69.5000 of the HTSUS. While the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope remains dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memoranda

[FR Doc. 2020–27316 Filed 12–10–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–428–848]

Forged Steel Fluid End Blocks From the Federal Republic of Germany: Final Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of forged steel fluid end blocks (fluid end blocks) from the Federal Republic of Germany (Germany).

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Joseph Dowling or Robert Palmer, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401

[14] *See* 19 CFR 351.309(c)(1)(i); *see* also 19 CFR 351.303 (for general filing requirements).

[15] *See* 19 CFR 351.309(d); *see* also 19 CFR 351.303 (for general filing requirements).

[16] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1646 or (202) 482–9068, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 26, 2020, Commerce published the *Preliminary Determination* of this countervailing duty (CVD) investigation, which also aligned the final determination of this CVD investigation with the final determination in the companion antidumping duty investigation of fluid end blocks from Germany.[1] A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum which is hereby adopted by this notice.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov*. In addition, a complete version of the Final Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Period of Investigation

The period of investigation (POI) is January 1, 2018 through December 31, 2018.

Scope of the Investigation

The products covered by this investigation are fluid end blocks from Germany. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation'' in Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination*. *See* Appendix I for the final scope of the investigation.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs by parties in this investigation are discussed in the Issues and Decision Memorandum. A list of the issues raised by parties raised is attached to this notice at Appendix II.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce 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.[5] For a full description of the methodology underlying our final determination, *see* the Issues and Decision Memorandum.

Verification

Commerce normally verifies information relied upon in making its final determination, pursuant to section 782(i)(1) of the Tariff Act of 1930, as amended (the Act). However, during the course of this investigation, we were unable to conduct on-site verification due to travel restrictions.[6] Consistent with section 776(a)(2)(D) of the Act, Commerce relied on the information submitted on the record, which we used in making our *Preliminary Determination* and Post-Preliminary Determination,[7] as facts available in making our final determination.

All-Others Rate

We continue to calculate the all-others rate using a weighted average of the individual estimated subsidy rates calculated for the examined respondents (BGH Edelstahl Siegen GmbH and Schmiedewerke Gröditz GmbH) using each company's publicly ranged data for the value of their exports of subject merchandise to the United States.[8]

Final Determination

Commerce determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate (percent)
BGH Edelstahl Siegen GmbH[9]	5.86
Schmiedewerke Gröditz GmbH[10]	6.71
voestalpine Bohler Group[11]	14.81
All Others[12]	6.29

Disclosure

We intend to disclose to parties in this proceeding the calculations performed for this final determination within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to sections 703(d)(1)(B) and (d)(2) of the Act, Commerce instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise from Germany that were

[1] *See Forged Steel Fluid End Blocks from the Federal Republic of Germany: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination,* 85 FR 31454 (May 26, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Forged Steel Fluid End Blocks from Federal Republic of Germany,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum to the File, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

[5] *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.

[6] *See* Memorandum, ''Cancellation of Verification and Establishment of the Briefing Schedule,'' dated October 23, 2020.

[7] *See* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fluid End Blocks from the Federal Republic of Germany: Post-Preliminary Analysis,'' dated October 26, 2020 (Post-Preliminary Determination).

[8] *See Preliminary Determination,* 85 FR at 31454.

[9] As discussed in the Preliminary Decision Memorandum, Commerce found the following companies to be cross-owned with BGH Edelstahl Siegen GmbH: Boschgotthardshütte O. Breyer GmbH, BGH Edelstahlwerke GmbH, Rohstoff-, Press- und Schneidbetrieb Siegen GmbH, and SRG Schrott und Recycling GmbH.

[10] As discussed in the Preliminary Decision Memorandum, Commerce found the following companies to be cross-owned with Schmiedewerke Gröditz GmbH: GMH Schmiedetechnik GmbH, Georgsmarienhütte Holding GmbH, and GHM Recycling GmbH.

[11] *See* Memorandum, ''AFA Calculation Memorandum for the Final Determination,'' dated December 7, 2020.

[12] For discussion of the calculation of this rate, *see* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fluid End Blocks from the Federal Republic of Gemany: Final Determination Calculation of All Other's Rate,'' dated December 7, 2020.

entered or withdrawn from warehouse, for consumption on or after May 26, 2020, the date of publication of the *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, effective September 23, 2020, we instructed CBP to discontinue the suspension of liquidation of all entries of subject merchandise, but to continue the suspension of liquidation of all entries of subject merchandise between May 26, 2020 and September 22, 2020.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a CVD order and require a cash deposit of estimated countervailing duties for entries of subject merchandise in the amounts indicated above, in accordance with section 706(a) of the Act. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated, and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, Commerce will notify the ITC of its final affirmative determination that countervailable subsidies are being provided to producers and exporters of fluid end blocks from Germany. As Commerce's final determination is affirmative, in accordance with section 705(b) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury. In addition, we are making available to the ITC all non-privileged and nonproprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Notification Regarding Administrative Protective Orders

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

[13] Erneuerbare-Energien-Gesetz (EEG) or Renewable Energy Resources Act.

[14] Combined Heat and Power Act or Kraft-Wärme-Kopplungsgesetz.

[FR Doc. 2020–27335 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–891; A–580–904]

Forged Steel Fittings From India and the Republic of Korea: Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing antidumping duty orders on forged steel fittings from India and the Republic of Korea (Korea).

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Caitlin Monks, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2670.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(c), on October 19, 2020, Commerce published its final affirmative determinations in the less-than-fair-value (LTFV) investigations of forged steel fittings from India and Korea.[1] On November 25, 2020, the ITC notified Commerce of its final affirmative determinations that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act, by reason of LTFV imports of forged steel fittings from India and Korea.[2]

Scope of the Orders

The products covered by these orders are forged steel fittings from India and Korea. For a complete description of the scope of the orders, *see* the Appendix to this notice.

Antidumping Duty Orders

On November 25, 2020, in accordance with sections 735(b)(1)(A)(i) and 735(d) of the Act, the ITC notified Commerce of its final determinations in this investigation, in which it found that an industry in the United States is materially injured by reason of imports of forged steel fittings from India and Korea.[3] Therefore, in accordance with section 735(c)(2) of the Act, Commerce is issuing these antidumping duty orders. Because the ITC determined that imports of forged steel fittings from India and Korea are materially injuring a U.S. industry, unliquidated entries of such merchandise from India and Korea, entered or withdrawn from warehouse for consumption, are subject to the assessment of antidumping duties.

As a result of the ITC's final affirmative determinations, in accordance with section 736(a)(1) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price or constructed export price of the merchandise, for all relevant entries of forged steel fittings from India. Antidumping duties will be assessed on unliquidated entries of forged steel fittings from India and Korea entered, or withdrawn from warehouse, for consumption on or after May 28, 2020, the date of publication of the *Preliminary Determinations,*[4] but will not include entries occurring after the expiration of the provisional measures period and before publication of the ITC's final injury determination, as further described below.

Continuation of Suspension of Liquidation

In accordance with section 736 of the Act, Commerce will instruct CBP to continue to suspend liquidation of all relevant entries of forged steel fittings from India and Korea, as described in the Appendix of this notice, which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register**. These instructions suspending liquidation will remain in effect until further notice. Because the rate for Shakti Forge Industries Pvt. Ltd (Shakti) [5] is zero, we will not instruct CBP to suspend liquidation of entries of subject merchandise produced and exported by Shakti or to require cash deposits on such entries. Entries of subject merchandise exported to the United States by any other producer/exporter combination, *e.g.,* merchandise produced by a third party and exported by Shakti, or produced by Shakti and exported by a third party, are not entitled to this exclusion from suspension of liquidation and are subject to the applicable cash deposit rates noted below.

Commerce will also instruct CBP to require cash deposits equal to the estimated weighted-average dumping margins included in the tables below. Accordingly, effective on the date of publication in the **Federal Register** of the notice of the ITC's final affirmative injury determinations, CBP will require, at the same time as importers would

[15] Concession Fee Ordinance (Konzessionsabgabenverordung or KAV) Relief.

[16] Energy Tax Act or Energiesteuergesetz (EnergieStG).

[17] Electricity Tax Act or Stromsteuergesetz (StromStG).

[1] *See Forged Steel Fittings from India: Final Affirmative Determination of Sales at Less Than Fair Value,* 85 FR 66306 (October 19, 2020); *see also Forged Steel Fittings from the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value,* 85 FR 66302 (October 19, 2020).

[2] *See* ITC's Letter, ''Notification of ITC Final Determinations,'' dated November 25, 2020.

[3] *See* ITC Notification; *see also* Forged Steel Fittings from India and Korea (Inv. Nos. 701–TA–631 and 731–TA–1463–1464 (Final), USITC Publication 5137, November 2020).

[4] *See Forged Steel Fittings from India: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value, Postponement of Final Determination, and Extension of Provisional Measures,* 85 FR 32007 (May 28, 2020); *see also Forged Steel Fittings from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value, Postponement of Final Determination, and Extension of Provisional Measures,* 85 FR 32010 (May 28, 2020); (*Preliminary Determinations*).

[5] Commerce has determined Shakti Forge Industries Pvt. Ltd and its affiliate Shakti Forge to constitute a single entity. *See* Preliminary Decision Memorandum.

normally deposit estimated duties on subject merchandise, a cash deposit equal to the estimated weighted-average dumping margins listed in the tables below. The all-others rate for each country applies to all producers or exporters not specifically listed.

Estimated Weighted-Average Dumping Margins

The estimated weighted-average dumping margins for each antidumping duty order are as follows:

INDIA

Exporter/producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offset(s)) (percent) [6]
Shakti Forge Industries Pvt. Ltd [7]	* 0.00	Not Applicable.
Nikoo Forge Pvt. Ltd.	** 293.40	290.88.
Pan International	** 293.40	290.88.
Disha Auto Components Pvt. Ltd	** 293.40	290.88.
Dynamic Flow Products	** 293.40	290.88.
Kirtanlal Steel Pvt Ltd	** 293.40	290.88.
Metal Forgings Pvt Ltd	** 293.40	290.88.
Patton International Limited	** 293.40	290.88.
Sage Metals Limited	** 293.40	290.88.
Technotrak Engineers	** 293.40	290.88.
All Others	195.60	193.08.

* (*de minimis*).
** (adverse facts available (AFA)).

KOREA

Exporter/producer	Estimated weighted-average dumping margin (percent)
Samyoung Fitting Co., Ltd	17.08
Sandong Metal Industry Co., Ltd	** 198.38
ZEOtech Co., Ltd	** 198.38
Pusan Coupling Corporation	** 198.38
Shinchang Industries	** 198.38
Shinwoo Tech	** 198.38
Titus Industrial Korea Co, Ltd	** 198.38
All Others	17.08

** AFA.

Provisional Measures

Section 733(d) of the Act states that suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than four months, except that Commerce may extend the four-month period to no more than six months at the request of exporters representing a significant portion of exports of the subject merchandise. At the request of exporters that account for a significant proportion of forged steel fittings from India and Korea, Commerce extended the four-month period to six months in the *Preliminary Determinations,* published on May 28, 2020. Therefore, the extended provisional measures period, beginning on the date of publication of the *Preliminary Determinations,* ended on November 23, 2020. Pursuant to section 737(b) of the Act, the collection of cash deposits at the rates listed above will begin on the date of publication of the ITC's final injury determination.

Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of forged steel fittings from India and Korea entered, or withdrawn from warehouse, for consumption on or after November 24, 2020, the first day provisional measures were no longer in effect, until and through the day preceding the date of publication of the ITC's final injury determinations in the **Federal Register**.

Notifications to Interested Parties

This notice constitutes the antidumping duty orders with respect to forged steel fittings from India and Korea, pursuant to section 736(a) of the Act. Interested parties can find a list of antidumping duty orders currently in effect at *https://enforcement.trade.gov/stats/iastats1.html.*

These orders are issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: December 4, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Orders

The merchandise covered by these orders is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. Such fittings are made in a variety of shapes including, but not limited to, elbows, tees, crosses, laterals, couplings, reducers, caps, plugs, bushings, unions (including hammer unions), and outlets. Forged steel fittings are covered regardless of end finish, whether threaded, socket-weld or other end connections. The scope includes integrally reinforced forged branch outlet fittings, regardless of whether they have one or more ends that is a socket welding, threaded, butt welding end, or other end connections.

While these fittings are generally manufactured to specifications ASME B16.11, MSS SP–79, MSS SP–83, MSS–SP–97, ASTM A105, ASTM A350 and ASTM A182, the scope is not limited to fittings made to these specifications.

The term forged is an industry term used to describe a class of products included in applicable standards, and it does not reference an exclusive manufacturing process. Forged steel fittings are not manufactured from casings. Pursuant to the applicable standards, fittings may also be machined from bar stock or machined from seamless pipe and tube.

All types of forged steel fittings are included in the scope regardless of nominal pipe size (which may or may not be expressed in inches of nominal pipe size), pressure class rating (expressed in pounds of pressure, *e.g.,* 2,000 or 2M; 3,000 or 3M;

[6] *See* Memorandum, ''Final Countervailing Duty Determination Calculations for Shakti Forge Industries Pvt. Ltd. and Shakti Forge,'' dated October 13, 2020.

[7] Commerce has determined Shakti Forge Industries Pvt. Ltd and its affiliate Shakti Forge to constitute a single entity. *See* Preliminary Decision Memorandum.

6,000 or 6M; 9,000 or 9M), wall thickness, and whether or not heat treated.

Excluded from this scope are all fittings entirely made of stainless steel. Also excluded are flanges, nipples, and all fittings that have a maximum pressure rating of 300 pounds per square inch/PSI or less.

Also excluded from the scope are fittings certified or made to the following standards, so long as the fittings are not also manufactured to the specifications of ASME B16.11, MSS SP–79, MSS SP–83, MSS SP–97, ASTM A105, ASTM A350 and ASTM A182:

- American Petroleum Institute (API) 5CT, API 5L, or API 11B;
- American Society of Mechanical Engineers (ASME) B16.9;
- Manufacturers Standardization Society (MSS) SP–75;
- Society of Automotive Engineering (SAE) J476, SAE J514, SAE J516, SAE J517, SAE J518, SAE J1026, SAE J1231, SAE J1453, SAE J1926, J2044 or SAE AS 35411;
- Hydraulic hose fittings (*e.g.,* fittings used in high pressure water cleaning applications, in the manufacture of hydraulic engines, to connect rubber dispensing hoses to a dispensing nozzle or grease fitting) made to ISO 12151–1, 12151–2, 12151–3, 12151–4, 12151–5, or 12151–6;
- Underwriter's Laboratories (UL) certified electrical conduit fittings;
- ASTM A153, A536, A576, or A865;
- Casing conductor connectors made to proprietary specifications;
- Machined steel parts (*e.g.,* couplers) that are not certified to any specifications in this scope description and that are not for connecting steel pipes for distributing gas and liquids;
- Oil country tubular goods (OCTG) connectors (*e.g.,* forged steel tubular connectors for API 5L pipes or OCTG for offshore oil and gas drilling and extraction);
- Military Specification (MIL) MIL–C–4109F and MIL–F–3541; and
- International Organization for Standardization (ISO) ISO6150–B.

Also excluded from the scope are assembled or unassembled hammer unions that consist of a nut and two subs. To qualify for this exclusion, the hammer union must meet each of the following criteria: (1) The face of the nut of the hammer union is permanently marked with one of the following markings: ''FIG 100,'' ''FIG 110,'' ''FIG 100C,'' ''FIG 200,'' ''FIG 200C,'' ''FIG 201,'' ''FIG 202,'' ''FIG 206,'' ''FIG 207,'' ''FIG 211,'' ''FIG 300,'' ''FIG 301,'' ''FIG 400,'' ''FIG 600,'' ''FIG 602,'' ''FIG 607,'' ''FIG 1002,'' ''FIG 1003,'' ''FIG 1502,'' ''FIG 1505,'' ''FIG 2002,'' or ''FIG 2202''; (2) the hammer union does not bear any of the following markings: ''Class 3000,'' ''Class 3M,'' ''Class 6000,'' ''Class 6M,'' ''Class 9000,'' or ''Class 9M''; and (3) the nut and both subs of the hammer union are painted.

Also excluded from the scope are subs or wingnuts made to ASTM A788, marked with ''FIG 1002,'' ''FIG 1502,'' or ''FIG 2002,'' and with a pressure rating of 10,000 PSI or greater. These parts are made from AISI/SAE 4130, 4140, or 4340 steel and are 100 percent magnetic particle inspected before shipment.

Also excluded from the scope are tee, elbow, cross, adapter (or ''crossover''), blast joint (or ''spacer''), blind sub, swivel joint and pup joint which have wing nut or not. To qualify for this exclusion, these products must meet each of the following criteria: (1) Manufacturing and Inspection standard is API 6A or API 16C; and, (2) body or wing nut is permanently marked with one of the following markings: ''FIG 2002,'' ''FIG 1502,'' ''FIG 1002,'' ''FIG 602,'' ''FIG 206,'' or ''FIG any other number'' or MTR (Material Test Report) shows these FIG numbers.

To be excluded from the scope, products must have the appropriate standard or pressure markings and/or be accompanied by documentation showing product compliance to the applicable standard or pressure, *e.g.,* ''API 5CT'' mark and/or a mill certification report.

Subject carbon and alloy forged steel fittings are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) 7307.92.3010, 7307.92.3030, 7307.92.9000, 7307.99.1000, 7307.99.3000, 7307.99.5045, and 7307.99.5060. They may also be entered under HTSUS 7307.93.3010, 7307.93.3040, 7307.93.6000, 7307.93.9010, 7307.93.9040, 7307.93.9060, and 7326.19.0010.

The HTSUS subheadings and specifications are provided for convenience and customs purposes; the written description of the scope is dispositive.

[FR Doc. 2020–27304 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–892]

Forged Steel Fittings from India: Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing a countervailing duty order on forged steel fittings from India.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Lauren Caserta, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4737.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 705(d) of the Tariff Act of 1930, as amended (the Act), on October 20, 2020, Commerce published its affirmative final determination that countervailable subsidies are being provided to producers and exporters of forged steel fittings from India.[1] On November 25, 2020, the ITC notified Commerce of its affirmative determination that an industry in the United States is materially injured within the meaning of section 705(b)(1)(A)(i) of the Act, by reason of subsidized imports of subject merchandise from India.[2]

Scope of the Order

The scope of this order covers forged steel fittings from India. For a complete description of the scope, *see* the Appendix to this notice.

Countervailing Duty Order

On November 25, 2020, in accordance with sections 705(b)(1)(A)(i) and 705(d) of the Act, the ITC notified Commerce of its final determination in this investigation, in which it found that an industry in the United States is materially injured by reason of imports of forged steel fittings from India. Therefore, in accordance with section 705(c)(2) of the Act, Commerce is issuing this countervailing duty order. Because the ITC determined that imports of forged steel fittings from India are materially injuring a U.S. industry, unliquidated entries of such merchandise from India, entered or withdrawn from warehouse for consumption, are subject to the assessment of countervailing duties.

Therefore, in accordance with section 706(a) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, countervailing duties for all relevant entries of forged steel fittings from India. Countervailing duties will be assessed on unliquidated entries of forged steel fittings from India entered, or withdrawn from warehouse, for consumption on or after March 30, 2020, the date of publication of the *Preliminary Determination,*[3] but will not include entries occurring after the expiration of the provisional measures period and before publication of the ITC's final injury determination, as further described below.

Suspension of Liquidation

In accordance with section 706 of the Act, Commerce will instruct CBP to

[1] *See Forged Steel Fittings from India: Final Affirmative Countervailing Duty Determination,* 85 FR 66535 (October 20, 2020).

[2] *See* ITC's Letter, ''Notification of ITC Final Determinations,'' dated November 25, 2020.

[3] See Forged Steel Fittings from India: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination, 85 FR 17536 (March 30, 2020) (Preliminary Determination).

reinstitute the suspension of liquidation of forged steel fittings from India. We will also instruct CBP to require, pursuant to section 706(a)(1) of the Act, countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rates for the subject merchandise. These instructions suspending liquidation will remain in effect until further notice.

Company	Subsidy rate *ad valorem* (percent)
Shakti Forge Industries Pvt. Ltd[4]	2.64
Nikoo Forge Pvt. Ltd., Pan International, Patton International Limited, Sage Metals Limited, Kirtanlal Steel Private Limited, Disha Auto Components Private Limited, Dynamic Flow Products, Sara Sae Private Limited, and Parveen Industries Private Limited	300.77
All Others	2.64

Provisional Measures

Section 703(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months. In the underlying investigation, Commerce published the *Preliminary Determination* on March 30, 2020. Therefore, the four-month period beginning on the date of the publication of the *Preliminary Determinations* ended on July 27, 2020.

In accordance with section 703(d) of the Act and our practice, we instructed CBP to terminate the suspension of liquidation and to liquidate, without regard to countervailing duties, unliquidated entries of forged steel fittings from India entered, or withdrawn from warehouse, for consumption on or after July 28, 2020, the day after the date the provisional measures expired, until and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will resume on the date of publication of the ITC's final determination in the **Federal Register**.

Notifications to Interested Parties

This notice constitutes the countervailing duty order with respect to forged steel fittings from India pursuant to sections 706(a) of the Act. Interested parties can find a list of countervailing duty orders currently in effect at *https://enforcement.trade.gov/stats/iastats1.html.*

This order is issued and published in accordance with section 706(a) of the Act and 19 CFR 351.211(b).

Dated: December 4, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Order

The merchandise covered by this order is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. Such fittings are made in a variety of shapes including, but not limited to, elbows, tees, crosses, laterals, couplings, reducers, caps, plugs, bushings, unions (including hammer unions), and outlets. Forged steel fittings are covered regardless of end finish, whether threaded, socket-weld or other end connections. The scope includes integrally reinforced forged branch outlet fittings, regardless of whether they have one or more ends that is a socket welding, threaded, butt welding end, or other end connections.

While these fittings are generally manufactured to specifications ASME B16.11, MSS SP–79, MSS SP–83, MSS–SP–97, ASTM A105, ASTM A350 and ASTM A182, the scope is not limited to fittings made to these specifications.

The term forged is an industry term used to describe a class of products included in applicable standards, and it does not reference an exclusive manufacturing process. Forged steel fittings are not manufactured from casings. Pursuant to the applicable standards, fittings may also be machined from bar stock or machined from seamless pipe and tube.

All types of forged steel fittings are included in the scope regardless of nominal pipe size (which may or may not be expressed in inches of nominal pipe size), pressure class rating (expressed in pounds of pressure, *e.g.,* 2,000 or 2M; 3,000 or 3M; 6,000 or 6M; 9,000 or 9M), wall thickness, and whether or not heat treated.

Excluded from this scope are all fittings entirely made of stainless steel. Also excluded are flanges, nipples, and all fittings that have a maximum pressure rating of 300 pounds per square inch/PSI or less.

Also excluded from the scope are fittings certified or made to the following standards, so long as the fittings are not also manufactured to the specifications of ASME B16.11, MSS SP–79, MSS SP–83, MSS SP–97, ASTM A105, ASTM A350 and ASTM A182:

- American Petroleum Institute (API) 5CT, API 5L, or API 11B;
- American Society of Mechanical Engineers (ASME) B16.9;
- Manufacturers Standardization Society (MSS) SP–75;
- Society of Automotive Engineering (SAE) J476, SAE J514, SAE J516, SAE J517, SAE J518, SAE J1026, SAE J1231, SAE J1453, SAE J1926, J2044 or SAE AS 35411;
- Hydraulic hose fittings (*e.g.,* fittings used in high pressure water cleaning applications, in the manufacture of hydraulic engines, to connect rubber dispensing hoses to a dispensing nozzle or grease fitting) made to ISO 12151–1, 12151–2, 12151–3, 12151–4, 12151–5, or 12151–6;
- Underwriter's Laboratories (UL) certified electrical conduit fittings;
- ASTM A153, A536, A576, or A865;
- Casing conductor connectors made to proprietary specifications;
- Machined steel parts (*e.g.,* couplers) that are not certified to any specifications in this scope description and that are not for connecting steel pipes for distributing gas and liquids;
- Oil country tubular goods (OCTG) connectors (*e.g.,* forged steel tubular connectors for API 5L pipes or OCTG for offshore oil and gas drilling and extraction);
- Military Specification (MIL) MIL–C–4109F and MIL–F–3541; and
- International Organization for Standardization (ISO) ISO6150–B.

Also excluded from the scope are assembled or unassembled hammer unions that consist of a nut and two subs. To qualify for this exclusion, the hammer union must meet each of the following criteria: (1) The face of the nut of the hammer union is permanently marked with one of the following markings: ''FIG 100,'' ''FIG 110,'' ''FIG 100C,'' ''FIG 200,'' ''FIG 200C,'' ''FIG 201,'' ''FIG 202,'' ''FIG 206,'' ''FIG 207,'' ''FIG 211,'' ''FIG 300,'' ''FIG 301,'' ''FIG 400,'' ''FIG 600,'' ''FIG 602,'' ''FIG 607,'' ''FIG 1002,'' ''FIG 1003,'' ''FIG 1502,'' ''FIG 1505,'' ''FIG 2002,'' or ''FIG 2202''; (2) the hammer union does not bear any of the following markings: ''Class 3000,'' ''Class 3M,'' ''Class 6000,'' ''Class 6M,'' ''Class 9000,'' or ''Class 9M''; and (3) the nut and both subs of the hammer union are painted.

Also excluded from the scope are subs or wingnuts made to ASTM A788, marked with ''FIG 1002,'' ''FIG 1502,'' or ''FIG 2002,'' and with a pressure rating of 10,000 PSI or greater. These parts are made from AISI/SAE 4130, 4140, or 4340 steel and are 100 percent magnetic particle inspected before shipment.

Also excluded from the scope are tee, elbow, cross, adapter (or ''crossover''), blast joint (or ''spacer''), blind sub, swivel joint and pup joint which have wing nut or not. To qualify for this exclusion, these products must meet each of the following criteria: (1) Manufacturing and Inspection standard is API 6A or API 16C; and, (2) body or wing nut is permanently marked with one of the following markings: ''FIG 2002,'' ''FIG 1502,'' ''FIG 1002,'' ''FIG 602,'' ''FIG 206,'' or ''FIG any other number'' or MTR (Material Test Report) shows these FIG numbers.

To be excluded from the scope, products must have the appropriate standard or pressure markings and/or be accompanied by documentation showing product compliance to the applicable standard or pressure, *e.g.,* ''API 5CT'' mark and/or a mill certification report.

Subject carbon and alloy forged steel fittings are normally entered under Harmonized Tariff Schedule of the United

[4] Commerce has found Shakti Forge Industries Pvt. Ltd. and Shakti Forge to be cross-owned, pursuant to 19 CFR 351.525(b)(6)(vi).

States (HTSUS) 7307.92.3010, 7307.92.3030, 7307.92.9000, 7307.99.1000, 7307.99.3000, 7307.99.5045, and 7307.99.5060. They may also be entered under HTSUS 7307.93.3010, 7307.93.3040, 7307.93.6000, 7307.93.9010, 7307.93.9040, 7307.93.9060, and 7326.19.0010.

The HTSUS subheadings and specifications are provided for convenience and customs purposes; the written description of the scope is dispositive.

[FR Doc. 2020–27305 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–847]

Forged Steel Fluid End Blocks From the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that imports of forged steel fluid end blocks (fluid end blocks) from the Federal Republic of Germany (Germany) are being, or are likely to be, sold in the United States at less than fair value (LTFV) for the period of investigation October 1, 2018 through September 30, 2019.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Alexis Cherry or Katherine Johnson, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0607 or (202) 482–4929, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 23, 2020, Commerce published in the **Federal Register** its preliminary affirmative determination in the LTFV investigation of fluid end blocks from Germany, in which we also postponed the final determination until December 7, 2020.[1] We invited interested parties to comment on the *Preliminary Determination.* A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.[2]

Scope of the Investigation

The products covered by this investigation are fluid end blocks from Germany. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Decision Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination.* See Appendix I for the final scope of the investigation.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of the issues addressed in the Issues and Decision Memorandum is attached to this notice at Appendix II. 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.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Verification

Commerce was unable to conduct on-site verification of the information relied upon in making its final determination in this investigation as provided for in section 782(i) of the Tariff Act of 1930, as amended (the Act). Accordingly, we took additional steps in lieu of on-site verification and requested additional documentation and information.[5]

Changes Since the Preliminary Determination

Based on our analysis of the comments received and our findings related to our request for information in lieu of verification, we made certain changes to the margin calculations. For a discussion of these changes, *see* the ''Margin Calculations'' section of the Issues and Decision Memorandum.

Use of Adverse Facts Available

The respondents Schmiedewerke Groditz GmbH (SWG) and voestalpine Bohler Group (voestalpine) failed to cooperate in this investigation. Therefore, in the *Preliminary Determination,* pursuant to sections 776(a) and (b) of the Act, Commerce assigned SWG and voestalpine a rate based on adverse facts available (AFA). There is no new information on the record that would cause us to revisit our determination to apply AFA to these companies. Accordingly, we continue to find that the application of AFA pursuant to sections 776(a) and (b) of the Act is warranted with respect to SWG and voestalpine. Commerce has assigned to SWG's and voestalpine's exports of the subject merchandise the rate of 70.84 percent, which is BGH's highest transaction-specific margin.[6] Because this rate is not secondary information, but rather is based on information obtained in the course of the investigation, Commerce need not corroborate this rate pursuant to section 776(c) of the Act.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that the estimated weighted-average dumping margin for all other producers and exporters not individually investigated shall be equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers

[1] *See Forged Steel Fluid End Blocks from the Federal Republic of Germany: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 85 FR 44513 (July 23, 2020) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from the Federal Republic of Germany,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

[5] *See* Commerce's Letter to BGH, ''Less-Than-Fair-Value Investigation of Forged Steel Fluid End Blocks from the Federal Republic of Germany,'' dated October 20, 2020; *see also* BGH's Letter, ''Forged Steel Fluid End Blocks from Germany: Response to Questionnaire in Lieu of Performing On-Site Verification,'' dated October 28, 2020.

[6] *See* Issues and Decision Memorandum.

individually investigated excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act. Commerce assigned a rate based entirely on facts available to SWG and voestalpine. Therefore, the only rate that is not zero, *de minimis,* or based entirely on facts otherwise available is the rate calculated for BGH. Consequently, the rate calculated for BGH is also assigned as the rate for all other producers and exporters.

Final Determination

The final estimated weighted-average dumping margins are as follows:

Exporter/producer	Estimated weighted-average dumping margin (percent)
BGH Edelstahl Siegen GmbH	[7] 3.82
Schmiedewerke Groditz GmbH ..	** 70.84
voestalpine Bohler Group	** 70.84
All Others	3.82

** Adverse Facts Available.

Disclosure

We intend to disclose the calculations performed in this final determination within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of fluid end blocks from Germany, as described in Appendix I of this notice, which are entered, or withdrawn from warehouse, for consumption on or after July 23, 2020, the date of publication in the **Federal Register** of the affirmative *Preliminary Determination.*

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), we will instruct CBP to require a cash deposit for such entries of merchandise equal to the estimated weighted-average dumping margin as follows: (1) The cash deposit rate for the respondents listed above will be equal to the respondent-specific estimated weighted-average dumping margin determined in this final determination; (2) if the exporter is not a respondent identified above but the producer is, then the cash deposit rate will be equal to the respondent-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension-of-liquidation instructions will remain in effect until further notice.

While Commerce normally adjusts cash deposits for estimated antidumping (AD) duties by the amount of export subsidies countervailed in a companion CVD proceeding when CVD provisional measures are in effect, we have not adjusted the cash deposit rates listed above because Commerce found no countervailable export subsidies in the final determination of the companion CVD investigation.[8]

International Trade Commission Notification

In accordance with section 735(d) of the Act, we will notify the International Trade Commission (ITC) of the final affirmative determination of sales at LTFV. Because Commerce's final determination is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of fluid end blocks no later than 45 days after this final determination. If the ITC determines that such injury does not exist, this proceeding will be terminated, and all cash deposits posted will be refunded and suspension of liquidation will be lifted. If the ITC determines that such injury does exist, Commerce will issue an AD order directing CBP to assess, upon further instruction by Commerce, AD duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

Notification Regarding Administrative Protective Orders

This notice will serve as a final reminder to the parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of 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

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I—Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

[7] *See* Memorandum, ''Antidumping Duty Investigation of Forged Steel Fluid End Blocks from the Republic of Germany: Final Determination Margin Calculation for BGH Edelstahl Siegen GmbH,'' dated concurrently with, and hereby adopted by, this notice.

[8] *See* Forged Steel Fluid End Blocks from the Federal Republic of Germany: Final Affirmative Countervailing Duty Determination, and accompanying Issues and Decision Memorandum, dated December 7, 2020.

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II—List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–27331 Filed 12–10–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–116]

Forged Steel Fluid End Blocks From the People's Republic of China: Final Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of forged steel fluid end blocks (fluid end blocks) from the People's Republic of China (China).

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Jaron Moore or Janae Martin, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3640 or (202) 482–0238, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 26, 2020, Commerce published the *Preliminary Determination* of this countervailing duty (CVD) investigation, which also aligned the final determination of this CVD investigation with the final determination of the concurrent antidumping duty (AD) investigation.[1] A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum which is hereby adopted by this notice.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Final Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Period of Investigation

The period of investigation is January 1, 2018 through December 31, 2018.

Scope of the Investigation

The products covered by this investigation are fluid end blocks from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination. See* Appendix I for the final scope of the investigation.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs by parties in this investigation are discussed in the Issues and Decision Memorandum. A list of the issues raised by parties is attached to this notice at Appendix II.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce 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.[5] For a

[1] *See Forged Steel Fluid End Blocks from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination,* 85 FR 31457 (May 26, 2020) (*Preliminary Determination*).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Forged Steel Fluid End Blocks from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See* Memorandum to the File, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

[5] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E)

full description of the methodology underlying our final determination, *see* the Issues and Decision Memorandum.

In making this final determination, Commerce relied, in part, on facts available pursuant to section 776(a) of the Act. Additionally, as discussed in the Issues and Decision Memorandum, because one or more respondents did not act to the best of their ability in responding to our requests for information, we drew adverse inferences, where appropriate, in selecting from among the facts otherwise available, pursuant to section 776(b) of the Act.[6]

Verification

Commerce normally verifies information relied upon in making its final determination, pursuant to section 782(i)(1) of the Tariff Act of 1930, as amended (the Act). However, during the course of this investigation, we were unable to conduct on-site verification due to travel restrictions.[7] Consistent with section 776(a)(2)(D) of the Act, Commerce relied on the information submitted on the record, which we used in making our *Preliminary Determination* and Post-Preliminary Determination,[8] as facts available in making our final determination.

All-Others Rate

We continue to calculate the all-others rate using a weighted average of the individual estimated subsidy rates calculated for the examined respondents (Shanghai Qinghe Machinery Co., Ltd. and Nanjing Develop Advanced Manufacturing Co., Ltd.) using each company's publicly-ranged data for the value of their exports to the United States of subject merchandise.[9]

Final Determination

Commerce determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate *ad valorem* (percent)
Nanjing Develop Advanced Manufacturing Co., Ltd[10]	16.80
Shanghai Qinghe Machinery Co., Ltd[11]	19.88
China Machinery Industrial Products Co., Ltd	[12] 337.07
Anhui Tianyu Petroleum Equipment Manufacturing Co., Ltd	
CNCCC Sichuan Imp & Exp Co., Ltd	
GE Petroleum Equipment (Beijing) Co., Ltd	
Jiaxing Shenghe Petroleum Machinery Co., Ltd	
Ningbo Minmetals & Machinery Imp & Exp Co., Ltd	
Qingdao RT G&M Co., Ltd	
Shandong Fenghuang Foundry Co., Ltd	
Shandongshengjin Ruite Energy Equipment Co., Ltd (part of Shengli Oilfield R&T Group)	
Shanghai Baisheng Precision Machine	
Shanghai Boss Petroleum Equipment	
Shanghai CP Petrochemical and General Machinery Co., Ltd	
Suzhou Douson Drilling & Production Equipment Co., Ltd	
Zhangjiagang Haiguo New Energy Equipment Manufacturing Co., Ltd	
Anhui Yingliu Electromechanical Co., Ltd	
Daye Special Steel Co., Ltd, (Citic Specific Steel Group)	
Suzhou Fujie Machinery Co., Ltd., (Fujie Group)	
All Others	[13] 19.52

Disclosure

Commerce intends to disclose to interested parties the calculations and analysis performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of the publication of this notice in proceeding in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination* and pursuant to sections 703(d)(1)(B) and (d)(2) of the Act, we instructed 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 May 26, 2020, the date of publication of the *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, effective September 23, 2020, we instructed CBP to discontinue the suspension of liquidation of all entries at that time, but to continue the suspension of liquidation of all entries between May 26, 2020 and September 22, 2020.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a CVD order and require a cash deposit of estimated countervailing duties for entries of subject merchandise in the amounts indicated above, in accordance with section 706(a) of the Act. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated, and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, Commerce will notify the ITC of its final affirmative determination that countervailable subsidies are being provided to producers and exporters of fluid end blocks from China. As Commerce's final determination is affirmative, in accordance with section 705(b) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury. In addition, we are making available to the ITC all non-privileged and nonproprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[6] *See* Issues and Decision Memorandum at ''Use of Facts Otherwise Available and Adverse Inferences'' section.

[7] *See* Memorandum, ''Cancellation of Verification and Setting of Briefing Schedule,'' dated October 5, 2020.

[8] *See* Memorandum, ''Post-Preliminary Analysis of Countervailing Duty Investigation: Forged Steel Fluid End Blocks from the People's Republic of China,'' dated September 18, 2020 (Post-Preliminary Determination).

[9] *See Preliminary Determination,* 85 FR 31457; *see also* Memorandum, ''AFA Calculation Memorandum for the Final Determination in the Investigation of Forged Steel Fluid End Blocks from the People's Republic of China,'' dated December 7, 2020.

[10] Commerce has found the following company to be cross-owned with Nanjing Develop Advanced Manufacturing Co., Ltd.: Nanjing Develop Industrial and Commercial Co., Ltd.

[11] Commerce has found the following companies to be cross-owned with Shanghai Qinghe Machinery Co., Ltd.: Haimo Technologies Group Corp. and Lanzhou Chenglin Oil Drilling Equipment Co., Ltd.

[12] For discussion of the calculation of this rate, *see* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fluid End Blocks from the People's Republic of China: Final Determination Calculation of AFA Rate,'' dated December 7, 2020.

[13] For discussion of the calculation of this rate, *see* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fluid End Blocks from the People's Republic of China: Final Determination Calculation of All-Other's Rate,'' dated December 7, 2020.

Notification Regarding Administrative Protective Orders

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffery I. Kessler,

Assistant Secretary for Enforcement and Compliance.

APPENDIX I

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

APPENDIX II

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2020–27330 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–841]

Forged Steel Fluid End Blocks from Italy: Final Affirmative Countervailing Duty Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of forged steel fluid end blocks (fluid end blocks) from Italy.

DATES: Applicable December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Nicholas Czajkowski or Konrad Ptaszynski, 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) 482–1395 or (202) 482–6187, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 26, 2020, Commerce published the *Preliminary Determination* of this countervailing duty (CVD) investigation, which also aligned the final determination of this CVD investigation with the final determination in the companion antidumping duty investigation of fluid end blocks from Italy.[1]

A summary of the events that occurred since Commerce published the *Preliminary Determination,* as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum which is hereby adopted by this notice.[2] The Issues and Decision Memorandum is a public document and

[1] *See Forged Steel Fluid End Blocks from Italy: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination,* 85 FR 31460 (May 26, 2020) (*Preliminary Determination*).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Fluid End Blocks from Italy,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

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 Final Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Period of Investigation

The period of investigation is January 1, 2018 through December 31, 2018.

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks from Italy. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

During the course of this investigation, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Decision Memorandum to address these comments.[3] We received comments from interested parties on the Preliminary Scope Memorandum, which we address in the Final Scope Decision Memorandum, dated concurrently with, and hereby adopted by, this final determination.[4] Commerce is not modifying the scope language as it appeared in the *Preliminary Determination. See* Appendix I for the final scope of the investigation.

Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs and parties in this investigation are discussed in the Issues and Decision Memorandum. A list of the issues raised by parties raised is attached to this notice at Appendix II.

Methodology

Commerce conducted this investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, Commerce 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.[5] For a full description of the methodology underlying our final determination, *see* the Issues and Decision Memorandum.

Verification

Commerce normally verifies information relied upon in making its final determination, pursuant to section 782(i)(1) of the Tariff Act of 1930, as amended (the Act). However, during the course of this investigation, we were unable to conduct on-site verification due to travel restrictions.[6] Consistent with section 776(a)(2)(D) of the Act, Commerce relied on the information submitted on the record, which we used in making our *Preliminary Determination* and Post-Preliminary Determination,[7] as facts available in making our final determination.

All-Others Rate

We continue to calculate the all-others rate using a weighted average of the individual estimated subsidy rates calculated for the examined respondents (Lucchini Mame Forge S.p.A and Metalcam S.p.A) using each company's publicly-ranged data for the value of their exports to the United States of subject merchandise.[8]

Final Determination

Commerce determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate *ad valorem* (percent)
Lucchini Mame Forge S.p.A.	4.76
Metalcam S.p.A.	3.12
All Others	3.52
Companies Subject to AFA (non-respondent companies): Forge Mochieri S.p.A.; Imer International S.p.A.; Galperti Group, Mimest S.p.A.; P.Technologies S.r.L	44.86

Disclosure

Commerce intends to disclose to interested parties its calculations and analysis performed in this final determination within five days of its public announcement, or if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Continuation of Suspension of Liquidation

As a result of our *Preliminary Determination,* and pursuant to sections 703(d)(1)(B) and (d)(2) of the Act, Commerce instructed U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise under consideration from Italy that were entered or withdrawn from warehouse, for consumption on or after May 26, 2020, the date of publication of the *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, effective September 23, 2020, we instructed CBP to discontinue the suspension of liquidation of all entries at that time, but to continue the suspension of liquidation of all entries between May 26, 2020 and September 22, 2020.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we will issue a CVD order and require a cash deposit of estimated countervailing duties for such entries of subject merchandise in the amounts indicated above, in accordance with section 706(a) of the Act. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated, and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, Commerce will notify the ITC of its final affirmative determination that countervailable subsidies are being provided to producers and exporters of fluid end blocks from India. As Commerce's final determination is affirmative, in accordance with section 705(b) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury. In addition, we are making available to the ITC all non-privileged and nonproprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the

[3] *See* Memorandum, '' Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated May 18, 2020 (Preliminary Scope Decision Memorandum).

[4] *See* Memorandum, ''Forged Steel Fluid End Blocks from the Federal Republic of Germany, India, Italy, and the People's Republic of China: Scope Comments Decision Memorandum for the Final Determinations,'' dated December 7, 2020 (Final Scope Decision Memorandum).

[5] *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.

[6] *See* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fittings from India: Verification and Schedule for Submission of Case and Rebuttal Briefs,'' dated August 3, 2020.

[7] *See* Memorandum, ''Countervailing Duty Investigation of Forged Steel Fluid End Blocks from Italy: Post-Preliminary Analysis,'' dated August 11, 2020 (Post-Preliminary Determination).

[8] *See Preliminary Determination,* 85 FR at 31462.

ITC confirms that it will not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

Notification Regarding Administrative Protective Orders

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to the APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This determination is issued and published pursuant to sections 705(d) and 771(i) of the Act and 19 CFR 351.210(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The products covered by this investigation are forged steel fluid end blocks (fluid end blocks), whether in finished or unfinished form, and which are typically used in the manufacture or service of hydraulic pumps.

The term ''forged'' is an industry term used to describe the grain texture of steel resulting from the application of localized compressive force. Illustrative forging standards include, but are not limited to, American Society for Testing and Materials (ASTM) specifications A668 and A788.

For purposes of this investigation, the term ''steel'' denotes metal containing the following chemical elements, by weight: (i) Iron greater than or equal to 60 percent; (ii) nickel less than or equal to 8.5 percent; (iii) copper less than or equal to 6 percent; (iv) chromium greater than or equal to 0.4 percent, but less than or equal to 20 percent; and (v) molybdenum greater than or equal to 0.15 percent, but less than or equal to 3 percent. Illustrative steel standards include, but are not limited to, American Iron and Steel Institute (AISI) or Society of Automotive Engineers (SAE) grades 4130, 4135, 4140, 4320, 4330, 4340, 8630, 15–5, 17–4, F6NM, F22, F60, and XM25, as well as modified varieties of these grades.

The products covered by this investigation are: (1) Cut-to-length fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) of 11 inches (279.4 mm) to 75 inches (1,905.0 mm); and (2) strings of fluid end blocks with an actual height (measured from its highest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), an actual width (measured from its widest point) of 8 inches (203.2 mm) to 40 inches (1,016.0 mm), and an actual length (measured from its longest point) up to 360 inches (9,144.0 mm).

The products included in the scope of this investigation have a tensile strength of at least 70 KSI (measured in accordance with ASTM A370) and a hardness of at least 140 HBW (measured in accordance with ASTM E10).

A fluid end block may be imported in finished condition (*i.e.,* ready for incorporation into a pump fluid end assembly without further finishing operations) or unfinished condition (*i.e.,* forged but still requiring one or more finishing operations before it is ready for incorporation into a pump fluid end assembly). Such finishing operations may include: (1) Heat treating; (2) milling one or more flat surfaces; (3) contour machining to custom shapes or dimensions; (4) drilling or boring holes; (5) threading holes; and/or (6) painting, varnishing, or coating.

Excluded from the scope of this investigation are fluid end block assemblies which (1) include (a) plungers and related housings, adapters, gaskets, seals, and packing nuts, (b) valves and related seats, springs, seals, and cover nuts, and (c) a discharge flange and related seals, and (2) are otherwise ready to be mated with the ''power end'' of a hydraulic pump without the need for installation of any plunger, valve, or discharge flange components, or any other further manufacturing operations.

The products included in the scope of this investigation may enter under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7218.91.0030, 7218.99.0030, 7224.90.0015, 7224.90.0045, 7326.19.0010, 7326.90.8688, or 8413.91.9055. While these HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the investigation is dispositive.

Appendix II

List of Topics Discussed in the Final Decision Memorandum

[FR Doc. 2020–27336 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–910]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea: 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 seamless carbon and alloy steel standard, line, and pressure pipe (seamless pipe) from the Republic of Korea (Korea). 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 11, 2020.

FOR FURTHER INFORMATION CONTACT: Moses Song or Natasia Harrison, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7885 or (202) 482–1240, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 703(b) of the Tariff Act of 1930, as amended

(the Act). Commerce published the notice of initiation of this investigation on August 4, 2020.[1] On September 2, 2020, Commerce postponed the preliminary determination of this investigation to December 7, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics 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.

Scope of the Investigation

The products covered by this investigation are seamless pipe from Korea. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the *Preamble* to Commerce's regulations,[4] we set aside a period of time, as stated in the *Initiation Notice,* for parties to raise issues regarding product coverage (*i.e.,* scope).[5] We received comments concerning the scope of the antidumping duty (AD) and countervailing duty (CVD) investigations of seamless pipe as it appeared in the *Initiation Notice.* We are currently evaluating the scope comments filed by the interested parties. We intend to issue our preliminary decision regarding the scope of this and the companion AD and CVD investigations no later than February 3, 2021, the deadline for the preliminary determinations in the companion AD investigations with respect to Korea, Russia, and Ukraine.[6] We will issue a final scope decision after considering any relevant comments submitted in case and rebuttal briefs.[7]

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.[8]

Commerce notes that, in making these findings, it relied, in part, on facts available and, because it finds that the respondent did not act to the best of its ability to respond to Commerce's requests for information, Commerce drew an adverse inference where appropriate in selecting from among the facts otherwise available.[9] 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 CVD determination in this investigation with the final determination in the companion AD investigation of seamless pipe from Korea based on a request made by the petitioner.[10] 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 April 19, 2021, 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.

In this investigation, Commerce preliminarily calculated an individual estimated countervailable subsidy rate for Iljin Steel Corporation (Iljin), the only individually examined exporter/producer in this investigation. Because the only individually calculated rate is not zero, *de minimis,* or based entirely on facts otherwise available, we are preliminarily assigning the estimated countervailable subsidy rate calculated for Iljin to all other producers and exporters, pursuant to section 705(c)(5)(A)(i) of the Act.

Preliminary Determination

Commerce preliminarily determines that the following estimated countervailable subsidy rates exist:

Company	Subsidy rate percent
Iljin Steel Corporation	2.13
All Others	2.13 percent

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of its public announcement, or if there is no public announcement, within five days of the date of this notice in accordance with 19 CFR 351.224(b).

Verification

Commerce is currently unable to conduct on-site verification of the information relied upon in making its

[1] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea and the Russian Federation: Initiation of Countervailing Duty Investigations,* 85 FR 47170 (August 4, 2020) (*Initiation Notice).*

[2] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea and the Russian Federation: Postponement of Preliminary Determinations in the Countervailing Duty Investigations,* 85 FR 54533 (September 2, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination of the Countervailing Duty Investigation of Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[5] *See Initiation Notice,* 85 FR at 47171.

[6] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea, the Russian Federation, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair Value Investigations,* 85 FR 73687 (November 19, 2020).

[7] The deadlines for interested parties to submit scope case and rebuttal briefs will be established in the preliminary

scope decision memorandum.

[8] *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.

[9] *See* sections 776(a) and (b) of the Act.

[10] *See* Vallourec Star, LP's (Petitioner's) Letter, ''Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Korea and Russia: Request to Align Final Determinations,'' dated October 15, 2020.

final determination in this investigation. Accordingly, we intend to take additional steps in lieu of on-site verification. Commerce will notify interested parties of any additional documentation or information required.

Public Comment

As noted above, Commerce will issue a preliminary scope decision no later than February 3, 2021. All interested parties will have the opportunity to submit case and rebuttal briefs on the preliminary scope determination by the deadline established in the memorandum. All parties filing scope briefs or rebuttals thereto, must file identical documents simultaneously on the records of all the ongoing AD and CVD seamless pipe investigations. No new factual information or business proprietary information may be included in either scope briefs or rebuttal scope briefs.

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the deadline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[11] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

International Trade Commission Notification

In accordance with section 703(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If Commerce's final determination is affirmative, the ITC will make its final injury determination before the later of 120 days after the date of Commerce's preliminary determination or 45 days after its final determination.

Notification to Interested Parties

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act and 19 CFR 351.205(c).

Dated: December 7, 2020.

Jeffrey I. Kessler,

Assistant Secretaryfor Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by the scope of this investigation is seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in nominal outside diameter, regardless of wall-thickness, manufacturing process (*e.g.,* hot-finished or cold-drawn), end finish (*e.g.,* plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (*e.g.,* bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or ''hollow profiles'' suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials (ASTM) or American Petroleum Institute (API) specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, ASTM A–1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application, with the exception of the exclusions discussed below.

Specifically excluded from the scope of the investigation are: (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications, including pipe produced to the ASTM A–822 standard; (2) all pipes meeting the chemical requirements of ASTM A–335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the investigations are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, *i.e.,* outside diameter and wall thickness, of ASTM A–53, ASTM A–106 or API 5L specifications.

Subject seamless standard, line, and pressure pipe are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070. The HTSUS subheadings and specifications are provided for convenience and customs purposes; the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2020–27306 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–DS–P

[11] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); and *Temporary Rule* Modifying AD/CVD Service Requirements Due to COVID–19, 85 FR 17006, 17007 (March 26, 2020).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Notice To Suspend Applications for Certification for Printing NOAA Nautical Charts and Publications

AGENCY: National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice to suspend accepting new applications for certification for printing and distribution of NOAA nautical charts and the United States Coast Pilot, and to update the public on digital distribution of NOAA's products.

SUMMARY: The federal government ceased printing of paper nautical charts in April 2014. Since then, the Office of Coast Survey has successfully transitioned the printing of paper nautical charts to the private sector and, since the **Federal Register** Notice of January 2, 2014, has certified more than three dozen companies to print and sell NOAA nautical charts and the United

States Coast Pilot®. This transition has resulted in a broad market providing product differentiation with optional value-added features. However, Coast Survey is in the process of reducing the amount of traditional NOAA paper nautical products that it maintains as it moves to facilitating a method from which paper charts can be derived from the NOAA's electronic navigational charts (NOAA ENC®) found on website: *https://nauticalcharts.noaa.gov/charts/noaa-enc.html.* Within the next five years, the number of unique charts that will be available for vendors to print will be reduced by roughly 60%. Coast Survey recognized that a hold on accepting new applications must be put in place until the final number of traditional paper charts that NOAA will maintain is determined. The plan for transitioning away from the traditional NOAA paper charts is available in the ''Sunsetting Traditional NOAA Paper Charts'' document found on the following website: *https://nauticalcharts.noaa.gov/publications/docs/raster-sunset.pdf.*

To maintain a healthy market that meets the needs of recreational and commercial mariners, Coast Survey is suspending the certifications for new, non-certified printers of charts while continuing to maintain certification of printers who continue to meet standards as provided under their current agreements. There are currently eight certified printers of the Coast Pilot. Coast Survey feels the market can bear no more that 10 of these printers. Once there are 10 certified printers of the Coast Pilot, Coast Survey will suspend the certifications for new, non-certified printers of the Coast Pilot.

DATES: Send comments on or before February 9, 2021.

ADDRESSES: Comments can be submitted online to the Office of Coast Survey's inquiry system, ASSIST, at the following site *https://www.nauticalcharts.noaa.gov/customer-service/assist/.*

FOR FURTHER INFORMATION CONTACT: Matthew Kroll, Deputy Chief, Navigation Services Division, NOAA's Office of Coast Survey at *matt.kroll@noaa.gov,* 240–533–0063

SUPPLEMENTARY INFORMATION: NOAA privatized the printing of nautical charts in October 2013. In January 2014, Coast Survey started soliciting private companies to apply for NOAA certification to print, sell, and distribute paper nautical charts that NOAA's National Ocean Service considered ''published'', and that therefore meet carriage requirements. After review, Coast Survey certifies applicants who meet all NOAA chart standards.

At the time of Coast Survey's January 2014 solicitation, NOAA had two certified printing agents. As of October 29, 2020, NOAA had 36 certified agents found here, *https://nauticalcharts.noaa.gov/publications/print-agents.html#paper-charts,* with two additional companies under review.

Coast Survey has concluded that the current certified printers are meeting market needs, and that the companies with pending applications for certification will adequately fill any additional market openings. Therefore, until further notice, Coast Survey will not accept any new applications for certification, except for printers of the Coast Pilot until 10 Coast Pilot printers has been achieved.

Coast Survey began the transition away from traditional paper products and considers the NOAA ENC as its primary product to meet navigation needs, and makes the following resources available:

1. NOAA's electronic navigational charts (NOAA ENC®) (*https://nauticalcharts.noaa.gov/charts/noaa-enc.html*) are available for free download.

2. See Coast Survey's plan to improve the ENC, ''Transforming the NOAA ENC.'' (*https://nauticalcharts.noaa.gov/publications/docs/enc-transformation.pdf*).

3. United States Coast Pilot (*https://nauticalcharts.noaa.gov/publications/coast-pilot/index.html*) is available online in a digital format.

4. NOAA's Custom Chart tool (*https://devgis.charttools.noaa.gov/pod/*) gives the user the ability to create and download charts based on your own scale, extent, and paper size settings.

The National Charting Plan outlines several improvements to chart content (*https://nauticalcharts.noaa.gov/charts/docs/NCP-1-pager-v2.pdf*).

Authority: 33 U.S.C. Chapter 17, Coast and Geodetic Survey Act of 1947.

Shepard M. Smith,

Director, Office of Coast Survey, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2020–27344 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA687]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Naval Base San Diego Pier 6 Replacement Project, San Diego, California

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to the Naval Base San Diego Pier 6 Replacement Project in San Diego, California. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than January 11, 2021.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be sent to *ITP.Meadows@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-*

marine-mammal-protection-act without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Dwayne Meadows, Ph.D., Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On July 14, 2020, NMFS received an application from the Navy requesting an IHA to take small numbers of California sea lions incidental to pile driving and removal associated with the Naval Base San Diego Pier 6 Replacement Project. The application was deemed adequate and complete on November 25, 2020. The Navy's request is for take of a small number of California sea lions by Level B harassment. Neither the Navy nor NMFS expects serious injury or mortality to result from this activity, and therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

The purpose of the project is to remove and replace a decaying and inadequate pier for Navy ships. Specifically, in-water construction work includes removing the existing pier (by vibratory pile extraction, water jetting, hydraulic underwater chainsaw, direct pulling, and/or pile clippers) consisting of a total of 1,998 12 to 24-inch piles, after removing above water structures and utilities. Once demolition has opened up space, construction will begin in the same location on a new pier measuring 37 m (120 ft) wide by 457 m (1,500 ft) long. New construction work involves impact driving of 966 piles. This includes 528 24-inch structural concrete piles, 208 24-inch concrete fender piles, 4 20-inch piles for a load-out ramp, and 226 16-inch fiberglass secondary and corner fender piles. Pile driving/removal is expected to take no more than 250 days. Pile driving would be by vibratory pile driving until resistance is too great and driving would switch to an impact hammer.

The pile driving/removal can result in take of marine mammals from sound in the water which results in behavioral harassment or auditory injury.

Dates and Duration

The work described here is scheduled for October 1, 2021 through September 30, 2022. In-water activities are planned for daylight hours only.

Specific Geographic Region

The activities would occur in the south-central portion of San Diego Bay (Figure 1). San Diego Bay is a narrow, crescent-shaped natural embayment oriented northwest-southeast with an approximate length of 24 kilometers (km) (15 miles (mi)) and a total area of roughly 4 km^2 (11,000 acres; Port of San Diego, 2007). The width of the Bay ranges from 0.3 to 5.8 km (0.2 to 3.6 mi), and depths range from 23 m (74 ft) Mean Lower Low Water (MLLW) near the tip of Ballast Point to less than 1.2 m (4 ft) at the southern end (Merkel and Associates, Inc., 2009). Approximately half of the Bay is less than 4.5 meters (m) (15 feet (ft)) deep and much of it is less than 15 m (50 ft) deep (Merkel and Associates, Inc., 2009). The northern and central portions of the Bay have been shaped by historical dredging and filling to support large ship navigation and shoreline development. The United States Army Corps of Engineers dredges the main navigation channel in the Bay to maintain a depth of 14 m (47 ft) MLLW and is responsible for providing safe transit for private, commercial, and military vessels within the bay (NOAA 2012). Outside of the navigation channel, the bay floor consists of platforms at depths that vary slightly (Merkel and Associates, Inc., 2009). Within the Central Bay, typical depths range from 10.7–11.6 m (35–38 ft) MLLW to support large ship turning and anchorage, and small vessel marinas are typically dredged to depths of 4.6 m (15 ft) MLLW (Merkel and Associates, Inc., 2009).

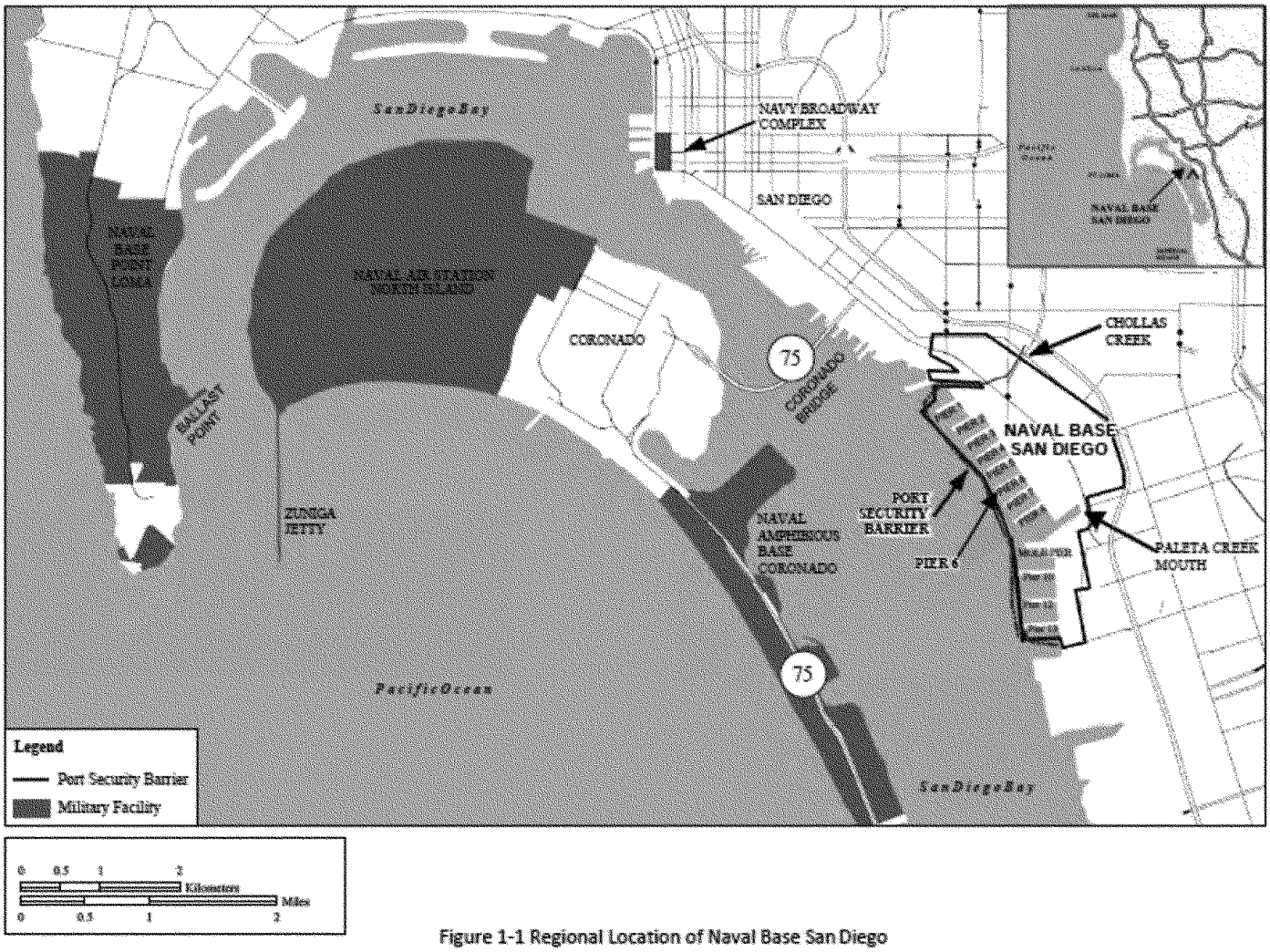

Figure 1-1 Regional Location of Naval Base San Diego

Figure 1-- Map of Proposed Project Area in San Diego, CA. The proposed project would occur at Pier 6 near the center of the base

San Diego Bay is heavily used by commercial, recreational, and military vessels, with an average of 82,413 vessel movements (in or out of the Bay) per year (approximately 225 vessel transits per day), a majority of which are presumed to occur during daylight hours. This number of transits does not include recreational boaters that use San Diego Bay, estimated to number 200,000 annually (San Diego Harbor Safety Committee, 2009). Background (ambient) noise in the south-central San Diego Bay averaged 126 decibels (dB) in 2019 (Dahl and Dall'Osto 2019). Noise from non-impulsive sources associated with the proposed activities is, therefore assumed to become indistinguishable from background noise as it diminishes to 126 dB re: 1 micropascal (µPa) with distance from the source (Dahl and Dall'Osto, 2019).

Section 2.2 of the application provides extensive additional details about the project area.

Detailed Description of Specific Activity

The purpose of the project is to remove and replace a decaying and inadequate pier built in 1945 that is now too narrow, structurally weakened and decaying. A new, wider pier is needed to provide adequate ship berthing infrastructure to support modern Navy ships and fleet readiness. The Navy will abate any hazardous materials, and then disconnect and remove all utilities and mechanical equipment from the old pier. After the old pier deck and associated structures are removed, the exiting 1,998 in-water piles will be removed. Existing piles include 1,833 20 or 24-inch concrete piles, 149 12-inch timber-plastic composite piles, and 16 16-inch steel I piles (Table 1). Workers would initially attempt to remove the piles by dead-pull with or without water jetting the pile (where an external high-pressure water jet is used to loosen the sediment around the pile). A vibratory hammer may also be used to loosen the piles prior to removal. If a pile cannot be removed by these methods, workers would use a hydraulic cutter or underwater hydraulic chainsaw to cut the piles at the mudline. Once the piles are cut, a crane would remove the pile and set it onto a barge for transport to a concrete processing yard. The Navy expects to be able to remove up to 8 piles per day, meaning 250 days of work will be required to remove all old piles.

Once demolition has opened up space, construction will begin in the same location on the new pier. New construction work involves vibratory and impact driving of 966 piles (Table

1). This includes 528 24-inch structural concrete piles, 208 24-inch concrete fender piles, 4 20-inch piles for a load-out ramp, and 226 16-inch fiberglass secondary and corner fender piles. Pile driving/removal is expected to take no more than 250 days. Pile driving would be by impact hammer only. The total length of the piles would range from approximately 26 m (85 ft) (fender piles) to 34 m (110 ft) (structural piles); the length of the portion of the piles in the water column would range from approximately 3 to 9 m (10 to 30 ft), depending on pile type, location, and tide. The Navy estimates they will install 7 piles per day, meaning in-water construction will take 138 days.

It is anticipated that overlap between demolition and installation activities would occur over the 250-day project period. Pile removal would begin on day 1 while pile installation is anticipated to begin after removal of one third of the piles (after approximately 83 days of pile removal). Pile installation is expected to periodically occur alongside ongoing pile removal activities over 138 days of the remaining 167 project days of pile removal. Because pile installation cannot continue where demolition activities are incomplete, there would be 29 days (167 days—138 days of pile installation) where only pile removal would occur after pile installation has started. In summary, the 250-day project period would include 112 days of pile removal-only activities and 138 days of concurrent pile removal and installation activities. There may be simultaneous use of no more than two of the various pile extraction methods (pile clippers, water jetting, underwater chainsaws or vibratory pile removal) during pile removal.

The pile driving equipment will be deployed and operated from barges, on water. Materials will be delivered on barges.

TABLE 1—SUMMARY OF PILE DRIVING ACTIVITIES

Method	Pile type	Number of piles	Piles/day	Total estimated days
Demolition of Existing Pier				
Vibratory Extraction High-pressure Water Jetting Hydraulic Pile Clipper Hydraulic Chainsaw.	24-inch square pre-cast concrete, 20-inch square pre-stressed/pre-cast concrete piles.	1,833	8	250
	12-inch composite (timber-plastic) piles	149		
Vibratory Extraction	16-inch I-shaped steel piles	16		
Total		1,998		
Construction of New Pier				
Impact Pile Driving	24-inch octagonal concrete structural test piles.	15	7	138
	24-inch octagonal concrete structural piles	513		
	24-inch square concrete fender system test piles.	4		
	24-inch square concrete primary fender piles	204		
	20-inch square concrete pile for load-out ramp cradle.	4		
	16-inch fiberglass secondary and corner fender piles.	226		
High-pressure Water Jetting	20- and 24-inch concrete piles	Within Above Counts		
Total		966		

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 2 lists all species with expected potential for occurrence in the project area in San Diego Bay and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here

as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Pacific SARs (*e.g.,* Caretta *et al.,* 2020).

TABLE 2—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR

Common name	Scientific name	Stock	ESA/ MMPA status; Strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions): California Sea Lion	*Zalophus californianus*	United States	-, -, N	257,606 (N/A, 233,515, 2014).	14,011	>321

[1]—Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2]—NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance.

[3]—These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

California sea lions (*Zalophus californianus*) spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing take of this species. Other marine mammal species observed in San Diego Bay are the coastal bottlenose dolphin (*Tursiops truncatus*), which is regularly seen in the North Bay; Pacific harbor seal (*Phoca vitulina*), which frequently enters the North Bay; and common dolphins (*Delphinus* spp.), which are rare visitors in the North Bay. Gray whales (*Eschrichtius robustus*) are occasionally sighted near the mouth of San Diego Bay during their winter migration (Naval Facilities Engineering Command, Southwest and Port of San Diego Bay, 2013). Based on many years of observations and numerous Navy-funded surveys in San Diego Bay (Merkel and Associates, Inc., 2008; Sorensen and Swope, 2010; Graham and Saunders, 2014; Tierra Data Inc., 2016), these other marine mammals rarely occur south of the Coronado Bay Bridge, are not known to occur near Naval Base San Diego, and any occurrence in the project area would be very rare. Therefore, while coastal bottlenose dolphins, Pacific harbor seals, common dolphins, and gray whales have been reported in San Diego Bay, they are not anticipated to occur in the project area and no take of these species is anticipated or proposed to be authorized.

California Sea Lion

California sea lions occur from Vancouver Island, British Columbia, to the southern tip of Baja California. Sea lions breed on the offshore islands of southern and central California from May through July (Heath and Perrin, 2008). During the non-breeding season, adult and subadult males and juveniles migrate northward along the coast to central and northern California, Oregon, Washington, and Vancouver Island (Jefferson *et al.,* 1993). They return south the following spring (Heath and Perrin 2008, Lowry and Forney 2005). Females and some juveniles tend to remain closer to rookeries (Antonelis *et al.,* 1990; Melin *et al.,* 2008).

Pupping occurs primarily on the California Channel Islands from late May until the end of June (Peterson and Bartholomew 1967). Weaning and mating occur in late spring and summer during the peak upwelling period (Bograd *et al.,* 2009). After the mating season, adult males migrate northward to feeding areas as far away as the Gulf of Alaska (Lowry *et al.,* 1992), and they remain away until spring (March–May), when they migrate back to the breeding colonies. Adult females generally remain south of Monterey Bay, California throughout the year, feeding in coastal waters in the summer and offshore waters in the winter, alternating between foraging and nursing their pups on shore until the next pupping/breeding season (Melin and DeLong, 2000; Melin *et al.,* 2008).

In San Diego Bay, California sea lions regularly occur on rocks, buoys and other structures, and especially on bait barges. California sea lion occurrence in the project area is expected to be rare based on sighting of only two individuals in the water off of Navy Base San Diego during one 2010 survey (Sorensen and Swope, 2010). Different age classes of California sea lions are found in the San Diego region throughout the year (Lowry *et al.,* 1991). Although adult male California sea lions feed in areas north of San Diego, animals of all other ages and sexes spend most, but not all, of their time feeding at sea during winter. During warm-water months, a high proportion of the adult males and females are hauled-out at terrestrial sites.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and

Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater)(true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater)(sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. California sea lions are in the otariid family group.

Potential Effects of Specified Activities on Marine Mammals and their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Acoustic effects on marine mammals during the specified activity can occur from vibratory and impact pile driving/removal and underwater chainsaws, pile clippers and water jetting. The effects of underwater noise from the Navy's proposed activities have the potential to result in Level A or Level B harassment of marine mammals in the action area.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far (ANSI 1994, 1995). The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.,* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact pile driving and vibratory pile removal as well as water jetting, underwater chainsaws, and pile clippers. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI, 1986; NIOSH, 1998; ANSI, 2005; NMFS, 2018). Non-impulsive sounds (*e.g.,* machinery operations such as drilling or dredging, vibratory pile driving, water jetting, chainsaws, pile clippers, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007).

Two types of pile hammers would be used on this project: impact and vibratory. Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak Sound pressure Levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson *et al.,* 2005).

Pile clippers and underwater chainsaws are hydraulically operated equipment. A pile clipper is a large, heavy elongated horizontal guillotine-like structure that is mechanically lowered over a pile down to the mudline or substrate where hydraulic force is used to push a sharp blade to cut a pile. The underwater chainsaws are operated by SCUBA divers. Water jet systems use very high pressure jets of water to move and even cut materials. Sounds generated by this demolition equipment are non-impulsive and continuous (NAVAC Southwest, 2020)

The likely or possible impacts of the Navy's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile installation and removal.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving and removal and the various demolition equipment is the primary means by which marine mammals may be harassed from the Navy's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.,* 2007). Generally, exposure to pile driving and removal and other construction noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving and demolition noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.,* 2004; Southall *et al.,* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.,* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.,* 1958, 1959; Ward, 1960; Kryter *et al.,* 1966; Miller, 1974; Ahroon *et al.,* 1996; Henderson and Hu, 2008). PTS levels for marine mammals are estimates, with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.,* 2008), there are no empirical data measuring PTS in marine mammals, largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from cetacean TTS measurements (see Southall *et al.,* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.,* 2000; Finneran *et al.,* 2000, 2002). As described in Finneran (2016), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SEL_{cum}) in an accelerating fashion: At low exposures with lower SEL_{cum}, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SEL_{cum}, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.,* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose

dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.,* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). The potential for TTS from impact pile driving exists. After exposure to playbacks of impact pile driving sounds (rate 2760 strikes/hour) in captivity, mean TTS increased from 0 dB after 15 minute exposure to 5 dB after 360 minute exposure; recovery occurred within 60 minutes (Kastelein *et al.,* 2016). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018).

Installing piles requires impact pile driving. There would likely be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the action area and not remaining for extended periods of time, the potential for TS declines.

Behavioral Harassment - Exposure to noise from pile driving and removal also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007; Archer *et al.,* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.,* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B and C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.,* 2001; Nowacek *et al.,* 2004; Madsen *et al.,* 2006; Yazvenko *et al.,* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

In 2016, the Alaska Department of Transportation and Public Facilities (ADOT&PF) documented observations of marine mammals during construction activities (*i.e.,* pile driving) at the Kodiak Ferry Dock (see 80 FR 60636, October 7, 2015). In the marine mammal monitoring report for that project (ABR 2016), 1,281 Steller sea lions were observed within the Level B disturbance zone during pile driving or drilling (*i.e.,* documented as Level B harassment take). Of these, 19 individuals demonstrated an alert behavior, 7 were fleeing, and 19 swam away from the project site. All other animals (98 percent) were engaged in activities such as milling, foraging, or fighting and did not change their behavior. In addition, two sea lions approached within 20 meters of active vibratory pile driving activities. Three harbor seals were observed within the disturbance zone during pile driving activities; none of them displayed disturbance behaviors. Fifteen killer whales and three harbor porpoise were also observed within the Level B harassment zone during pile driving. The killer whales were travelling or milling while all harbor porpoises were travelling. No signs of disturbance were noted for either of these species. Given the similarities in activities and habitat, we expect similar behavioral responses of marine mammals to the Navy's specified activity. That is, disturbance, if any, is likely to be temporary and localized (*e.g.,* small area movements).

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle 1950; Moberg 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg 1987; Blecha 2000).

Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.,* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,* 2004; Lankford *et al.,* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.,* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.,* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar projects in the area.

Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. The San Diego area contains active military and commercial shipping, cruise ship and ferry operations, as well as numerous recreational and other commercial vessel and background sound levels in the area are already elevated as described in Dahl and Dall'Osta (2019).

Potential Effects of High-Pressure Water Jetting, Underwater Chainsaw, and Pile Clipper Sounds—High-pressure water jetting, underwater chainsaws, and pile clippers may be used to assist with removal of piles (and water jetting may be used to aid installation). The sounds produced by these activities are of similar frequencies to the sounds produced by vessels (NAVFAC Southwest, 2020), and are anticipated to diminish to background noise levels (or be masked by background noise levels) in the Bay relatively close to the project site. Therefore, the effects of this equipment are likely to be similar to those discussed above in the *Behavioral Harassment* section.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving and removal that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would previously have been 'taken' because of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Marine Mammal Habitat Effects

The Navy's construction activities could have localized, temporary impacts on marine mammal habitat and their prey by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During impact and vibratory pile driving or removal, elevated levels of underwater noise would ensonify San Diego Bay where both fishes and mammals occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater and airborne sound.

A temporary and localized increase in turbidity near the seafloor would occur in the immediate area surrounding the area where piles are installed or removed. In general, turbidity associated with pile installation is localized to about a 25-foot (7.6-meter) radius around the pile (Everitt *et al.* 1980). The sediments of the project site are sandy and will settle out rapidly when disturbed. Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could

avoid localized areas of turbidity. Local strong currents are anticipated to disburse any additional suspended sediments produced by project activities at moderate to rapid rates depending on tidal stage. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

In-Water Construction Effects on Potential Foraging Habitat

The area likely impacted by the project is relatively small compared to the available habitat (*e.g.,* the impacted area is in the south central bay only) of San Diego Bay and does not include any Biologically Important Areas or other habitat of known importance. The area is highly influenced by anthropogenic activities. The total seafloor area affected by pile installation and removal is a very small area compared to the vast foraging area available to marine mammals in the San Diego Bay. At best, the impact area provides marginal foraging habitat for marine mammals and fish. Furthermore, pile driving and removal at the project site would not obstruct movements or migration of marine mammals.

Avoidance by potential prey (*i.e.,* fish) of the immediate area due to the temporary loss of this foraging habitat is also possible. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity.

In-water Construction Effects on Potential Prey—Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick and Mann, 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.,* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.,* 2013; Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.,* 2012b; Casper *et al.,* 2013).

Because of the rarity of use and research, the effects of pile clippers, underwater chainsaws, and water jetting are not fully known; but given their similarity to ship noises we do not expect unique effects from these activities.

The most likely impact to fish from pile driving and removal and demolition activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

Construction activities, in the form of increased turbidity, have the potential to adversely affect forage fish in the project area. Forage fish form a significant prey base for many marine mammal species that occur in the project area. Increased turbidity is expected to occur in the immediate vicinity (on the order of 10 feet (3 m) or less) of construction activities. However, suspended sediments and particulates are expected to dissipate quickly within a single tidal cycle. Given the limited area affected and high tidal dilution rates any effects on forage fish are expected to be minor or negligible. Finally, exposure to turbid waters from construction activities is not expected to be different from the current exposure; fish and marine mammals in San Diego Bay are routinely exposed to substantial levels of suspended sediment from natural and anthropogenic sources.

In summary, given the short daily duration of sound associated with individual pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance,

which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment, as use of the acoustic source (*i.e.,* vibratory or impact pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown)—discussed in detail below in Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Due to the lack of marine mammal density, NMFS relied on local occurrence data and group size to estimate take. Below, we describe the factors considered here in more detail and present the proposed take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 microPascal (μPa) (root mean square (rms)) for continuous (*e.g.,* vibratory pile-driving) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

The Navy's proposed activity includes the use of continuous (vibratory pile-driving, water jetting, chainsaw and pile clippers) and impulsive (impact pile-driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) thresholds are applicable. However, as discussed above, the Navy has established that the ambient noise in the project area is 126 dB re 1 μPa (rms). Since this is louder than the 120 dB threshold for continuous sources, 126 dB becomes the effective threshold for Level B harassment for continuous sources.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's activity includes the use of impulsive (impact pile-driving) and non-impulsive (vibratory pile driving/removal and other removal methods) sources.

These thresholds are provided in Table 4. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (Received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB $L_{E,HF,24h}$: 155 dB	*Cell 6* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$:232 dB $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile removal, water jetting, pile clippers and underwater chainsaws).

Vibratory hammers produce constant sound when operating, and produce vibrations that liquefy the sediment surrounding the pile, allowing it to penetrate to the required seating depth or be withdrawn more easily. An impact hammer is a steel device that works like a piston, producing a series of independent strikes to drive the pile. Impact hammering typically generates the loudest noise associated with pile installation. The actual durations of each installation method vary depending on the type and size of the pile.

In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for piles of various sizes being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels for the various pile types, sizes and methods (see Table 5). Data for the removal methods including water jetting, pile clippers and underwater chainsaws come from data gathered at other nearby Navy projects in San Diego Bay (NAVFAC SW, 2020), the source levels used are from the averages of the maximum source levels measured, a somewhat more conservative measure than the median sound levels we typically use.

TABLE 5—PROJECT SOUND SOURCE LEVELS

Pile driving activity		Estimated sound source level at 10 meters without attenuation			Data source and proxy
Method	Pile Type	dB RMS	dB SEL	dB peak	
Vibratory Extraction	12-inch timber/plastic	152			Greenbusch Group (2018).
	20 and 24-inch concrete	160			Caltrans (2015), Table I.2–2, 24-inch steel sheet.
	16-inch steel	160			Caltrans (2015), Table I.2–2, 24-inch steel sheet.
Water Jetting	20-inch concrete	158			NAVFAC SW (2020), 24 x 30-inch concrete.
Underwater Chainsaw	12 to 24-inch concrete	150			NAVFAC SW (2020), 16-inch concrete.*
Small Pile Clipper	12-inch timber/plastic	154			NAVFAC SW (2020), 13-inch polycarbonate.
Large Pile Clipper	20-inch concrete	161			NAVFAC SW (2020), 24-inch concrete.
Impact Hammer	20 and 24-inch concrete	176	166	188	Caltrans (2015), Table I.2–1, 24-inch concrete.
	16-inch fiberglass	153	** 144	** 177	Caltrans (2015), 13-inch plastic.

Note: SEL = single strike sound exposure level; dB peak = peak sound level; rms = root mean square.
* Source level was 147 dB at 17m from source, back calculated to 150dB using transmission loss coefficient of 15.
** Average of the peak values was 166 and that value was used in modelling in Dell'Osto and Dahl (2019) rather than the absolute peak we recommend for use in the user spreadsheet, SEL calculated from assumed strike rate in Dell'Osto and Dahl (2019).

During pile driving installation activities, there may be times when two pile extraction methods (pile clippers, water jetting, underwater chainsaws or vibratory pile removal) are used simultaneously. The likelihood of such an occurrence is anticipated to be infrequent, will depend on the specific methods chosen by the contractor, and would be for short durations on that day. In-water pile removal occurs intermittently, and it is common for removal to start and stop multiple times as each pile is adjusted and its progress is measured. Moreover, the Navy has multiple options for pile removal depending on the pile type and condition, sediment, and how stuck the pile is, etc. When two continuous noise sources, such as pile clippers, have overlapping sound fields, there is potential for higher sound levels than for non-overlapping sources. When two or more pile removal methods (pile clippers, water jetting, underwater chainsaws or vibratory pile removal) are used simultaneously, and the sound field of one source encompasses the sound field of another source, the sources are considered additive and combined using the following rules (see Table 6): For addition of two simultaneous methods, the difference between the two sound source levels (SSLs) is calculated, and if that difference is between 0 and 1 dB, 3 dB are added to the higher SSL; if difference is between 2 or 3 dB, 2 dB are added to the highest SSL; if the difference is between 4 to 9 dB, 1 dB is added to the highest SSL; and with differences of 10 or more dB, there is no addition (NMFS 2018b; WSDOT 2018).

TABLE 6—RULES FOR COMBINING SOUND LEVELS GENERATED DURING PILE REMOVAL

Difference in SSL	Level A zones	Level B zones
0 or 1 dB	Add 3 dB to the higher source level	Add 3 dB to the higher source level.
2 or 3 dB	Add 2 dB to the higher source level	Add 2 dB to the higher source level.
4 to 9 dB	Add 1 dB to the higher source level	Add 1 dB to the higher source level.

TABLE 6—RULES FOR COMBINING SOUND LEVELS GENERATED DURING PILE REMOVAL—Continued

Difference in SSL	Level A zones	Level B zones
10 dB or more	Add 0 dB to the higher source level	Add 0 dB to the higher source level.

Source: Modified from USDOT 1995, WSDOT 2018, and NMFS 2018b
Note: dB = decibels; SSL = sound source level.

There is also the possibility that impact installation of piles could happen simultaneously with any of the non-impulsive removal methods over large portions of the project as described above. On days when this occurs the Level A harassment zones would be based on the zones calculated for impact pile driving while the Level B harassment zone would be the largest of the zones for whatever construction methods are being used that day.

Level B Harassment Zones

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \mathrm{Log10}\,(R1/R2),$$

where

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for the Navy's proposed activity in the absence of specific modelling. For this project however, the Navy did model sound propagation for the impact and vibratory hammering methods (Dall'Osto and Dahl 2019). For all other pile removal methods we used the practical spreading value.

The Navy determined underwater noise would fall below the behavioral effects threshold of 126 dB rms for marine mammals at distances of less than 10 to 7,140 m depending on the pile type(s) and methods (Table 7). It should be noted that based on the bathymetry and geography of San Diego Bay, sound will not reach the full distance of the Level B harassment isopleths in all directions. Because the Navy's as yet unhired contractor has not decided which of the various pile removal methods it will use, we only calculate a worst-case scenario of simultaneous operation of two of the loudest sound producing methods (large pile clippers) to consider the largest possible harassment zones for simultaneous pile removal.

TABLE 7—LEVEL A AND LEVEL B ISOPLETHS FOR EACH PILE DRIVING TYPE AND METHOD

Pile Driving Activity		Radial distance or maximum modeled length × width (m)	
Method	Pile type	Level A	Level B
Vibratory Extraction	12-inch timber/plastic	<10	2167 × 1065.
	20 and 24-inch concrete	<10	6,990 × 1,173.
	16-inch steel	<10	7,140 × 1,595.
Water Jetting	20-inch concrete	<10	1359.
Underwater Chainsaw	12 to 24-inch concrete	<10	398.
Small Pile Clipper	12-inch timber/plastic	<10	736.
Large Pile Clipper	20 to 24-inch concrete	<10	2154.
Two Large Pile Clippers	20 to 24-inch concrete	<10	3415.
Impact Hammer	20 and 24-inch concrete	<10	192.
	16-inch fiberglass	<10	<10.

Level A Harassment Zones

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of take by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as impact/vibratory pile driving or removal using any of the methods discussed above, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS.

As discussed above, the Navy modelled sound propagation for impact and vibratory hammering of piles (Dall'Osto and Dahl 2019) and used those models to calculate Level A harassment isopleths. For all other pile removal methods we used the User Spreadsheet to determine the Level A harassment isopleths. Inputs used in the User Spreadsheet or models are reported in Table 8 and the resulting isopleths are reported in Table 7 for each of construction methods.

TABLE 8—NMFS TECHNICAL GUIDANCE USER SPREADSHEET INPUT TO CALCULATE LEVEL A ISOPLETHS FOR A COMBINATION OF PILE DRIVING

Pile Driving Activity		Radial distance or maximum modeled length × width (m)	
Method	Pile Type	Piles per day	Strikes per pile/ duration to drive a single pile
Vibratory Extraction	12-inch timber/plastic	8	10 minutes.
	20 and 24-inch concrete	8	10 minutes.
	16-inch steel	8	10 minutes.
Water Jetting	20-inch concrete	8	20 minutes.
Underwater Chainsaw	12 to 24-inch concrete	8	10 minutes.
Small Pile Clipper	12-inch timber/plastic	8	10 minutes.
Large Pile Clipper	20-inch concrete	8	10 minutes.
Impact Hammer	20 and 24-inch concrete	7	600 strikes.
	16-inch fiberglass	7	600 strikes.

The above input scenarios lead to PTS isopleth distances (Level A thresholds) of less than 10 m for all methods and piles (Table 7).

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. Here we describe how the information provided above is brought together to produce a quantitative take estimate.

No California sea lion density information is available for south San Diego Bay. Potential exposures to impact and vibratory pile driving noise for each threshold for California sea lions were estimated using data collected during a 2010 survey as reported in Sorensen and Swope (2010). During this survey two separate sea lions were observed in the project area.

The available survey data from Sorenson and Swope (2010) and other unpublished monitoring data from recent nearby projects on Naval Base San Diego suggests two California sea lions could be present each day in the project area. However given the limited data available and the more northerly location of this project relative to the recent dry dock project (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-floating-dry-dock-project-naval-base-san-diego*) where we estimate two California sea lions per day, to be conservative, we have estimated four California sea lions could be present each day. As noted above, there are 250 days of in-water work for this project. Multiplication of the above estimate of animals per day (4) times the days of work (250) results in a proposed Level B harassment take of 1000 California sea lions (Table 9). The Navy intends to avoid Level A harassment take by shutting down activities if a California sea lion approaches within 20 m of the project site, which encompasses all Level A harassment ensonification zones. Therefore, no take by Level A harassment is anticipated or proposed for authorization.

TABLE 9—PROPOSED AUTHORIZED AMOUNT OF TAKING, BY LEVEL A HARASSMENT AND LEVEL B HARASSMENT, BY SPECIES AND STOCK AND PERCENT OF TAKE BY STOCK

Species	Authorized Take		Percent of Stock
	Level B	Level A	
California sea lion (*Zalophus californianus*) U.S. Stock	1000	0	0.4

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The following mitigation measures are proposed in the IHA:

- For in-water heavy machinery work other than pile driving, if a marine

mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location; or (2) positioning of the pile on the substrate via a crane (*i.e.,* stabbing the pile);

• Conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;

• For those marine mammals for which Level B harassment take has not been requested, in-water pile installation/removal will shut down immediately if such species are observed within or entering the Level B harassment zone; and

• If take reaches the authorized limit for an authorized species, pile installation will be stopped as these species approach the Level B harassment zone to avoid additional take.

The following mitigation measures would apply to the Navy's in-water construction activities.

• *Establishment of Shutdown Zones*—The Navy will establish shutdown zones for all pile driving and removal activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones typically vary based on the activity type and marine mammal hearing group (Table 4). In this case there is only one species affected and all level A harassment isopleths are less than 10 m radius. To be conservative, the Navy will establish a 20 m shutdown zone for all pile driving or removal activities.

• The placement of Protected Species Observers (PSOs) during all pile driving and removal activities (described in detail in the Proposed Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile installation. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

• *Monitoring for Level B Harassment*—The Navy will monitor the Level A and B harassment zones. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential halt of activity should the animal enter the shutdown zone. Placement of PSOs will allow PSOs to observe marine mammals within the Level B harassment zones.

• *Pre-activity Monitoring*—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence.

• *Soft Start*—Soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the impact hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period. This procedure will be conducted three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and

• Mitigation and monitoring effectiveness.

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the Monitoring Plan and Section 5 of the IHA. Marine mammal monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

• Independent PSOs (*i.e.,* not construction personnel) who have no other assigned tasks during monitoring periods must be used;

• At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

• Other PSOs may substitute education (degree in biological science or related field) or training for experience;

• Where a team of three or more PSOs are required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and

• The Navy must submit PSO Curriculum Vitae for approval by NMFS prior to the onset of pile driving.

PSOs must have the following additional qualifications:

• Ability to conduct field observations and collect data according to assigned protocols;

• Experience or training in the field identification of marine mammals, including the identification of behaviors;

• Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

• Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

• Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Up to four PSOs will be employed. PSO locations will provide an unobstructed view of all water within the shutdown zone, and as much of the Level A and Level B harassment zones as possible. PSO locations are as follows:

(1) At the pile driving/removal site or best vantage point practicable to monitor the shutdown zones;

(2) For activities with Level B harassment zones larger than 400 m two additional PSO locations will be used. One will be across from the project location along Inchon Road at Naval Amphibious Base Coronado; and

(3) Two additional PSOs will be located in a small boat. The boat will conduct a pre-activity survey of the entire monitoring area prior to in-water construction. The boat will start from south of the project area (where potential marine mammal occurrence is lowest) and proceed to the north. When the boat arrives near the northern boundary of the Level B harassment zone (*e.g.,* just north of the western side of the Coronado Bridge as depicted in the Figures in the monitoring plan) it will set up station so the PSOs are best situated to detect any marine mammals that may approach from the north. The two PSOs aboard will split monitoring duties in order to monitor a 360 degree sweep around the vessel with each PSO responsible for 180 degrees of observable area.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving/removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving or drilling equipment is no more than 30 minutes.

Hydroacoustic Monitoring and Reporting

The Navy has volunteered to conduct hydroacoustic monitoring of all pile driving and removal methods. Data will be collected for a representative number of piles (three to five) for each installation or removal method. As part of the below-mentioned report, or in a separate report with the same timelines as above, the Navy will provide an acoustic monitoring report for this work. Hydroacoustic monitoring results can be used to adjust the size of the Level B harassment and monitoring zones after a request is made and approved by NMFS. The acoustic monitoring report must, at minimum, include the following:

• Hydrophone equipment and methods: recording device, sampling rate, distance (m) from the pile where recordings were made; depth of recording device(s).

• Type of pile being driven or removed, substrate type, method of driving or removal during recordings.

• For impact pile driving: Pulse duration and mean, median, and maximum sound levels (dB re: 1µPa): SELcum, peak sound pressure level (SPLpeak), and single-strike sound exposure level (SELs-s).

• For vibratory removal and other non-impulsive sources: Mean, median, and maximum sound levels (dB re: 1µPa): root mean square sound pressure level (SPLrms), SELcum.

• Number of strikes (impact) or duration (vibratory or other non-impulsive sources) per pile measured, one-third octave band spectrum and power spectral density plot.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

• Dates and times (begin and end) of all marine mammal monitoring;

• Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory and if other removal methods were used);

• Weather parameters and water conditions during each monitoring period (*e.g.,* wind speed, percent cover, visibility, sea state);

• The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;

• Age and sex class, if possible, of all marine mammals observed;

• PSO locations during marine mammal monitoring;

• Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);

• Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;

• Number of individuals of each species (differentiated by month as appropriate) detected within the monitoring zone;

• Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any; and

• Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR), NMFS and to the regional stranding coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:

• Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

• Species identification (if known) or description of the animal(s) involved;

• Condition of the animal(s) (including carcass condition if the animal is dead);

• Observed behaviors of the animal(s), if alive;

• If available, photographs or video footage of the animal(s); and

• General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

Pile driving activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level B harassment from underwater sounds generated from pile driving and removal. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway.

The takes from Level B harassment would be due to potential behavioral disturbance, TTS, and PTS. No mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Proposed Mitigation section).

The nature of the pile driving project precludes the likelihood of serious injury or mortality. Take would occur within a limited, confined area (south-central San Diego Bay) of the stock's range. Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further the amount of take proposed to be authorized is extremely small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed by activities (as noted during modification to the Kodiak Ferry Dock) or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day and that pile driving and removal would occur across six months, any harassment would be temporary. There are no other areas or times of known biological importance for any of the affected species.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

• No mortality or Level A harassment is anticipated or authorized;

• No important habitat areas have been identified within the project area;

• For all species, San Diego Bay is a very small and peripheral part of their range;

• The Navy would implement mitigation measures such as vibratory driving piles to the maximum extent practicable, soft-starts, and shut downs; and

• Monitoring reports from similar work in San Diego Bay have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our

determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS proposes to authorize is below one third of the estimated stock abundance of California sea lions (in fact, take of individuals is less than 1% of the abundance of the affected stock). This is likely a conservative estimate because they assume all takes are of different individual animals which is likely not the case. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the West Coast Region Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the Navy to conduct the Naval Base San Diego Pier 6 Replacement project in San Diego, CA from October 1, 2021 through September 30, 2022, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed Naval Base San Diego Pier 6 Replacement project. We also request at this time comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent Renewal IHA.

On a case-by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA);
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: December 7, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–27225 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648- XA677]

Takes of Marine Mammals Incidental To Specified Activities; Taking Marine Mammals Incidental to the U.S. Coast Guard's Base Los Angeles/Long Beach Wharf Expansion Project, Los Angeles, California

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the U. S. Coast Guard (Coast Guard) to incidentally harass, by Level B harassment only, marine mammals during activities associated with the Base Los Angeles/Long Beach Wharf Expansion Project in Los Angeles, California.

DATES: This Authorization is effective from February 1, 2021 through January 31, 2022.

FOR FURTHER INFORMATION CONTACT: Dwayne Meadows, Ph.D., Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-*

marine-mammal-protection-act. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On July 2, 2020, NMFS received an application from the Coast Guard requesting an IHA to take small numbers of five species of marine mammals incidental to pile driving associated with the Base Los Angeles Long Beach Wharf Expansion Project in Los Angeles, California. The application was deemed adequate and complete on October 5, 2020. The Coast Guard's request is for take of a small number of five species of marine mammals by Level A and/or Level B harassment. Neither the Coast Guard nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Specified Activity

Overview

The purpose of the project is to expand the existing wharf and other base infrastructure for hosting two additional offshore patrol cutters. The existing 1255-foot (383 meters (m)) long by 30-foot (9 m) wide wharf will be extended 265 feet (81 m). The waterfront improvements also include repair of the bank erosion area and placement of small rocks for slope protection near the new onshore electrical substation. Specifically, construction work includes installing up to 102 pier support piles (16 to 30-inch diameter concrete piles) and 126 fender and corner protection piles (16 to 30-inch diameter concrete piles). Pile driving will be by impact hammering. Because of other permitting restrictions, in-water pile driving can only occur between September 1 and April 14, to avoid the nesting season of the California least tern. A detailed description of the planned project is provided in the **Federal Register** notice for the proposed IHA (85 FR 66939; October 21, 2020). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Response

A notice of NMFS's proposal to issue an IHA to the Coast Guard was published in the **Federal Register** on October 21, 2020 (85 FR 66939). That notice described, in detail, the Coast Guard's activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received public comment from one commenter. The U.S. Geological Survey noted they have ''no comment to offer at this time''. A comment letter from the Marine Mammal Commission (Commission) was separately received pursuant to the Commission's authority to recommend steps it deems necessary or desirable to protect and conserve marine mammals (16 U.S.C. 1402.202(a)). We are obligated to respond to the Commission's recommendations within 120 days, and we do so below.

Comment: The Commission recommends that NMFS refrain from issuing renewals for any authorization unless it is consistent with the procedural requirements specified in section 101(a)(5)(D)(iii) of the MMPA.

Response: In prior responses to comments about IHA Renewals (*e.g.,* 84 FR 52464; October 02, 2019 and 85 FR 53342, August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, and promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process.

Comment: The Commission recommends that NMFS reinforce that USCG must keep a running tally of the total Level A and B harassment takes for each species consistent with condition 4(j) of the final authorization.

Response: We agree that the USCG must ensure they do not exceed authorized takes but do not concur with the recommendation. NMFS is not responsible for ensuring that the USCG does not operate in violation of an issued IHA.

Comment: The Commission recommends that NMFS include in the final authorization the requirement that USCG conduct pile-driving activities during daylight hours only.

Response: We do not fully concur with the Commission's recommendation, or with their underlying justification, and do not adopt it as stated. While the USCG has no intention of conducting pile driving activities at night, it is unnecessary to preclude such activity should the need arise (*e.g.,* on an emergency basis or to complete driving of a pile begun during daylight hours, should the construction operator deem it necessary to do so). We disagree with the statement that a prohibition on pile driving activity outside of daylight hours is necessary to meet the MMPA's least practicable adverse impact standard, and the Commission does not justify this assertion.

Comment: The Commission recommends that NMFS prioritize resolving the issue of the appropriate timeframes over which sound exposure levels should be accumulated when estimating the extents of the Level A harassment zones in the near future and consider incorporating animat modeling into its user spreadsheet.

Response: NMFS concurs with this recommendation and has prioritized the issue.

Comment: The Commission recommends that NMFS (1) specify why it has used a smaller source level reduction for bubble curtains from prior projects based on the same referenced data, (2) refrain from using the 5-decibel (dB) bubble curtain source level reduction factor for far-field impacts (≤ 100 m) and (3) consult with

acousticians, including those at the University of Washington-Applied Physics Laboratory, regarding the appropriate source level reduction factor, if any, to use to minimize far-field effects on marine mammals.

Response: NMFS does not agree with the Commission's assessment of bubble curtains. As is their right, the USCG wished to use a more conservative source level reduction for bubble curtains, their application reflected this desire, and we concurred that a 5 dB source level reduction was acceptable and we proposed this reduction.

NMFS does not agree with the Commission's assessment on bubble curtain efficacy that is based on near- and far-distance (referred as ''near-field'' and ''far-field'' by the Commission). Although the measured levels at far-distances (*i.e.,* >100 m) often show less differences from those measured near the source (*e.g.,* at 10 m), this is likely due to propagation effects that some of the sediment-borne acoustic energy that was not attenuated by the bubble curtain re-emerged into the water-column at much further distances. However, this information should not be used to suggest that a different noise level reduction needs to be used for long-distance impact assessment. Since the applicant used a conservative practical spreading modeling (*i.e.,* 15 log (r)), acoustic energy that is lost due to boundary refraction and reflection is not considered in determining the impact distances, and this loss is in addition to the practical spreading. Therefore, the small differences at far-distances between with and without bubble curtains indicates that the bubble curtain is less effective in attenuating additional acoustic energy beyond that within the water column. Further, NMFS has previously outlined our rationale for the bubble curtain source level reduction factor (*e.g.,* 84 FR 64833, November 25, 2019; 84 FR 28474, June 19, 2019) in response to a similar comment from the Commission.

Comment: The Commission recommends that NMFS work with USCG to ensure that the near-source hydrophone location is 10 m from the pile and the far-field hydrophone location(s) are 100–200 m from the pile.

Response: NMFS agrees that it is important to ensure adequate review of hydroacoustic monitoring plans before they are implemented by applicants. The USCG's request for proposals to contract the work for this project (which was announced before this IHA was proposed) does not specify exact distances or locations of hydrophones for the hydroacoustic monitoring. We will work with the USCG and their hydroacoustic monitoring contractor, within the constraints of USCG's contract, to achieve the best possible monitoring data.

Comment: The Commission recommends that NMFS authorize at least 38 Level A harassment takes of harbor seals based on the possibility that at least one seal could occur in the project area on each of the 38 days of proposed activities.

Response: We do not concur with the Commission's recommendation. As noted in our proposed authorizations, we typically estimate take based on the area of the harassment zone and the density of potentially taken species. As also noted in our proposed authorizations, when density data are not available for a species (as is the case for harbor seals in this project area) we use proxy density or abundance data to help calculate take. Just as with density data, the proxies often result in fractional estimates of animals potentially affected per day of activity. As the Commission has been aware, our standard practice is to round estimates based on significant digits after calculating daily take, not to round to whole numbers of take each day as the Commission suggests. We do not round to whole numbers of take until the end of the series of calculations used to estimate take. Using those standard practices we arrived at an estimate of 19 takes of harbor seals.

The Commission also notes higher occurrences of harbor seals in areas far away from the project site (*i.e.,* survey zone 8). They raised this issue in their informal comments. As we told the Commission in our response to those informal comments, based on the numerous surveys in areas closer to the project area, and anecdotal evidence that the harbor seals located near the breakwall (such as zone 8) do not venture further into the harbor near the project area, we believe that the proposed 19 takes of harbor seals are sufficiently representative of take that may be expected to occur.

Comment: The Commission recommends that NMFS either (1) increase the number of takes of common dolphins from 200 to 280 if USCG intended to assume that one group of dolphins could be present each full week of activities and activities would occur only five days per week or (2) clarify that it assumed that one group of common dolphins would be present every 7 days rather than every full week of activities.

Response: We do not concur with the Commission's recommendation. The Commission raised this issue in their informal comments. The Commission mistakenly asserted we had used the term ''work week'' in our analysis and made an unsubstantiated assumption that construction activities would occur only 5 days per week and that our analysis depends on how many days per week an applicant is actually able to work (*e.g.,* because of weather or mechanical issues, etc.). As noted in our informal comment response to the Commission, our take analysis assumed that one group of common dolphins would be present every 7 days of work and thus there is no need to change the number of takes of common dolphins.

Changes From the Proposed IHA to Final IHA

We made minor clarifications in our standard language in the Mitigation section of this notice and in the IHA to reflect that because only impact hammering is being used, in some cases shutdown zones are larger than the Level B harassment and monitoring zones. Minor typographical errors were corrected.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species or stocks for which take is expected and authorized for this action, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Pacific SARs (*e.g.,* Carretta *et al.* 2020).

TABLE 1—SPECIES THAT SPATIALLY CO-OCCUR WITH THE ACTIVITY TO THE DEGREE THAT TAKE IS REASONABLY LIKELY TO OCCUR

Common name	Scientific name	Stock	ESA/ MMPA status; Strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae:.						
Gray Whale	*Eschrichtius robustus*	Eastern North Pacific	-, -, N	26,960 (0.05, 25,849, 2016) ..	801	138
Order Cetartiodactyla—Cetacea—Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose Dolphin	*Tursiops truncatus*	California Coastal	-, -, N	453 (0.06, 346, 2011)	2.7	>2.0
Short-beaked common dolphin.	*Delphinus delphis*	California/Oregon/Washington	-, -, N	969,861 (0.17, 839,325, 2016)	8,393	≥40
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
California Sea Lion	*Zalophus californianus*	United States	-, -, N	257,606 (N/A, 233,515, 2014)	14,011	>321
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	California	-, -, N	30,968 (N/A, 27,348, 2012) ...	1,641	43

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual Mortality/Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

California sea lion, harbor seal, and bottlenose dolphin spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have authorized take of these species. Short-beaked common dolphin and gray whale occurrence and density is such that take is possible, and we have authorized take of these species also. A detailed description of the species likely to be affected by the project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (85 FR 66939; October 21, 2020); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the Coast Guard's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The notice of proposed IHA (85 FR 66939; October 21, 2020) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from the Coast Guard's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (85 FR 66939; October 21, 2020).

Estimated Take

This section provides an estimate of the number of incidental takes authorized through this IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment, as use of the acoustic source (*i.e.,* impact pile driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result for gray whales and harbor seals because predicted auditory injury zones are larger. The mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds

above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). NMFS relied on local occurrence data and group size to estimate take. Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

Using the best available science, NMFS has developed acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 (micro Pascal) µPa root mean square (rms) for continuous (*e.g.,* vibratory pile-driving) and above 160 dB re 1 µPa (rms) for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

The Coast Guard's proposed activity includes the use of impulsive (impact pile-driving) sources, and therefore the 160 dB re 1 µPa (rms) threshold is applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Coast Guard's activity includes the use of impulsive (impact pile-driving) sources.

These thresholds are provided in Table 2. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 2—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (Received Level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:*$L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa, and cumulative sound exposure level (L_E) has a reference value of 1µPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving).

An impact hammer would be used to place the pile at its intended depth through rock or harder substrates. An impact hammer is a steel device that works like a piston, producing a series of independent strikes to drive the pile. Impact hammering typically generates the loudest noise associated with pile installation. The actual durations of each installation method vary depending on the type and size of the pile.

In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for piles of various sizes being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels for the various pile sizes and methods (see Table 3). Data are provided for 16 and 30-inch concrete piles that are the extremes of the possible range of sizes. As noted above, the Coast Guard will use a bubble curtain to reduce sounds from pile driving. A 5dB reduction is applied to

the source levels for calculating distances to the Level A harassment and Level B harassment sound thresholds. This is a conservative reduction based on several studies including CALTRANS (2015) and Austin *et al.* (2016).

TABLE 3—PROJECT SOUND SOURCE LEVELS

Pile driving activity		Data source			Estimated sound source level at 10 meters without attenuation
Hammer type	Pile type	dB RMS	dB SEL	dB peak	
Impact	16-inch concrete	166	155	185	CALTRANS (2015) (Table I.2–1,18-inch concrete).
Impact	30-inch concrete	176	166	200	CALTRANS (2015) (Table I.2–3).

Note: RMS = root mean square, SEL = single strike sound exposure level; dB peak = peak sound level. A 5-db reduction for use of a bubble curtain reduces these source levels when calculating isopleth distances below.

Level B Harassment Zones

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10 (R1/R2)

where:

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for the Coast Guard's activity.

Using the practical spreading model, the Coast Guard determined underwater noise would fall below the behavioral effects threshold for marine mammals at distances no greater than 55 m with an effective source level of 171 dB rms for the 30-inch piles (Table 4). This distance determines the maximum Level B harassment zone for the project.

TABLE 4—CALCULATED DISTANCES (METERS) TO LEVEL B HARASSMENT ISOPLETHS (M) FOR EACH PILE TYPE

Pile type	Level B isopleth (m)
16-inch concrete	12
30-inch concrete	55

Level A Harassment Zones

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of take by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as impact pile driving, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS.

Inputs used in the User Spreadsheet (Table 5), and the resulting isopleths are reported below (Table 6) for each of the pile types.

TABLE 5—NMFS TECHNICAL GUIDANCE USER SPREADSHEET INPUT TO CALCULATE LEVEL A ISOPLETHS

Pile type	Piles/day	Strikes per pile *	Days of pile driving **
16-inch concrete	6	1564 strikes	17.
30-inch concrete	6	1748 strikes	21 or 30.

Note: Propagation loss coefficient is 15LogR and Weighting Factor Adjustment is 2 for all cells.
* Strikes per pile are an estimate from a geotechnical report for the project (TCG, 2019).
** Days depends on size of pile ultimately used for wharf support. Take will be calculated using largest zones (30 inch piles) and longest duration (38 days using 16 inch support piles and 30-inch fender and corner piles).

The above input scenarios lead to PTS isopleth distances (Level A thresholds) of 1 to 194.6 meters (3 to 639 feet), depending on the marine mammal group and scenario (Table 7). Note that the Level A harassment isopleths are larger than the level B harassment isopleths for the low-frequency and high-frequency cetaceans and the phocid pinnipeds because of the large number of piles and strikes per day and use of only an impact hammer.

TABLE 6—CALCULATED DISTANCES (METERS) TO LEVEL A HARASSMENT ISOPLETHS (M) FOR EACH HEARING GROUP AND PILE TYPE

Pile type	Low-frequency cetaceans (meters)	Mid-frequency cetaceans (meters)	High-frequency cetaceans (meters)	Phocid pinnipeds (meters)	Otariid pinnipeds (meters)
16-inch concrete	28.0	1	33.4	15	1.1
30-inch concrete	163.4	5.8	194.6	87.4	6.4

Note: a 10-meter shutdown zone will be implemented for all species and activity types to prevent direct injury of marine mammals.

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, abundance, or group dynamics of marine mammals that will inform the take calculations. Density data in the port and harbor does not exist for any species, but as described above, there are three baseline biological surveys since 2000 (MEC, 2002; SAIC, 2010; MBC, 2016) that provide observations in over 30 defined zones within the harbor, three of which are near the ensonified area of the project and are used to estimate take.

Here we describe how the information provided above is brought together to produce a quantitative take estimate. Take by Level A and Level B harassment is summarized in Table 7.

Gray Whale

Because live gray whales were not sighted during the baseline surveys (see above), but are periodically known from the harbor, and the Level A harassment and shutdown zone radius is 170 m (656 feet), we authorize two Level A harassment takes (Table 7) for inadvertent takes of animals that could enter the shutdown zone undetected or before shutdown could be implemented. Because the Level A harassment and shutdown zones are larger than the Level B harassment zone, we do not authorize take by Level B harassment, but recognize animals could also inadvertently enter the smaller Level B harassment zone after already being recorded as Level A harassment within the larger Level A harassment zone.

Bottlenose Dolphin

The highest observation on any given day in the three zones surrounding the Coast Guard Base from the three biological baseline surveys (MEC, 2002; SAIC, 2010; MBC, 2016) is 12. Given the small zone size relative to the study area an expected number of three animals in the project area per day is a reasonable representation of daily occurrence for the species. Given a maximum pile driving period of 38 days, 3 animals per day would equate a take of 114 incidents of Level B harassment. Based on the above, we conservatively authorize 114 Level B harassment takes of bottlenose dolphins (Table 7). Because the Level A harassment and shutdown zones are very small and we believe the protected species observer (PSO) will be able to effectively monitor and implement the shutdown zones, we do not authorize take by Level A harassment.

Short-beaked Common Dolphin

Observations during biological surveys in 2013 through 2014 included one pod of 40 individuals in the Los Angeles Main Channel where the project occurs (MBC, 2016). This number of individuals is highly unlikely to be present in the project area on a daily basis. We conservatively assume one pod of 40 could be present each full week. Given a maximum pile driving period of 38 days, this would equate to 5 full weeks or 200 takes through Level B harassment. Based on the above, we authorize 200 Level B harassment takes of short-beaked common dolphins (Table 7). Because the Level A harassment and shutdown zones are very small and we believe the PSO will be able to effectively monitor and implement the shutdown zones, we do not authorize take by Level A harassment.

California Sea Lion

The highest observation on any given day in the three zones surrounding the Coast Guard Base from the three biological baseline surveys (MEC, 2002; SAIC, 2010; MBC, 2016) is 65 sea lions. Given the small zone size relative to the study area an expected number of 10 animals in the project area per day is a reasonable representation of daily occurrence for the species. Given a maximum pile driving period of 38 days, 10 animals per day would equate to 380 incidents of Level B harassment. Based on the above, we authorize 380 Level B harassment takes of California sea lions (Table 7). Because the Level A harassment and shutdown zones are very small and we believe the PSO will be able to effectively monitor and implement the shutdown zones, we do not authorize take by Level A harassment.

Harbor Seal

The highest observation on any given day in the three zones surrounding the Coast Guard Base from the three biological baseline surveys (MEC, 2002; SAIC, 2010; MBC, 2016) is 1 seal. The Level A harassment zone for this species is 90 m (295 feet), however the Coast Guard proposed a smaller shutdown zone to minimize work stoppages. We are authorizing a shutdown zone of 55 m (180 feet, see Mitigation section below) that coincides with the size of the Level B harassment zone for ease of implementation. It is conservatively estimated that 0.5 animals per day might enter the shutdown zone or Level A harassment zone between 55 and 90 m (180 –295 feet). Given a maximum pile driving period of 38 days, this would equate to a take of 19 individuals through Level A harassment (Table 7). Because the Level A harassment and shutdown zones are larger than the Level B harassment zone, we do not authorize take by Level B harassment, but recognize animals could also enter the smaller Level B harassment zone after already being recorded within the larger Level A harassment zone.

TABLE 7—AUTHORIZED AMOUNT OF TAKING, BY LEVEL A AND LEVEL B HARASSMENT, BY SPECIES AND STOCK AND PERCENT OF TAKE BY STOCK

Species	Authorized take		
	Level B	Level A	Percent of stock
Harbor seal (*Phoca vitulina*) California Stock	0	19	<0.1
California sea lion (*Zalophus californianus*) U.S. Stock	380	0	0.2
Gray whale (*Eschrichtius robustus*) Eastern North Pacific Stock	0	2	<0.1
Common bottlenose dolphin (*Tursiops truncatus*) California Coastal Stock	114	0	25.2
Short-beaked common dolphin (*Delphinus delphis*) California/Oregon/Washington Stock	200	0	<0.1

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

The following mitigation measures are authorized in the IHA:

- For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location; or (2) positioning of the pile on the substrate via a crane (*i.e.,* stabbing the pile);
- Conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- For those marine mammals for which Level A or B harassment take has not been requested, in-water pile installation/removal (if necessary) will shut down immediately if such species are observed within or entering the Level A or B harassment zone; and
- If take reaches the authorized limit for an authorized species, pile installation will be stopped as these species approach the Level A or B harassment zone to avoid additional take.

The following mitigation measures would apply to the Coast Guard's in-water construction activities.

- *Establishment of Shutdown Zones*—The Coast Guard will establish shutdown zones for all pile driving activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 8). Shutdown zones are rounded up to the next 10 m from the largest Level A harassment zones in Table 7, except in the case of the phocid group where the shutdown zone is reduced to the same size as the largest Level B harassment zone (55 m) and the applicant has requested the authorization of Level A harassment takes for the area within the Level A harassment one and outside the shutdown zone;
- *PSOs*—The placement of PSOs during all pile driving activities (described in detail in the Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile installation. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected;

TABLE 8—SHUTDOWN ZONES

Pile type	Low-frequency cetaceans (meters)	Mid-frequency cetaceans (meters)	High-frequency cetaceans (meters)	Phocid pinnipeds (meters)	Otariid pinnipeds (meters)
16-inch concrete	30	10	40	20	10
30-inch concrete	170	10	200	55	10

• *Monitoring for Level A and B Harassment*—The Coast Guard will monitor the Level A and B harassment zones. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential halt of activity should the animal enter the shutdown zone. Placement of PSOs will allow PSOs to observe marine mammals within the Level B harassment zones;

• *Pre-activity Monitoring*—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will be required;

• *Soft Start*—Soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period. This procedure will be conducted three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer;

• *Bubble Curtain*—The Coast Guard is required to employ a bubble curtain during all impact pile driving and operate it in a manner consistent with the following performance standards: (1) The bubble curtain must distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column; (2) The lowest bubble ring must be in contact with the mudline for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline contact. No parts of the ring or other objects shall prevent full mudline contact; and (3) Air flow to the bubblers must be balanced around the circumference of the pile;

• *Hydroacoustic monitoring*—The Coast Guard is required to conduct hydroacoustic monitoring of at least two piles of each pile diameter; and

• Pile driving is planned to occur during daylight hours.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

• Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);

• Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);

• Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

• How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

• Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and

• Mitigation and monitoring effectiveness.

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the Monitoring section of the application and section 5 of the IHA. Marine mammal monitoring during pile driving must be conducted by NMFS-approved PSOs in a manner consistent with the following:

• Independent PSOs (*i.e.,* not construction personnel) who have no other assigned tasks during monitoring periods must be used;

• At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

• Other PSOs may substitute education (degree in biological science or related field) or training for experience; and

• The Coast Guard must submit PSO Curriculum Vitae for approval by NMFS prior to the onset of pile driving.

PSOs must have the following additional qualifications:

• Ability to conduct field observations and collect data according to assigned protocols;

• Experience or training in the field identification of marine mammals, including the identification of behaviors;

• Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

• Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

• Ability to communicate orally, by radio or in person, with project

personnel to provide real-time information on marine mammals observed in the area as necessary.

One PSO will be employed. PSO location will provide an unobstructed view of all water within the shutdown and Level A and Level B harassment zones.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving/removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving or drilling equipment is no more than 30 minutes.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory);
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance);
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;
- Age and sex class, if possible, of all marine mammals observed;
- PSO locations during marine mammal monitoring;
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);
- Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;
- Number of marine mammals detected within the harassment zones, by species.
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;
- Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals;
- Submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above).

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Hydroacoustic Monitoring and Reporting—The Coast Guard will monitor the driving of at least two piles of each diameter. As part of the above-mentioned report, or in a separate report with the same timelines as above, the Coast Guard will provide an acoustic monitoring report for this work. The acoustic monitoring report must, at minimum, include the following:

- Hydrophone equipment and methods: recording device, sampling rate, distance (m) from the pile where recordings were made; depth of recording device(s);
- Type of pile being driven, substrate type, method of driving during recordings, and if a sound attenuation device is used;
- For impact pile driving: Pulse duration and mean, median, and maximum sound levels (dB re: 1µPa): cumulative sound exposure level (SELcum), peak sound pressure level (SPLpeak), and single-strike sound exposure level (SELs-s); and
- Number of strikes per pile measured, one-third octave band spectrum and power spectral density plot.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Coast Guard shall report the incident to the Office of Protected Resources (OPR), NMFS and to the regional stranding coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Coast Guard must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and

growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analyses applies to all of the species listed in 7, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Pile driving activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level A harassment and Level B harassment from underwater sounds generated from pile driving. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway.

The takes from Level A and Level B harassment would be due to potential behavioral disturbance, TTS, and PTS. No mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Mitigation section).

The Level A harassment zones identified in Table 6 are based upon an animal exposed to impact pile driving multiple piles per day. Considering duration of impact driving each pile (up to 45 minutes) and breaks between pile installations (to reset equipment and move pile into place), this means an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement throughout the area. So while the take we are proposing to authorize is expected to occur, if an animal was exposed to accumulated sound energy, the resulting PTS would likely be small (*e.g.,* PTS onset) at lower frequencies where pile driving energy is concentrated, and unlikely to result in impacts to individual fitness, reproduction, or survival.

The nature of the pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take would occur within a limited, confined area (Los Angeles port) of any given stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further the amount of take authorized for any given stock is small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed by activities (as noted during modification to the Kodiak Ferry Dock; see *Behavioral Harassment* section of the **Federal Register** notice for the proposed IHA (85 FR 66939; October 21, 2020)) or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day and that pile driving and removal would occur across a few weeks, any harassment would be temporary. There are no other areas or times of known biological importance for any of the affected species.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- Authorized Level A harassment would be very small amounts and of low degree;
- No biologically important areas have been identified within the project area;
- For all species, the project area is a very small, human-altered and peripheral part of their range;
- The Coast Guard would implement mitigation measures such soft-starts, bubble curtain, and shut downs; and
- Monitoring reports from similar work in the ports have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS finds that the total marine mammal take from the activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS authorizes of all species or stocks is below one third of the estimated stock abundance. These are all likely conservative estimates of individuals taken because they assume all takes are of different individual animals which is likely not the case. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

Based on the analysis contained herein of the proposed activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an

IHA) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Endangered Species Act (ESA)

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Authorization

NMFS has issued an IHA to the Coast Guard for the potential harassment of small numbers of five marine mammal species incidental to the Base Los Angeles/Long Beach Wharf Expansion project in Los Angeles, California, provided the previously mentioned mitigation, monitoring and reporting requirements are followed.

Dated: December 7, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–27205 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Multistakeholder Process on Promoting Software Component Transparency

AGENCY: National Telecommunications and Information Administration, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Telecommunications and Information Administration (NTIA) will convene a virtual meeting of a multistakeholder process on promoting software component transparency on January 13, 2021.

DATES: The meeting will be held on January 13, 2021, from 12:00 p.m. to 4:00 p.m., Eastern Time.

ADDRESSES: The meeting will be held virtually, with online slide share and dial-in information to be posted at *https://www.ntia.gov/SoftwareTransparency.*

FOR FURTHER INFORMATION CONTACT: Allan Friedman, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4725, Washington, DC 20230; telephone: (202) 482–4281; email: *afriedman@ntia.gov.* Please direct media inquiries to NTIA's Office of Public Affairs: (202) 482–7002; email: *press@ntia.gov.*

SUPPLEMENTARY INFORMATION:

Background

This NTIA cybersecurity multistakeholder process focuses on promoting software component transparency.[1] Most modern software is not written completely from scratch, but includes existing components, modules, and libraries from the open source and commercial software world. Modern development practices such as code reuse, and a dynamic IT marketplace with acquisitions and mergers, make it challenging to track the use of software components. The Internet of Things compounds this phenomenon, as new organizations, enterprises, and innovators take on the role of software developer to add ''smart'' features or connectivity to their products. While the majority of libraries and components do not have known vulnerabilities, many do, and the sheer quantity of software means that some software products ship with vulnerable or out-of-date components.

The first meeting of this multistakeholder process was held on July 19, 2018, in Washington, DC.[2] Stakeholders presented multiple perspectives, and identified several inter-related work streams: Understanding the Problem, Use Cases and State of Practice, Standards and Formats, and Healthcare Proof of Concept. Since then, stakeholders have been discussing key issues and developing products such as guidance documents. NTIA acts as the convener, but stakeholders drive the outcomes. Success of the process will be evaluated by the extent to which broader findings on software component transparency are implemented across the ecosystem.

The first set of stakeholder-drafted documents on Software Bills of Materials was published by NTIA in November 2019. Those documents, and subsequent consensus-approved drafts from the community, are available at: *https://www.ntia.gov/SBOM.* The main objectives of the January 13, 2021 meeting are to share progress from the working groups; to give feedback on the ongoing work around technical challenges, tooling, demonstrations, and awareness and adoption; and to continue discussions around potential guidance or playbook documents. This meeting will also feature short demonstrations of SBOM-related tools and services to help the community understand the growth of the broader ecosystem. Demonstration suggestions and proposals should be 250 words or less and should be submitted to Allan Friedman at *afriedman@ntia.gov* by December 21, 2020. More information about stakeholders' work is available at: *https://www.ntia.gov/SoftwareTransparency.*

Time and Date: NTIA will convene the next meeting of the multistakeholder process on Software Component Transparency on January 13, 2021, from 12:00 p.m. to 4:00 p.m. Eastern Time. The exact time of the meeting is subject to change. Please refer to NTIA's website, *https://www.ntia.gov/SoftwareTransparency,* for the most current information.

Place: The meeting will be held virtually, with online slide share and dial-in information to be posted at *https://www.ntia.gov/SoftwareTransparency.* Please refer to NTIA's website, *https://www.ntia.gov/SoftwareTransparency,* for the most current information.

Other Information: The meeting is open to the public and the press on a first-come, first-served basis.

The virtual meeting is accessible to people with disabilities. Requests for real-time captioning or other auxiliary aids should be directed to Allan Friedman at (202) 482–4281 or *afriedman@ntia.gov* at least seven (7) business days prior to the meeting. Access details for the meeting are subject to change. Please refer to NTIA's website, *https://www.ntia.gov/SoftwareTransparency,* for the most current information.

[1] NTIA serves as the President's principal adviser on telecommunications and information policies. *See* 47 U.S.C. 902(b)(2)(D).

[2] Notes, presentations, and a video recording of the July 19, 2018 kickoff meeting are available at: *https://www.ntia.gov/SoftwareTransparency.*

Dated: December 8, 2020.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2020–27323 Filed 12–10–20; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to and deletions from the procurement list.

SUMMARY: This action adds product(s) and service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) and service(s) from the Procurement List previously furnished by such agencies.

DATES: *Date added to and deleted from the Procurement List:* January 10, 2021

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 8/21/2020, 9/4/2020 and 9/11/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service(s) and impact of the additions on the current or most recent contractors, the Committee has determined that the service(s) listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service(s) to the Government.

2. The action will result in authorizing small entities to furnish the service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the service(s) proposed for addition to the Procurement List.

End of Certification

Accordingly, the following service(s) are added to the Procurement List:

Service(s)

Service Type: Base Supply Center and Retail Gift Shop
Mandatory for: Bureau of Alcohol, Firearms, Tobacco and Explosives, Washington, DC
Designated Source of Supply: Virginia Industries for the Blind, Charlottesville, VA
Contracting Activity: ATF ACQUISITION AND PROPERTY MGMT DIV, ATF
Service Type: Janitorial Service
Mandatory for: FAA, Portland Air Traffic Control Tower and SSC Office Space, Portland, ME
Designated Source of Supply: Northern New England Employment Services, Portland, ME
Contracting Activity: FEDERAL AVIATION ADMINISTRATION, 697DCK REGIONAL ACQUISITIONS SVCS
Service Type: Janitorial Service
Mandatory for: Federal Aviation Administration, Norfolk Air Traffic Control Tower, Virginia Beach, VA and Patrick Henry Field Air Traffic Control Tower, Newport News, VA
Designated Source of Supply: Portco, Inc., Portsmouth, VA
Contracting Activity: FEDERAL AVIATION ADMINISTRATION, 697DCK REGIONAL ACQUISITIONS SVCS
Service Type: Janitorial Service
Mandatory for: FAA, Air Traffic Control Tower, Roanoke, VA
Designated Source of Supply: Goodwill Industries of the Valleys, Inc., Roanoke, VA
Contracting Activity: FEDERAL AVIATION ADMINISTRATION, 697DCK REGIONAL ACQUISITIONS SVCS

Deletions

On 11/6/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) and service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the product(s) and service(s) to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) and service(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(s) and service(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
7510–01–357–6830—Pad, Executive Message Recording, White/Yellow, 2⅝″ x 6¼″, 400 Message Forms
Designated Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC; The Arkansas Lighthouse for the Blind, Little Rock, AR
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR (2, NEW YORK, NY

NSN(s)—Product Name(s):
7530–01–600–2026—Notebook, Memorandum Book, 100% PCW, 3x5″, 60 sheets, Narrow Rule, White
7530–01–600–2028—Notebook, Spiral Bound, 100% PCW, 8½x11″, 80 sheets, College Rule, White
7530–01–600–2027—Notebook, Spiral Bound, 100% PCW, 8½x11″, 100 sheets, Wide Rule, White
7530–01–600–2016—Notebook, Spiral Bound, 100% PCW, 8½x11'', 120 sheets, College Rule, White
7530–01–600–2015—Notebook, Spiral Bound, 100% PCW, 8½x11″, 200 sheets, College Rule, White
7530–01–600–2021—Notebook, Spiral Bound, 100% PCW, 8x10½″, 70 sheets, Wide Rule, White
Designated Source of Supply: Winston-Salem Industries for the Blind, Inc., Winston-Salem, NC
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):
1005–01–134–3621—Index, Elevation
Designated Source of Supply: Arizona Industries for the Blind, Phoenix, AZ
Contracting Activity: DLA LAND AND MARITIME, COLUMBUS, OH

Service(s)

Service Type: Cutting and Assembly
Mandatory for: Robins Air Force Base, Robins AFB, GA
Designated Source of Supply: Middle Georgia Diversified Industries, Inc., Dublin, GA
Contracting Activity: DEFENSE LOGISTICS AGENCY, DLA AVIATION
Service Type: Janitorial/Custodial
Mandatory for: Denver Federal Center: Building 95, Denver, CO
Designated Source of Supply: North Metro Community Services for Developmentally Disabled, Westminster, CO
Contracting Activity: GENERAL SERVICES ADMINISTRATION, FPDS AGENCY COORDINATOR
Service Type: Vehicle Washing Service
Mandatory for: US Customs and Border Protection, Island of Puerto Rico & Virgin Islands, San Juan, PR
Designated Source of Supply: The Corporate Source, Inc., Garden City, NY
Contracting Activity: U.S. CUSTOMS AND BORDER PROTECTION, BORDER ENFORCEMENT CTR DIV
Service Type: Janitorial/Grounds Maintenance
Mandatory for: US Customs and Border Protection, Big Bend Sector Texas, Marfa, TX
Designated Source of Supply: Professional Contract Services, Inc., Austin, TX
Contracting Activity: U.S. CUSTOMS AND BORDER PROTECTION, BORDER ENFORCEMENT CTR DIV
Service Type: Janitorial/Custodial
Mandatory for: Naval Intelligence Command Building: (NIC II including trailers 1, 2 and 3), Suitland, MD
Designated Source of Supply: Melwood Horticultural Training Center, Inc., Upper Marlboro, MD
Contracting Activity: GENERAL SERVICES ADMINISTRATION, FPDS AGENCY COORDINATOR
Service Type: Custodial & Grounds Maintenance
Mandatory for: Immigration and Customs Enforcement: Penthouse Floor and Parking Floor, San Juan, PR
Immigration and Customs Enforcement: Calle Gonzalez Clemente #30, Mayaguez, PR
Designated Source of Supply: The Corporate Source, Inc., Garden City, NY
Contracting Activity: U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, MISSION SUPPORT DALLAS
Service Type: Janitorial/Custodial
Mandatory for: GSA, Leased Space: 603–11 East 2nd Street, Des Moines, IA
Mandatory for: U.S. Courthouse Annex, Des Moines, IA
Designated Source of Supply: Goodwill Solutions, Inc., Johnston, IA
Contracting Activity: PUBLIC BUILDINGS SERVICE, GSA/PUBLIC BUILDINGS SERVICE
Service Type: Custodial service
Mandatory for: National Counterdrug Training Center Campus, Annville, PA
Designated Source of Supply: Opportunity Center, Incorporated, Wilmington, DE
Contracting Activity: DEPT OF THE ARMY, W7NX USPFO ACTIVITY PA ARNG
Service Type: Janitorial/Custodial
Mandatory for: Annapolis USARC, Annapolis, MD
Mandatory for: Jecelin USARC, Baltimore, MD
Designated Source of Supply: CHI Centers, Inc., Silver Spring, MD
Contracting Activity: DEPT OF THE ARMY, W6QK ACC–PICA
Service Type: Janitorial/Custodial
Mandatory for: U.S. Federal Building, Courthouse and Post Office, Thomasville, GA
Designated Source of Supply: Thomas Grady Service Center, Inc., Thomasville, GA
Contracting Activity: PUBLIC BUILDINGS SERVICE, ACQUISITION DIVISION/SERVICES BRANCH
Service Type: Grounds Maintenance
Mandatory for: U.S. Army Reserve Center: 1635 Armor Road, Akron, OH
Contracting Activity: DEPT OF THE ARMY, W40M RHCO–ATLANTIC USAHCA

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2020–27320 Filed 12–10–20; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the procurement list.

SUMMARY: The Committee is proposing to add service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes product(s) previously furnished by such agencies.

DATES: Comments must be received on or before: January 10, 2021.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–4149.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Service(s)

Service Type: Custodial and Related Services
Mandatory for: GSA PBS Region 5, Theodore Levin US Courthouse, Detroit, MI
Mandatory for: GSA PBS Region 5, Rosa Parks Federal Building, Detroit, MI
Mandatory for: GSA PBS Region 5, Rosa Parks Federal Garage, Detroit, MI
Mandatory for: GSA PBS Region 5, US Customs Cargo Inspection Facilities, Detroit, MI
Designated Source of Supply: Jewish Vocational Service and Community Workshop, Southfield, MI (Prime Contractor)
Designated Source of Supply: Services to Enhance Potential, Dearborn, MI (Subcontractor for the Rosa Parks Federal Building and Garage, and US Customs Cargo Inspection Facilities
Contracting Activity: PUBLIC BUILDINGS SERVICE, PBS R5

Deletions

The following product(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
MR 13120—Set, Container, Pop, 5pc
MR 13130—Set, Bowl, Colander, Large, 3 pc
MR 13131—Container, Rectangle, Pop, 1.5 Qt
MR 13132—Container, Square, Pop, Small, 0.9 Qt.
MR 13133—Container, Rectangle, Pop, 2.5 Qt.
MR 13134—Container, Square, Pop, Small, 0.3 Qt.
Designated Source of Supply: Cincinnati Association for the Blind, Cincinnati, OH
Contracting Activity: Military Resale-Defense Commissary Agency
NSN(s)—Product Name(s):
9905–00–NIB–0001—Link, Hasp and Strap Assembly
9905–00–NIB–0014—Link, Hasp and Strap Assembly
Designated Source of Supply: Mississippi Industries for the Blind, Jackson, MS
Contracting Activity: U.S. Postal Service, Washington, DC, Washington, DC

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2020–27319 Filed 12–10–20; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, December 16, 2020, 10:00 a.m.

PLACE: This meeting will be conducted by remote means.

STATUS: Commission Meeting—Open to the Public.

MATTER TO BE CONSIDERED: Decisional Matter: CPSC Plan to Create e-Filing Program for Imported Consumer Products.

ATTENDANCE: Due to the COVID 19 Pandemic this Commission Meeting will be held by remote means. If you would like to attend the meeting follow the directions under virtual meeting attendance on CPSC.gov: *https://www.cpsc.gov/Newsroom/Public-Calendar.*

CONTACT PERSON FOR MORE INFORMATION: Alberta Mills, Office of the Secretariat, Office of the General Counsel, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–6833 (Office) or (240) 863–8938 (Cell).

Dated: December 9, 2020.

Alberta E. Mills,

Secretary.

[FR Doc. 2020–27411 Filed 12–9–20; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–68]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–68 with attached Policy Justification and Sensitivity of Technology.

Dated: December 8, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

October 26, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-68 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Taipei Economic and Cultural Representative Office in the United States (TECRO) for defense articles and services estimated to cost $2.37 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 20–68

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser*: Taipei Economic and Cultural Representative Office in the United States (TECRO)

(ii) *Total Estimated Value*:

Major Defense Equipment*	$1.16 billion
Other	$1.21 billion
TOTAL	$2.37 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*: TECRO has requested to buy up to one hundred (100) Harpoon Coastal Defense Systems (HCDS) consisting of:

Major Defense Equipment (MDE):
Up to four hundred (400) RGM-84L-4 Harpoon Block II Surface Launched Missiles
Four (4) RTM-84L-4 Harpoon Block II Exercise Missiles
Non-MDE:
Also included are four hundred eleven (411) containers, one hundred (100) Harpoon Coastal

Defense System Launcher Transporter Units, twenty-five (25) radar trucks, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor representatives' technical assistance, engineering and logistics support services, and other related elements of logistics support.

(iv) *Military Department*: Navy (TW-P-LHX)

(v) *Prior Related Cases, if any*: TW-P-LGV, TW-P-LGN, TW-P-LGL

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex

(viii) *Date Report Delivered to Congress*: October 26, 2020

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office in the United States (TECRO) – RGM-84L-4 Harpoon Surface Launched Block II Missiles

TECRO has requested to buy up to one hundred (100) Harpoon Coastal Defense Systems (HCDS) consisting of up to four hundred (400) RGM-84L-4 Harpoon Block II Surface Launched Missiles; and four (4) RTM-84L-4 Harpoon Block II Exercise Missiles. Also included are four hundred and eleven (411) containers, one hundred (100) Harpoon Coastal Defense System Launcher Transporter Units, twenty-five (25) radar trucks, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor representatives' technical assistance, engineering and logistics support services, and other related elements of logistics support. The total estimated program cost is $2.37 billion.

This proposed sale is consistent with U.S. law and policy as expressed in Public Law 96–8.

This proposed sale serves U.S. national, economic, and security interests by supporting the recipient's continuing efforts to modernize its armed forces and to maintain a credible defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, economic and progress in the region.

This proposed sale will improve the recipient's capability to meet current and future threats by providing a flexible solution to augment existing surface and air defenses. The recipient will be able to employ a highly reliable and effective system to counter or deter maritime aggressions, coastal blockades, and amphibious assaults. This capability will easily integrate into existing force infrastructure. The recipient will have no difficulty absorbing these systems into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be The Boeing Company, St. Louis, MO. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of two (2) U.S. contractor representatives to the recipient for a duration of 8 years to support technical reviews, support, and oversight.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–68

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The RGM-84L Harpoon Surface Launched Block II missile system is a non-nuclear tactical weapon system. It provides a day, night, and adverse weather, standoff air-to-surface capability and is an effective Anti-Surface Warfare missile. The RGM-84L incorporates components, software, and technical design information that are considered sensitive. These elements are essential to the ability of the Harpoon missile to selectively engage hostile targets under a wide range of operations, tactical and environmental conditions:

- The Radar Seeker,
- The Radar Altimeter,
- The GPS/INS System,
- Operational Flight Program Software, and
- Missile operational characteristics and performance data.

2. The highest level of classification of defense articles, components, and services included in this potential sale is CONFIDENTIAL.

3. If a technologically advanced adversary were to obtain knowledge of the hardware and software elements, the information could be used to develop countermeasures or equivalent systems, which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the recipient can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the recipient.

[FR Doc. 2020–27292 Filed 12–10–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–72]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–72 with attached Policy Justification and Sensitivity of Technology.

Dated: December 8, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

October 16, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-72 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Romania for defense articles and services estimated to cost $300 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 20–72

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Romania

(ii) *Total Estimated Value:*

Major Defense Equipment *	$ 10 million
Other	$290 million
Total	$300 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Government of Romania has requested to buy two (2) Coastal Defense Systems (CDS) consisting of:

Major Defense Equipment (MDE):

Up to ten (10) Link-16 Multifunctional Information Distribution System—Joint Tactical Radio Systems (MIDS–JTRS)

Non-MDE:

Also included are two Coastal Defense System Fire Distribution Centers; four Mobile Launch Vehicles; Transport Loading Vehicles; Naval Strike Missiles; non-operational Inert Handling/Loading Missile (IHM) to support missile handling and loading/unloading; training missile and equipment spares; associated containers; training and training equipment; publications and technical documentation; spares parts; loading and mobile

maintenance support; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department:* Navy (RO–P–SAE)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* October 16, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Romania—Naval Strike Missile (NSM) Coastal Defense System (CDS)

The Government of Romania has requested to buy two (2) Coastal Defense Systems (CDS) consisting of: Up to ten (10) Link-16 Multifunctional Information Distribution System—Joint Tactical Radio Systems (MIDS–JTRS). Also included are two Coastal Defense System Fire Distribution Centers; four Mobile Launch Vehicles; Transport Loading Vehicles; Naval Strike Missiles; non-operational Inert Handling/Loading Missile (IHM) to support missile handling and loading/unloading; training missile and equipment spares; associated containers; training and training equipment; publications and technical documentation; spares parts; loading and mobile maintenance support; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support. The estimated total cost is $300 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a NATO Ally in developing and maintaining a strong and ready self-defense capability. This proposed sale will enhance U.S. national security objectives in the region.

The proposed sale will improve Romania's capability to meet current and future threats by improving Romania's maritime defense capabilities in the Black Sea and increasing interoperability with the United States. Romania will use this long-range, precision strike weapon to enhance mission effectiveness, survivability, and NATO interoperability in current and future missions and operations. Romania will have no difficulty absorbing this equipment and support into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal U.S. contractor will be Raytheon Missile and Defense, Tucson, AZ. There are no known offset agreements proposed in connection with this potential sale.

Implementation of the proposed sale will require U.S. Government and contractor personnel to visit Romania on a temporary basis in conjunction with program technical oversight and support requirements, including program and technical reviews, as well as to provide training and maintenance support in country.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–72

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

1. The Naval Strike Missile (NSM) Coastal Defense System (CDS) provides a high performance, mobile, ground-based coastal defense capability. It has a net centric architecture, which enables multiple simultaneous engagements and over-the-horizon (OTH) targeting. The system can be closely integrated and adapted to a country's adjacent weapons and command and control systems. This expands the defended area and enhances the total fighting capability of the force. The NSM CDS is a ''turn-key'' solution that includes equipment, prime movers, spares, training, training equipment, logistics support equipment, documentation, services, and communications. This configuration consists of mobile Command and Control (C2) Fire Distribution Centers (FDCs) with an integrated communication subsystem and associated software; Mobile Launch Vehicles (MLVs) that perform a complete fire mission; Transport Loading Vehicles (TLVs) for the missiles; communication subsystem; Uninterrupted Power Supply (UPS); tactical missiles; telemetered missiles to support test firings; inert or ''dummy'' missiles for handling/loading training; and an inert operational missile to support ground based integration and system verification testing.

2. Multifunctional Information Distribution System—Joint Tactical Radio System (MIDS–JTRS) is a secure data and voice communication network using Link-16 architecture. MIDS–JTRS provides a high capacity, low latency internet Protocol (IP) based waveform that can quickly transmit large amounts of data. Advanced algorithms allow cooperative detection and engagement of a wider array of targets, improving fused track accuracy and increasing lethality/survivability through Situational Awareness.

3. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

4. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

5. A determination has been made that Romania can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

6. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of the Romania.

[FR Doc. 2020–27299 Filed 12–10–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–66]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–66 with attached Policy Justification and Sensitivity of Technology.

Dated: December 8, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

October 9, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-66 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Finland for defense articles and services estimated to cost $12.5 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 500–06–C

Transmittal No. 20-66

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Finland

(ii) *Total Estimated Value*:

Major Defense Equipment*	$ 8.4 billion
Other	$ 4.1 billion
Total	$12.5 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):
- Sixty-four (64) F-35 Joint Strike Fighter CTOL Aircraft
- Sixty-six (66) Pratt & Whitney F-135 Engines (64 installed and 2 spares)
- Five hundred (500) GBU-53/B Small Diameter Bomb II (SDB II) All-Up Round (AUR)
- Twelve (12) GBU-53/B SDB II Guided Test Vehicles (GTV)
- Twelve (12) GBU-53/B SDB II Captive Carry Vehicles (CCV)
- One hundred fifty (150) Sidewinder, AIM-9X Block II+ (Plus) Tactical Missiles
- Thirty-two (32) Sidewinder, AIM-9X Block II+ (Plus) Captive Air Training Missiles (CATMs)
- Thirty (30) AIM-9X Block II+ (Plus) Sidewinder Tactical Guidance Units
- Eight (8) AIM-9X Block II Sidewinder CATM Guidance Units
- One hundred (100) AGM-154C-1 Joint Stand Off Weapon (JSOW-C1) Tactical Missiles
- Two hundred (200) Joint Air-to-Surface Standoff Missile-Extended Range (JASSM-ER) AGM-158B-2 Missiles
- Two (2) AGM-158B-2 JASSM-ER Separation Test Vehicles
- Two (2) AGM-158B-2 JASSM-ER Instrumented Test Vehicles
- Two (2) AGM-158B-2 JASSM-ER Jettison Test Vehicles
- Two (2) AGM-158B-2 Inert JASSM w/ Intelligent Telemetry Instrumentation Kits
- Two (2) AGM-158 Dummy Air Training Missiles
- One hundred twenty (120) KMU-556 JDAM Guidance Kits for GBU-31
- Three hundred (300) FMU-139D/B Fuzes
- Two (2) KMU-556(D-2)/B Trainer JDAM Guidance Kits for GBU-31
- Thirty (30) KMU-557 JDAM Guidance Kits for GBU-31
- One hundred fifty (150) KMU-572 JDAM Guidance Kits for GBU-38/54
- One hundred twenty (120) BLU-117, General Purpose Bomb
- Thirty-two (32) BLU-109, General Purpose Bomb
- One hundred fifty (150) BLU-111, General Purpose Bomb
- Six (6) MK-82, Inert Bomb
- One (1) FMU-139D/B (D-1) Inert Fuze

Non-MDE:
- Also included are Electronic Warfare Systems; Command, Control, Communications, Computer and Intelligence/Communications, Navigational, and Identification (C4I/CNI); Autonomic Logistics Global Support System (ALGS); Operational Data Integrated Network (ODIN); Air System Training Devices; Weapons Employment Capability and other Subsystems, Features, and Capabilities; F-35 unique infrared flares; reprogramming center access; F-35 Performance Based Logistics; software development/integration; aircraft ferry and tanker support; Detector Laser DSU-38A/B, Detector Laser DSU-38A(D-2)/B, KMU-572(D-2)/B Trainer (JDAM), 40 inch Wing Release Lanyard; GBU-53/B SDB II Weapon Load Crew Trainers (WLCT); GBU-53/B SDB II Practical Explosive Ordnance Disposal System Trainers (PEST); AGM-154C-1 JSOW Captive Flight Vehicles; AGM-154C-1 JSOW Dummy Air Training Missiles; AGM-154C-1 JSOW mission planning, integration support and testing, munitions storage security and training, weapon operational flight program software development; integration of the Joint Strike Missile; weapons containers; aircraft and munitions support and test equipment; communications equipment; provisioning, spares and repair parts; weapons repair and return support; personnel training and training equipment; weapon systems software, publications and technical documents; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department*: Air Force (FI-D-SAB; FI-D-YAB, FI-D-YAE, FI-D-YAJ); Navy (FI-P-AAQ, FI-P-AAS)

(v) *Prior Related Cases, if any*: None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex

(viii) *Date Report Delivered to Congress*: October 9, 2020

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Finland – F-35 Joint Strike Fighter Aircraft with Air-to-Air Missiles and Air-to-Ground Precision Guided Munitions

The Government of Finland has requested to buy sixty-four (64) F-35 Joint Strike Fighter CTOL aircraft; sixty-six (66) Pratt & Whitney F-135 engines (64 installed and 2 spares); five hundred (500) GBU-53/B Small Diameter Bomb II (SDB II) All-Up Round (AUR); twelve (12) GBU-53/B SDB II Guided Test Vehicles (GTV); twelve (12) GBU-53/B SDB II Captive Carry Vehicles (CCV); one hundred fifty (150) Sidewinder AIM-9X Block II+ (Plus) Tactical Missiles; thirty-two (32) Sidewinder AIM-9X Block II+ (Plus) Captive Air Training Missiles (CATMs); thirty (30) AIM-9X Block II+ (Plus) Sidewinder Tactical Guidance Units; eight (8) AIM-9X Block II Sidewinder CATM Guidance Units; one hundred (100) AGM-154C-1 Joint Stand Off Weapon (JSOW-C1) Tactical Missiles; two hundred (200) Joint Air-to-Surface Standoff Missile-Extended Range (JASSM-ER) AGM-158B-2 Missiles; two (2) AGM-158B-2 JASSM-ER Separation Test Vehicles; two (2) AGM-158B-2 JASSM-ER Instrumented Test Vehicles; two (2) AGM-158B-2 JASSM-ER Jettison Test Vehicles; two (2) AGM-158B-2 Inert JASSM w/Intelligent Telemetry Instrumentation Kits; two (2) AGM-158 Dummy Air Training Missiles; one hundred twenty (120) KMU-556 JDAM Guidance Kits for GBU-31; three hundred (300) FMU-139D/B Fuzes; two (2) KMU-556(D-2)/B Trainer JDAM Guidance Kits for GBU-31; thirty (30) KMU-557 JDAM Guidance Kits for GBU-31; one hundred fifty (150) KMU-572 JDAM Guidance Kits for GBU-38/54; one hundred twenty (120) BLU-117, General Purpose Bombs; thirty-two (32) BLU-109, General Purpose Bomb; one hundred fifty (150) BLU-111, General Purpose Bomb; six (6) MK-82, Inert Bomb; one (1) FMU-139D/B (D-1) Inert Fuze. Also included are Electronic Warfare Systems; Command, Control, Communications, Computer and Intelligence/Communications, Navigational, and Identification (C4I/CNI); Autonomic Logistics Global Support System (ALGS); Operational Data Integrated Network (ODIN); Air System Training Devices; Weapons Employment Capability and other Subsystems, Features, and Capabilities; F-35 unique infrared flares; reprogramming center access; F-35 Performance Based Logistics; software

development/integration; aircraft ferry and tanker support; Detector Laser DSU-38A/B, Detector Laser DSU-38A(D-2)/B, KMU-572(D-2)/B Trainer (JDAM), 40 inch Wing Release Lanyard; GBU-53/B SDB II Weapon Load Crew Trainers (WLCT); GBU-53/B SDB II Practical Explosive Ordnance Disposal System Trainers (PEST); AGM-154C-1 JSOW Captive Flight Vehicles; AGM-154C-1 JSOW Dummy Air Training Missiles; AGM-154C-1 JSOW mission planning, integration support and testing, munitions storage security and training, weapon operational flight program software development; integration of the Joint Strike Missile; weapons containers; aircraft and munitions support and test equipment; communications equipment; provisioning, spares and repair parts; weapons repair and return support; personnel training and training equipment; weapon systems software, publications and technical documents; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support. The total estimated cost is $12.5 billion.

This proposed sale will support the foreign policy and national security of the United States by improving the security of a trusted partner which is an important force for political stability and economic progress in Europe. It is vital to the U.S. national interest to assist Finland in developing and maintaining a strong and ready self-defense capability.

The proposed sale of F-35s and associated missiles and munitions will provide Finland with a credible defense capability to deter aggression in the region and ensure interoperability with U.S. forces. The proposed sale will replace Finland's retiring F/A-18s and enhance its air-to-air and air-to-ground self-defense capability. Finland will have no difficulty absorbing these aircraft into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Lockheed Martin Aeronautics Company, Fort Worth, TX; Pratt & Whitney Military Engines, East Hartford, CT; The Boeing Company, St. Charles, MO; and Raytheon Missiles and Defense, Tucson, AZ. This proposal is being offered in the context of a competition. If the proposal is accepted, it is expected that offset agreements will be required. Any offset agreement will be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will require multiple trips to Finland involving U.S. Government and contractor representatives for technical reviews/support, program management and training over the life of the program. U.S. contractor representatives will be required in Finland to conduct Contractor Engineering Technical Services (CETS) and Autonomic Logistics and Global Support (ALGS) for after-aircraft delivery.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–66

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology*:

1. The F-35A Conventional Take Off and Landing (CTOL) aircraft is a single-seat, singleengine, all-weather, stealth, fifth-generation, multirole aircraft. The F-35A CTOL contains sensitive technology including the low observable airframe/outer mold line, the Pratt and Whitney F135 engine, AN/APG-81 radar, an integrated core processor central computer, a mission systems/ electronic warfare suite, a multiple sensor suite, technical data/ documentation, and associated software. Sensitive elements of the F-35A are also included in operational flight and maintenance trainers. Sensitive and classified elements of the F-35A CTOL aircraft include hardware, accessories, components, and associated software for the following major subsystems:

a. The Pratt and Whitney F135 engine is a single 40,000-lb thrust class engine designed for the F-35 and assures highly reliable, affordable performance. The engine is designed to be utilized in all F-35 variants, providing unmatched commonality and supportability throughout the worldwide base of F-35 users.

b. The AN/APG-81 Active Electronically Scanned Array (AESA) is a high processing power/high transmission power electronic array capable of detecting air and ground targets from a greater distance than mechanically scanned array radars. It also contains a synthetic aperture radar (SAR), which creates high-resolution ground maps and provides weather data to the pilot, and provides air and ground tracks to the mission system, which uses it as a component to fuse sensor data.

c. The Electro-Optical Targeting System (EOTS) provides long-range detection and tracking as well as an infrared search and track (IRST) and forward-looking infrared (FLIR) capability for precision tracking, weapons delivery, and bomb damage assessment (BDA). The EOTS replaces multiple separate internal or podded systems typically found on legacy aircraft.

d. The Electro-Optical Distributed Aperture System (EODAS) provides the pilot with full spherical coverage for air-to-air and air-to-ground threat awareness, day/night vision enhancements, a fire control capability, and precision tracking of wingmen/ friendly aircraft. The EODAS provides data directly to the pilot's helmet as well as the mission system.

e. The Electronic Warfare (EW) system is a reprogrammable, integrated system that provides radar warning and electronic support measures (ESM) along with a fully integrated countermeasures (CM) system. The EW system is the primary subsystem used to enhance situational awareness, targeting support and self-defense through the search, intercept, location and identification of in-band emitters and to automatically counter IR and RF threats.

f. The Command, Control, Communications, Computers and Intelligence/ Communications, Navigation, and Identification (C4I/CNI) system provides the pilot with unmatched connectivity to flight members, coalition forces, and the battlefield. It is an integrated subsystem designed to provide a broad spectrum of secure, anti-jam voice and data communications, precision radio navigation and landing capability, self-identification, beyond visual range target identification, and connectivity to off-board sources of information. It also includes an inertial navigation and global positioning system (GPS) for precise location information. The functionality is tightly integrated within the mission system to enhance efficiency.

g. The aircraft C4I/CNI system includes two data links, the Multi-Function Advanced Data Link (MADL) and Link 16. The MADL is designed specifically for the F-35 and allows for stealthy communications between F-35s. Link 16 data link equipment allows the F-35 to communicate with legacy aircraft using widely-distributed J-series message protocols.

h. The F-35 Autonomic Logistics Global Sustainment (ALGS) provides a fully integrated logistics management solution. ALGS integrates a number of functional areas, including supply chain management, repair, support equipment, engine support, and training. The ALGS infrastructure

employs a state-of-the-art information system that provides real-time, decision-worthy information for sustainment decisions by flight line personnel. Prognostic health monitoring technology is integrated with the air system and is crucial to predictive maintenance of vital components.

i. The F-35 Operational Data Integrated Network (ODIN) provides an intelligent information infrastructure that binds all the key concepts of ALGS into an effective support system. ODIN establishes the appropriate interfaces among the F-35 Air Vehicle, the warfighter, the training system, government information technology (IT) systems, and supporting commercial enterprise systems. Additionally, ODIN provides a comprehensive tool for data collection and analysis, decision support and action tracking.

j. The F-35 Training System includes several training devices to provide integrated training for pilots and maintainers. The pilot training devices include a Full Mission Simulator (FMS) and Deployable Mission Rehearsal Trainer (DMRT). The maintainer training devices include an Aircraft Systems Maintenance Trainer (ASMT), Ejection System Maintenance Trainer (ESMT), Outer Mold Line (OML) Lab, Flexible Linear Shaped Charge (FLSC) Trainer, F135 Engine Module Trainer, and Weapons Loading Trainer (WLT). The F-35 Training System can be integrated, where both pilots and maintainers learn in the same Integrated Training Center (ITC). Alternatively, the pilots and maintainers can train in separate facilities (Pilot Training Center and Maintenance Training Center).

k. Other subsystems, features, and capabilities include the F-35's low observable air frame, Integrated Core Processor (ICP) Central Computer, Helmet Mounted Display System (HMDS), Pilot Life Support System (PLSS), Off-Board Mission Support (OMS) System and publications/maintenance manuals. The HMDS provides a fully sunlight readable, bi-ocular display presentation of aircraft information projected onto the pilot's helmet visor. The use of a night vision camera integrated into the helmet eliminates the need for separate Night Vision Goggles. The PLSS provides a measure of Pilot Chemical, Biological, and Radiological Protection through use of an OnBoard Oxygen Generating System (OBOGS); and an escape system that provides additional protection to the pilot. OBOGS takes the Power and Thermal Management System (PTMS) air and enriches it by removing gases (mainly nitrogen) by adsorption, thereby increasing the concentration of oxygen in the product gas and supplying breathable air to the pilot. The OMS provides a mission planning, mission briefing, and a maintenance/intelligence/tactical debriefing platform for the F-35.

2. The Reprogramming Center is located in the United States and provides F-35 customers a means to update F-35 electronic warfare databases.

3. The AGM-158B Joint Air-to-Surface Standoff Missile Extended Range (JASSM-ER) is an extended range low-observable, highly survivable subsonic cruise missile designed to penetrate next generation air defense systems en-route to target. It is designed to kill hard, medium-hardened, soft and area type targets. The extended range over the baseline was obtained by going from a turbo jet to a turbo-fan engine and by reconfiguring the fuel tanks for added capacity. Purchase will include test and training missiles.

4. The AGM-154 Joint Standoff Weapon (JSOW) is used by the Navy, Marine Corps, and Air Force, and allows aircraft to attack well-defended targets in day, night, and adverse weather conditions. The JSOW C and C-1 utilize GPS/INS guidance and an uncooled imaging infrared (IIR) seeker for terminal guidance, autonomous acquisition, and provides a precision targeting, 500-lb-class tandem warhead that is the Navy's primary standoff weapon against hardened targets. The JSOW C-1 added the Link 16 data link enabling a robust and flexible capability against high-value stationary land targets and moving maritime target capability. JSOW C-1 can fly via two dimensional and three dimensional waypoints to the target, offering the optimal path around integrated air defense systems (IADS).

5. The AIM-9X Block II+ (Plus) SIDEWINDER Missile is a supersonic, short-range Air-to-Air (A/A) guided missile which employs a passive Infrared (IR) target acquisition system, proportional navigational guidance, and a closed-loop position servo Fin Actuator Unit (FAU). It represents a substantial increase in missile acquisition and kinematics performance over the AIM-9M and replaces the AIM-9X Block I Missile configuration. The missile includes a high off-boresight seeker, enhanced countermeasure rejection capability, low drag/high angle of attack airframe and the ability to integrate the Helmet Mounted Cueing System. The software algorithms are the most sensitive portion of the AIM-9X missile. The software continues to be modified via a pre-planned product improvement (P3I) program in order to improve its counter-countermeasure capabilities. No software source code or algorithms will be released.

a. AIM-9X BLK II Captive Air Training Missile (CATM) is a flight certified inert mass simulator with a functioning Guidance Unit (GU). The CATM is the primary aircrew training device providing all pre-launch functions as well as realistic aerodynamic performance that equate to carrying a tactical missile. The CATM provides pilot training in aerial target acquisition and use of aircraft controls/displays.

b. AIM-9X BLK II+ (Plus) Tactical GU, WGU-57/B, provides the missile tracking, guidance, and control signals. The GU provides counter-countermeasures, improved reliability and maintainability over earlier Sidewinder models. Improvements include: (1) upgrade/redesign to the Electronics Unit Circuit Card Assemblies, (2) a redesigned center section harnessing, and (3) a larger capacity missile battery.

c. AIM-9X BLK II CATM GU, WGU-57/B, is identical to the tactical GU except the GU and Control Actuation System (CAS) batteries are inert and the software Captive. The software switch tells the missile processor that it is attached to a CATM and to ignore missile launch commands. The switch also signals software to not enter abort mode because there is no FAU connected to the GU.

d. AIM-9X BLK II Multi-Purpose Training Missile (MPTM) is a ground training device used to train ground personnel in aircraft loading, sectionalization, maintenance, transportation, storage procedures, and techniques. The missile replicates external appearance and features of a tactical AIM-9X-2 missile. The MPTM will physically interface with loading equipment, maintenance equipment, launchers, and test equipment. The missile is explosively and electrically inert and is NOT flight certified.

e. AIM-9X BLK II Dummy Air Training Missile (DATM) is used to train ground personnel in missile maintenance, loading, transportation, and storage procedures. All components are completely inert. The missile contains no programmable electrical components and is not approved for flight.

f. AIM-9X BLK II Active Optical Target Detector (AOTD) is newly designed for Block II. The AOTD/Data Link (AOTD/DL) uses the latest laser technology allowing significant increases in sensitivity, aerosol performance, low altitude performance, and Pk (Probability of Kill). The AOTD/

DL design includes a DL for 2-way platform communication. The AOTD/DL communicates with the GU over a serial interface which allows the GU to receive and transmit data so that a target position and status communication with a launching platform is possible during missile flight.

6. The GBU-31 Joint Direct Attack Munition (JDAM) is a 2,000 pound Inertial Navigation System/Global Positioning System (INS/GPS) guided precision air to ground munition. The GBU-31 has two JDAM tailkit variants, KMU-556 and the KMU-557. Each tailkit is bomb body specific. The KMU-556 is assembled to the MK-84 or BLU-117 bomb body to make the GBU-31v1, and the KMU-557 is assembled with BLU-109 bomb body to make the GBU-31v3.

7. The GBU-38 Joint Direct Attack Munition (JDAM) is a 500 pound INS/GPS guided precision air to ground munition. The GBU-38 consists of a KMU-572 bomb body specific tail kit, and MK-82 or BLU-111 bomb body.

8. The GBU-54 Laser Joint Direct Attack Munition (LJDAM) is a 500 pound JDAM which incorporates all the capabilities of the JDAM guidance tail kit and adds a precision laser guidance set. The LJDAM gives the weapon system an optional semi-active laser guidance in addition to INS/GPS guidance. This provides the optional capability to strike moving targets. The GBU-54 consists of a DSU-38 laser guidance set, and a KMU-572 bomb body specific tail kit, and MK-82 or BLU-111 bomb body.

9. The GBU-53/B Small Diameter Bomb Increment II (SDB II) is a 250-lb class precision-guided, semi-autonomous, conventional, air-to-ground munition used to defeat moving targets through adverse weather from standoff range. The SDB II has deployable wings and fins and uses GPS/INS guidance, network-enabled datalink (Link-16 and UHF), and a multi-mode seeker (millimeter wave radar, imaging infrared, semi-active laser) to autonomously search, acquire, track, and defeat targets from a standoff range. The SDB II employs a multi-effects warhead (Blast, Fragmentation, and Shaped-Charge) for maximum lethality against armored and soft targets. The SDB II weapon system consists of the tactical all-up round (AUR) weapon, a 4-place common carriage system, and mission planning system munitions application program (MAP). The carriage system is the BRU-61B/A. Two other operable configurations and two maintenance training configurations are described as follows:

a. SDB II Guided Test Vehicle (GTV) is an SDB II configuration used for land or sea range-based testing of the SDB II weapon system. The GTV has common flight characteristics of an SDB II AUR, but in place of the multi-effects warhead is a Flight Termination, Tracking, and Telemetry (FTTT) subassembly that mirrors the AUR multi-effects warhead's size and mass properties, but provides safe flight termination, free flight tracking and telemetry of encrypted data from the GTV to the data receivers. The SDB II GTV can have either inert or live fuses. All other flight control, guidance, data-link, and seeker functions are representative of the SDB II AUR.

b. SDB II Captive Carry Vehicles (CCV), formerly known as Captive Carry Reliability Test (CCRT) vehicles, are an SDB II configuration primarily used for reliability data collection during carriage. The CCV has common characteristics of an SDB II AUR but with an inert warhead and fuze. The CCV has an inert mass in place of the warhead that mimics the warhead's mass properties.

c. The SDB II Weapon Load Crew Trainer (WLCT) is a mass mockup of the tactical AUR used for load crew and maintenance training. It does not contain energetics, a live fuze, any sensitive components, or hazardous material. It is not flight certified.

d. The SDB II Practical Explosive Ordnance Disposal Trainer (PEST) is an EOD training unit with sections and internal subassemblies which are identical to, or correlate to, the external hardware, sections and internal subassemblies of the tactical AUR. The PEST does not contain energetics, a live fuze, any sensitive components, or hazardous material. It is not flight certified.

10. The highest level of classification of information included in this potential sale is SECRET.

11. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

12. A determination has been made that Finland can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furthering U.S. foreign policy and national security objectives outlined in the Policy Justification.

13. All defense articles and services listed in this transmittal have been authorized for release and export to Finland.

[FR Doc. 2020–27291 Filed 12–10–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–69]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–69 with attached Policy Justification and Sensitivity of Technology.

Dated: December 8, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

October 21, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-69 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Taipei Economic and Cultural Representative Office in the United States (TECRO) for defense articles and services estimated to cost $1.008 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 20–69

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Taipei Economic and Cultural Representative Office in the United States (TECRO)

(ii) *Total Estimated Value:*

Major Defense Equipment *	$ .608 billion
Other	$ .400 billion
Total	$1.008 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

One hundred thirty-five (135) AGM–84H Standoff Land Attack Missile Expanded Response (SLAM–ER) Missiles

Four (4) ATM–84H SLAM–ER Telemetry Missiles

Twelve (12) CATM–84H Captive Air Training Missiles (CATM)

Non-MDE:

Also included are one hundred fifty-one (151) containers, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor representatives' technical

assistance, engineering and logistics support services, and other related elements of logistics support.

(vi) *Military Department:* Navy (TW–P–LIB)

(v) *Prior Related Cases, if any:* None

(vi) Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* October 21, 2020

*As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office in the United States (TECRO)—AGM–84H Standoff Land Attack Missile-Expanded Response (SLAM–ER) Missiles

TECRO has requested to buy one hundred thirty-five (135) AGM–84H Standoff Land Attack Missile Expanded Response (SLAM–ER) Missiles; four (4) ATM–84H SLAM–ER Telemetry Missiles; and twelve (12) CATM–84H Captive Air Training Missiles (CATM). Also included are one hundred fifty-one (151) containers, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor representatives' technical assistance, engineering and logistics support services, and other related elements of logistics support. The total estimated program cost is $1.008 billion.

This proposed sale is consistent with U.S. law and policy as expressed in Public Law 96–8.

This proposed sale serves U.S. national, economic, and security interests by supporting the recipient's continuing efforts to modernize its armed forces and to maintain a credible defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, economic and progress in the region.

This proposed sale will improve the recipient's capability to meet current and future threats as it provides all-weather, day and night, precision attack capabilities against both moving and stationary targets. The recipient will be able to employ a highly reliable and effective system to increase their warfighting effectiveness as needed, which can counter or deter aggressions by demonstrated precision against surface targets. This capability will easily integrate into existing force infrastructure as it will only improve defense against opposing threats. The recipient will have no difficulty absorbing these systems into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be the Boeing Company, St. Louis, MO. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of two (2) U.S. contractor representatives to the recipient for a duration of 8 years to support technical reviews, support, and oversight.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–69

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AGM–84H Standoff Land Attack Missile-Expanded Response (SLAM–ER) is a non-nuclear tactical weapon system currently in service in the U.S. Navy and three other foreign nations. SLAM–ER is a follow on to the SLAM missile that is no longer in production. It is a variant of the Harpoon missile that uses an Imaging Infrared (IIR) seeker, planar wings, and a penetrating warhead. SLAM–ER is effective against a wide range of land-based targets and has a secondary anti-ship mission capability. The following components are being conveyed by the proposed sale and are essential to the ability of the SLAM–ER missile to selectively engage hostile targets under a wide range of operations, tactical and environmental conditions.

- The Imaging Infrared Seeker,
- The GPS/INS System,
- Operational Flight Program Software, and
- Missile operational characteristics and performance data.

2. The highest level of classification of defense articles, components, and services included in this potential sale is CONFIDENTIAL.

3. If a technologically advanced adversary were to obtain knowledge of the hardware and software elements, the information could be used to develop countermeasures or equivalent systems, which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the recipient can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the recipient.

[FR Doc. 2020–27298 Filed 12–10–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 20–67]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Arms sales notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Karma Job at *karma.d.job.civ@mail.mil* or (703) 697–8976.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 20–67 with attached Policy Justification and Sensitivity of Technology.

Dated: December 8, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

October 9, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 20-67 concerning the Navy's proposed Letter(s) of Offer and Acceptance to the Government of Finland for defense articles and services estimated to cost $14.7 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Heidi H. Grant
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 20–67

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Finland

(ii) *Total Estimated Value:*

Major Defense Equipment *	$ 9.2 billion
Other	$ 5.5 billion
Total	$14.7 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):
- Fifty (50) F/A-18E Super Hornet Aircraft
- Eight (8) F/A-18F Super Hornet Aircraft
- Fourteen (14) EA-18G Growler Aircraft
- One hundred sixty-six (166) F414-GE-400 Engines (144 installed and 22 spares)
- Five hundred (500) GBU-53/B Small Diameter Bomb II (SDB II) All-Up Round (AUR)
- Twelve (12) GBU-53/B SDB II Guided Test Vehicles (GTV)
- Twelve (12) GBU-53/B SDB II Captive Carry Reliability Trainers
- One hundred fifty (150) AIM-9X Block II Sidewinder Tactical Missiles
- Thirty-two (32) AIM-9X Block II Sidewinder Captive Air Training Missiles (CATMs)

Thirty (30) AIM-9X Block II Sidewinder Tactical Guidance Units
Eight (8) AIM-9X Block II Sidewinder CATM Guidance Units
One hundred sixty (160) AGM-154C-1 Joint Stand Off Weapons (JSOW)
Two Hundred (200) AGM-158B-2B Joint Air-to-Surface Standoff Missile Extended Range All Up Rounds (JASSM ER AUR)
Two (2) AGM-158B-2 JASSM Separation Test Vehicles (STV)
Two (2) AGM-158B-2 JASSM Instrumented Test Vehicles (ITV)
Two (2) AGM-158B-2 JASSM Jettison Test Vehicles (JTV)
Two (2) AGM-158B-2 Inert Joint Air-to-Surface Standoff Missile (JASSM) with Telemetry Instrumental Kits
Two (2) AGM-158B-2 JASSM Maintenance Training Missiles (DATM)
One hundred twenty (120) BLU-117B/B 2000LB GP Bombs
One hundred twenty (120) KMU-556F/B Bomb Tail Kits (JDAM)
Three hundred (300) FMU-139D/B Fuzes
Two (2) KMU-556(D-2)/B Trainers (JDAM)
Thirty (30) BLU-109C/B 2000LB Bombs
Thirty (30) KMU-557F/B Bomb Tail Kits (JDAM)
Two (2) BLU-109(D-1)/B 2000LB Bombs
One hundred two (102) BLU-111B/B 500LB General Purpose Bombs
One hundred two (102) KMU-572F/B JDAM Bomb Tail Kits
Six (6) MK-82-0,1 500LB, General Purpose Bombs, Inert
Fifty-one (51) BLU-110B/B 1000LB General Purpose Bombs
Fifty (50) KMU-559F/B Bomb Tail Kits
Fifty-eight (58) M61A2 20MM Gun Systems
Thirty-two (32) Advanced Targeting Forward-Looking Infrared (ATFLIR)
Thirty-two (32) Sniper Targeting Pods
Fourteen (14) Advanced Electronic Attack Kit for EA-18G
Sixty-five (65) AN/ALR-67(V)3 Electric Warfare Countermeasures Receiving Sets
Sixty-five (65) AN/ALQ-214 Integrated Countermeasures Systems
Seventy-four (74) Multifunctional Information Distribution Systems – Joint Tactical Radio Systems (MIDS JTRS)
Eighty-nine (89) Joint Helmet Mounted Cueing Systems (JHMCS)
Three hundred seventy-seven (377) LAU-127E/A Guided Missile Launchers
Seventy-four (74) AN/AYK-29 Distributed Targeting Processor – Networked (DTP-N)
Twenty-five (25) Infrared Search and Track (IRST) Systems
Eight (8) Next Generation Jammer Mid-Band (NGJ-MB) Sets

Non-MDE:

Also included are AN/APG-79 Active Electronically Scanned Array (AESA) radars; High Speed Video Network (HSVN) Digital Video Recorder (HDVR); AN/AVS-9 Night Vision Goggles (NVG); AN/AVS-11 Night Vision Cueing Devices (NVCD); AN/ALE-47 Electronic Warfare Countermeasures Systems; AN/ARC-210 Communication System; AN/APX-111 Combined Interrogator Transponder; AN/ALE-55 Towed Decoys; Launchers (LAU-115D/A, LAU-116B/A, LAU118A); AN/AAQ-28(V) Litening Targeting Pod; Joint Mission Planning System (JMPS); Accurate Navigation (ANAV) Global Positioning System (GPS) Navigation; Aircraft Armament Equipment (AAE); Aircraft Ferry transportation; Foreign Liaison Officer (FLO) Support; Auxiliary Fuel Tanks, FMU-139D(D-2)/B fuzes; MK84–4 2000LB General Purpose Inert Bombs, MK83 Bomb General Purpose Inert Bombs; KMU-557C(D-2)/B tail kits; KMU-572C(D-2)/B tail kits; Detector Laser DSU-38A/B, Detector Laser DSU-38A(D-2)/B, KMU-559C(D-2)/B load trainer; Wing Release Lanyard Assemblies; AGM-154C-1 JSOW Captive Flight Vehicles, Dummy Air Training Missiles, AGM-154C-1 JSOW mission planning, integration support and testing, munitions storage security and training, weapon operational flight program software development; weapons containers; aircraft and munitions support and test equipment; communications equipment; provisioning, spares and repair parts; weapons repair and return support; personnel training and training equipment; weapon systems software, publications and technical documents; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department*: Navy (FI-P-SAC; FI-P-AAN; FI-P-AAO); Air Force (FI-D-YAB; FI-D-YAE; FI-D-YAJ)

(v) *Prior Related Cases, if any*: None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex

(viii) *Date Report Delivered to Congress*: October 9, 2020

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Finland — F/A-18E/F Super Hornet Aircraft and Weapons

The Government of Finland has requested to buy fifty (50) F/A-18E Super Hornet aircraft; eight (8) F/A-18F Super Hornet aircraft; fourteen (14) EA-18G Growler aircraft; one hundred sixty-six (166) F414-GE-400 engines (144 installed and 22 spares); five hundred (500) GBU-53/B Small Diameter Bomb II (SDB II) All-Up Round (AUR); twelve (12) GBU-53/B SDB II Guided Test Vehicles (GTV); twelve (12) GBU-53/B SDB II Captive Carry Reliability Trainers; one hundred fifty (150) AIM-9X Block II Sidewinder Tactical Missiles; thirty-two (32) AIM-9X Block II Sidewinder Captive Air Training Missiles (CATMs); thirty (30) AIM-9X Block II Sidewinder Tactical Guidance Units; eight (8) AIM-9X Block II Sidewinder CATM Guidance Units; one hundred sixty (160) AGM-154C-1 Joint Stand Off Weapons (JSOW); two hundred (200) AGM-158B-2B Joint Air-to-Surface Standoff Missile Extended Range All Up Rounds (JASSM ER AUR); two (2) AGM-158B-2 JASSM Separation Test Vehicles (STV); two (2) AGM-158B-2 JASSM Instrumented Test Vehicles (ITV); two (2) AGM-158B-2 JASSM Jettison Test Vehicles (JTV); two (2) AGM-158B-2 Inert Joint Air-to-Surface Standoff Missile (JASSM) with Telemetry Instrumental Kits; two (2) AGM-158B-2 JASSM Maintenance Training Missiles (DATM); one hundred twenty (120) BLU-117B/B 2000LB GP Bombs; one hundred twenty (120) KMU-556F/B Bomb Tail Kits (JDAM); three hundred (300) FMU-139D/B Fuzes; two (2) KMU-556(D-2)/B Trainers (JDAM); thirty (30) BLU-109C/B 2000LB Bombs; thirty (30) KMU-557F/B Bomb Tail Kits (JDAM); two (2) BLU-109(D-1)/B 2000LB Bombs; one hundred two (102) BLU-111B/B 500LB General Purpose Bombs; one hundred two (102) KMU-572F/B JDAM Bomb Tail Kits; six (6) MK-82–0,1 500LB, General Purpose Bombs, Inert; fifty-one (51) BLU-110B/B 1000LB General Purpose Bombs; fifty (50) KMU-559F/B Bomb Tail Kits; fifty-eight (58) M61A2 20MM Gun Systems; thirty-two (32) Advanced Targeting Forward-Looking Infrared (ATFLIR); thirty-two (32) Sniper Targeting Pods; fourteen (14) Advanced Electronic Attack Kit for EA-

18G; sixty-five (65) AN/ALR-67(V)3 Electric Warfare Countermeasures Receiving Sets; sixty-five (65) AN/ALQ-214 Integrated Countermeasures Systems; seventy-four (74) Multifunctional Information Distribution Systems – Joint Tactical Radio Systems (MIDS JTRS); eighty-nine (89) Joint Helmet Mounted Cueing Systems (JHMCS); three hundred seventy-seven (377) LAU-127E/A Guided Missile Launchers; seventy-four (74) AN/AYK-29 Distributed Targeting Processor – Networked (DTP-N); twenty-five (25) Infrared Search and Track (IRST) Systems; and eight (8) Next Generation Jammer Mid-Band (NGJ-MB) sets. Also included are AN/APG-79 Active Electronically Scanned Array (AESA) radars; High Speed Video Network (HSVN) Digital Video Recorder (HDVR); AN/AVS-9 Night Vision Goggles (NVG); AN/AVS-11 Night Vision Cueing Devices (NVCD); AN/ALE-47 Electronic Warfare Countermeasures Systems; AN/ARC-210 Communication System; AN/APX-111 Combined Interrogator Transponder; AN/ALE-55 Towed Decoys; Launchers (LAU-115D/A, LAU-116B/A, LAU118A); AN/AAQ-28(V) Litening Targeting Pod; Joint Mission Planning System (JMPS); Accurate Navigation (ANAV) Global Positioning System (GPS) Navigation; Aircraft Armament Equipment (AAE); Aircraft Ferry transportation; Foreign Liaison Officer (FLO) Support; Auxiliary Fuel Tanks, FMU-139D(D-2)/B fuzes; MK84–4 2000LB General Purpose Inert Bombs, MK83 Bomb General Purpose Inert Bombs; KMU-557C(D-2)/B tail kits; KMU-572C(D-2)/B tail kits; Detector Laser DSU-38A/B, Detector Laser DSU-38A(D-2)/B, KMU-559C(D-2)/B load trainer; Wing Release Lanyard Assemblies; AGM-154C-1 JSOW Captive Flight Vehicles, Dummy Air Training Missiles, AGM-154C-1 JSOW mission planning, integration support and testing, munitions storage security and training, weapon operational flight program software development; weapons containers; aircraft and munitions support and test equipment; communications equipment; provisioning, spares and repair parts; weapons repair and return support; personnel training and training equipment; weapon systems software, publications and technical documents; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support. The total estimated cost is $14.7 billion.

This proposed sale will support the foreign policy and national security of the United States by improving the security of a trusted partner which is an important force for political stability and economic progress in Europe. It is vital to the U.S. national interest to assist Finland in developing and maintaining a strong and ready self-defense capability.

The proposed sale of F/A-18E/Fs and EA-18Gs and associated weapons will provide Finland with a credible defense capability to deter aggression in the region and ensure interoperability with U.S. Forces. The proposed sale will replace Finland's retiring F/A-18C/Ds and enhance its air-to-air and air-to-ground self-defense capability. Finland will have no difficulty absorbing these aircraft into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be The Boeing Company, St. Louis, MO; Northrop Grumman, Los Angeles, CA; Raytheon Company, El Segundo, CA; Raytheon Missile Systems Company, Tucson, AZ; General Electric, Lynn, MA; and Lockheed Martin, Troy, AL. This proposal is being offered in the context of a competition. If the proposal is accepted, it is expected that offset agreements will be required. Any offset agreement will be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will require the assignment of six (6) additional U.S. contractor representatives to Finland on an intermittent basis for a duration of the life of the case to support delivery of the F/A-18E/F Super Hornet and EA-18G Growler aircraft and provide supply support management, inventory control, and equipment familiarization.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 20–67

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The F/A-18E Super Hornet (single seat) and F/A-18F Super Hornet and EA-18G Growler (dual seat), twin engine, multi-mission fighter/attack aircraft that can operate from either aircraft carriers or land bases. The F/A-18E/F Super Hornet and EA-18G Growler fills a variety of roles and provides air superiority, fighter escort, suppression of enemy air defenses, reconnaissance, forward air control, close and deep air support, and day and night strike missions.

a. The AN/APG-79 Active Electronically Scanned Array (AESA) Radar System provides the F/A-18E/F Super Hornet and EA-18G Growler aircraft with all-weather, multi-mission capability for performing Air-to-Air and Air-to-Ground targeting and attack. Air-to-Air modes provide the capability for all-aspect target detection, long-range search and track, automatic target acquisition, and tracking of multiple targets. Air-to-Surface attack modes provide high-resolution ground mapping navigation, weapon delivery, and sensor cueing.

b. The AN/ALR-67(V)3 Electric Warfare Countermeasures Receiving Set provides the F/A-18E/F aircrew with radar threat warnings by detecting and evaluating friendly and hostile radar frequency threat emitters and providing identification and status information about the emitters to on-board Electronic Warfare (EW) equipment and the aircrew. The Operational Flight Program (OFP) and User Data Files (UDF) used in the AN/ALR-67(V)3 contain threat parametric data used to identify and establish priority of detected radar emitters.

c. The AN/ALE-47 Countermeasures Dispensing System is a threat-adaptive dispensing system that dispenses chaff, flares, and expendable jammers for self-protection against airborne and ground-based Radio Frequency (RF) and Infrared threats. The Operational Flight Program (OFP) and Mission Data Files (MDF) used in the AN/ALE-47 contain algorithms used to calculate the best defense against specific threats.

d. The AN/ALQ-214 is an advanced airborne Integrated Defensive Electronic Countermeasures (IDECM) programmable modular automated system capable of intercepting, identifying, processing received radar signals (pulsed and continuous) and applying an optimum countermeasures technique in the direction of the radar signal, thereby improving individual aircraft probability of survival from a variety of Surface-to-Air and Air-to-Air Radio Frequency (RF) threats. The system operates in a standalone or Electronic Warfare (EW) suite mode. In the EW suite mode, the AN/ALQ-214 operates in a fully coordinated mode with the towed dispensable decoy, Radar Warning Receiver (RWR), and the onboard radar in the F/A-18E/F Super Hornet in a coordinated, non-interference manner sharing information for enhanced information. The AN/ALQ-214 was designed to operate in a

high-density Electromagnetic Hostile Environment with the ability to identify and counter a wide variety of multiple threats, including those with Doppler characteristics.

e. The AN/APX-111 Combined Interrogator/Transponder (CIT) with the Conformal Antenna System (CAS) is a complete MARK-XII identification system compatible with Identification Friend or Foe (IFF) Modes 1, 2, 3/A, C and 4 (secure). A single slide-in module that can be customized to the unique cryptographic functions for a specific country provides the systems secure mode capabilities. As a transponder, the CIT is capable or replying to interrogation modes 1, 2, 3/A C (altitude) and secure mode 4. The requirement is to upgrade Finland's Combined Interrogator Transponder (CIT) AN/APX-111 (V) IFF system software to implement Mode Select (Mode S) capabilities. Beginning in early 2005 EUROCONTROL mandated the civil community in Europe to transition to a Mode S only system and for all aircraft to be compliant by 2009. The Mode S Beacon System is a combined data link and Secondary Surveillance Radar (SSR) system that was standardized in 1985 by the International Civil Aviation Organization (ICAO). Mode S provides air surveillance using a data link with a permanent unique aircraft address. Selective Interrogation provides higher data integrity, reduced Radio Frequency (RF) interference levels, increased air traffic capacity, and adds air-to-ground data link.

f. The Joint Helmet Mounted Cueing System (JHMCS) is a modified HGU-55/P helmet that incorporates a visor-projected Heads-Up Display (HUD) to cue weapons and aircraft sensors to air and ground targets. In close combat, a pilot must currently align the aircraft to shoot at a target. JHMCS allows the pilot to simply look at a target to shoot. This system projects visual targeting and aircraft performance information on the back of the helmet's visor, enabling the pilot to monitor this information without interrupting his field of view through the cockpit canopy, the system uses a magnetic transmitter unit fixed to the pilot's seat and a magnetic field probe mounted on the helmet to define helmet pointing positioning. A Helmet Vehicle Interface (HVI) interacts with the aircraft system bus to provide signal generation for the helmet display. This provides significant improvement for close combat targeting and engagement.

g. The Joint Mission Planning System (JMPS) will provide mission planning capability for support of military aviation operations. It will also provide support for unit-level mission planning for all phases of military flight operations and have the capability to provide necessary mission data for the aircrew. JMPS will support the downloading of data to electronics data transfer devices for transfer to aircraft and weapon systems. A JMPS for a specific aircraft type will consist of basic planning tools called the Joint Mission Planning Environment (JMPE) mated with a Unique Planning Component (UPC) provided by the aircraft program. In addition, UPCs will be required for specific weapons, communication devices, and moving map displays. The JMPS will be tailored to the specific releasable configuration for the F/A-18E/F Super Hornet and EA-18G Growler.

h. The AN/AVS-9 Night Vision Goggles (NVG) provide imagery sufficient for an aviator to complete night time missions down to starlight and extreme low light conditions. The AN/AVS-9 is designed to satisfy the F/A-18E/F mission requirements for covert night combat, engagement, and support. The third generation light amplification tubes provide a high-performance, image-intensification system for optimized F/A-18E/F and EA-18G night flying at terrain-masking altitudes.

i. The AN/AVS-11 Night Vision Goggles (NVG) is capable of high resolution imaging. This capability allows reduced visibility weapon delivery. While the NVCD hardware is UNCLASSIFIED, this item requires Enhanced End Use Monitoring (EEUM).

j. The AN/ALE-55 Towed Decoy improves aircraft survivability by providing an enhanced, coordinated onboard/off-board countermeasure response to enemy threats.

k. The Multifunctional Informational Distribution System (MIDS) Joint Tactical Radio System (JTRS) a secure data and voice communication network using Link-16 architecture. The system provides enhanced situational awareness, positive identification of participants within the network, secure fighter-to-fighter connectivity, secure voice capability, and ARN-118 TACAN functionality. It provides three major functions: Air Control, Wide Area Surveillance, and Fighter-to-Fighter. The MIDS JTRS can be used to transfer data in Air-to-Air, Air-to-Surface, and Air-to-Ground scenarios. The MIDS Enhanced Interference Blanking Unit (EIBU) provides validation and verification of equipment and concept. EIBU enhances input/output signal capacity of the MIDS JTRS and addresses parts obsolescence.

l. LAU-127E/A Guided Missile Launchers designed to enable F/A-18E/F Super Hornet aircraft to carry and launch missiles. It provides the electrical and mechanical interface between the missile and launch aircraft as well as the two-way data transfer between missile and cockpit controls and displays to support preflight orientation and control circuits to prepare and launch the missile.

m. Accurate Navigation (ANAV) Global Positioning System (GPS) also includes Key Loading Installation and Facility Charges. The ANAV is a 24-channel SAASM based pulse-per-second GPS receiver built for next generation GPS technology.

n. The AN/ARC-210 Radio's Line-of-sight data transfer rates up to 80 kb/s in a 25 kHz channel creating high-speed communication of critical situational awareness information for increased mission effectiveness. Software that is reprogrammable in the field via Memory Loader/Verifier Software making flexible use for multiple missions. The AN/ARC-210 has embedded software with programmable cryptography for secure communications.

o. AN/PYQ-10(C) is the next generation of the currently fielded AN/CYZ-10 Data Transfer Device (DTD). The AN/PYQ-10(C) provides automated, secure and user-friendly methods for managing and distributing cryptographic key material, Signal Operating Instructions (SOI), and Electronic Protection data. This course introduces some of the basic components and activities associated with the AN/PYQ-10(C) in addition to hands-on training. Learners will become familiar with the security features of the SKL, practice the initial setup of the SKL, and will receive and distribute electronic keys using the SKL.

p. KIV-78 Dual Channel Encryptor Mode 4/Mode 5 Identify Friend or Foe (IFF) Crypto applique includes aircraft installs and initial spares, to ensure proper identification of aircraft during coalition efforts. The KIV-78 provides cryptographic and time-of-day services for a Mark XIIA (Mode 4 and Mode 5) IFF Combined Interrogator/Transponder (CIT), individual interrogator, and individual transponder.

q. Data Transfer Unit (DTU) with CRYPTO Type 1 and Ground Encryption Device (GED). The DTU (MU-1164(C)/A) has an embedded DAR-400EX and the GED (DI-12(C)/A) has an embedded DAR-400ES. Both versions of the DAR-400 are Type 1 devices.

r. High Speed Video Network (HSVN) Digital Video Recorder (HDVR) with CRYPTO Type 1 and Ground Encryption Device (GED). The HDVR

has an embedded DAR-400EX and the GED has an embedded DAR-400ES. Both versions of the DAR-400 are Type 1 devices.

s. The Advanced Targeting Forward Looking Infrared (ATFLIR) pod is a multi-sensor, electro-optical targeting pod incorporating infrared, low-light television camera, laser range finder/target designator, and laser spot tracker. It is used to provide navigation and targeting for military aircraft in adverse weather and using precision-guided weapons such as laser-guided bombs. It offers much greater target resolution and imagery accuracy than previous systems.

t. The Infrared Search and Track (IRST) is a long wave infrared targeting pod in an external fuel tank outer mold and carried on the centerline station. The IRST has an upgraded infrared receiver and processor to provide full system capability.

u. The Distributed Targeting Processor – Networked (DTP-N) will host the geo-location capability previously resident in the DTS, providing increased memory and speed, improving overall functionality. DTP-N enabled geo-registration and targeting enhancements, when used in conjunction with the advanced networking capabilities, will provide near real-time dissemination of actionable warfighting data thereby reducing kill chain times.

v. The M61A2 20MM Gun is a hydraulically, electrically or pneumatically driven, six-barrel, air-cooled, electrically fired Gatling-style rotary cannon which fires 20MM rounds at an extremely high rate. The M61 and its derivatives have been the principal cannon armament of United States military fixed-wing aircraft.

w. The F414-GE-400 Engines is a 22,000-pound class afterburning turbofan engine. The engine features an axial compressor with 3 fan stages and 7 high-pressure compressor stages, and 1 high-pressure and 1 low-pressure turbine stage. It incorporates advanced technology with the proven design base and features a Full Authority Digital Engine Control (FADEC) system - to provide the F/A-18E/F Super Hornet with a durable, reliable, and easy-to-maintain engine.

x. LAU-115D/A is a rail Launcher designed to enable F/A-18E/F Super Hornet aircraft to carry and launch missiles. The launcher is suspended from the bomb rack on wing stations. The LAU-127 launchers may be attached to the sides of the LAU-115 for carriage missiles.

y. LAU-116B/A Guided Missile Launchers designed to enable F/A-18E/F Super Hornet aircraft to carry and launch missiles. Two launchers, one left hand and one right hand, are installed in the underside of the aircraft fuselage at stations 4 and 6. The launchers are recessed in cavities within the aircraft fuselage, allowing the missiles to be semi recessed for aerodynamic purposes. Both versions of the LAU-116 are ejection launchers.

z. LAU-118A Guided Missile Launchers designed to enable F/A-18E/F Super Hornet aircraft to carry and launch missiles. It provides the electrical and mechanical interface between the missile and launch aircraft, as well as the two-way data transfer between missile and cockpit controls and displays to support preflight orientation and control circuits to prepare and launch the missile.

aa. The Advanced Electronic Attack Kit for the EA-18G Growler consists of the ALQ-218(V)2 Tactical Jamming Receiver, ALQ-227(V)1 Communication Countermeasure Set, CN-1717/A Interference Cancellation System, CP-2640/ALQ Electronic Attack Unit, R-2674(C)/A Joint Tactical Terminal Receiver (JTTR) and associated hardware required for installation.

bb. Next Generation Jammer Mid-Band (NGJ-MB) Sets provides a mid-band jamming capability for the EA-18G. On aircraft, two NGJ-MB pods, referred to as a shipset, work in conjunction with one another to provide full-uninterrupted azimuth coverage. NGJ-MB is designed to operate as a symmetric loadout, with one each on stations 3 and 9.

cc. The SNIPER Pod is a multi-sensor, electro-optical targeting pod incorporating infrared, low-light television camera, laser rangefinder/target designator, and laser spot tracker. It is used to provide navigation and targeting for military aircraft in adverse weather and using precision-guided weapons such as laser-guided bombs. It offers much greater target resolution and imagery accuracy than previous systems.

dd. AN/AAQ-28(V) Litening Targeting Pod is a multi-sensor, electro-optical targeting pod incorporating infrared, low-light television camera, laser rangefinder/target designator, and laser spot tracker. It significantly increases the combat effectiveness of the aircraft curing day night and other weather conditions in the attack of air and ground missions. The targeting pod contains high resolution forward looking infrared sensors that displays and infrared image of the target to the aircrew.

ee. Cartridge Actuated Devices (CADs) are designed for the F/A-18E/F Super Hornet as small explosive devices used to eject stores from launched devices, actuate other explosive systems, or provide initiation for aircrew escape devices. Propellant Actuated Devices (PADs) are a tool or specialized mechanized device or gas generator system that is activated by a propellant or releases or directs work through a propellant charge. Weapons release, aircraft ejection, life support, and fire-suppression systems are some facets that rely heavily on CADs and PADs.

ff. Books and Other Publications includes flight manuals, technical manuals and support of technical data and updates, release and distribution of classified publications for the operation and/or maintenance of the F/A-18E/F aircraft or systems.

gg. Software provides for initial design and development of the Electronic Warfare Software suite which encompasses AN/ALQ-214, AN/ALE-47, ALE-55, ALR-67, as part of the System Configuration Set (SCS) builds.

hh. Technical Data provides for the F/A-18E/F post-production of classified test reports and other related documentation.

ii. Training Aide and Devices provides for upgraded classified lessons, hardware and installation for the Tactical Operational Flight Trainers (TOFT), Low Cost Trainers (LCT), Aircrew courseware and spares for delivery and installation of Systems Configuration Sets (SCS).

2. The AIM-9X Block II Sidewinder Missile is a supersonic, short-range Air-to-Air (A/A) guided missile which employs a passive Infrared (IR) target acquisition system, proportional navigational guidance, and a closed-loop position servo Fin Actuator Unit (FAU). It represents a substantial increase in missile acquisition and kinematics performance over the AIM-9M and replaces the AIM-9X Block I Missile configuration. The missile includes a high off-boresight seeker, enhanced countermeasure rejection capability, low drag/high angle of attack airframe and the ability to integrate the Helmet Mounted Cueing System. The software algorithms are the most sensitive portion of the AIM-9X missile. The software continues to be modified via a pre-planned product improvement (P3I) program in order to improve its counter-countermeasure capabilities. No software source code or algorithms will be released.

a. AIM-9X BLK II Captive Air Training Missile (CATM) is a flight certified inert mass simulator with a functioning Guidance Unit (GU). The CATM is the primary aircrew training device providing all pre-launch functions as well as realistic

aerodynamic performance that equate to carrying a tactical missile. The CATM provides pilot training in aerial target acquisition and use of aircraft controls/displays.

b. AIM-9X BLK II Tactical GU, WGU-57/B, provides the missile tracking, guidance, and control signals. The GU provides counter-countermeasures, improved reliability and maintainability over earlier Sidewinder models. Improvements include: (1) upgrade/redesign to the Electronics Unit Circuit Card Assemblies, (2) a redesigned center section harnessing, and (3) a larger capacity missile battery.

c. AIM-9X BLK II CATM GU, WGU-57/B, is identical to the tactical GU except the GU and Control Actuation System (CAS) batteries are inert and the software Captive. The software switch tells the missile processor that it is attached to a CATM and to ignore missile launch commands. The switch also signals software to not enter abort mode because there is no FAU connected to the GU.

d. AIM-9X BLK II Multi-Purpose Training Missile (MPTM) is a ground training device used to train ground personnel in aircraft loading, sectionalization, maintenance, transportation, storage procedures, and techniques. The missile replicates external appearance and features of a tactical AIM-9X-2 missile. The MPTM will physically interface with loading equipment, maintenance equipment, launchers, and test equipment. The missile is explosively and electrically inert and is NOT flight certified.

e. AIM-9X BLK II Dummy Air Training Missile (DATM) is used to train ground personnel in missile maintenance, loading, transportation, and storage procedures. All components are completely inert. The missile contains no programmable electrical components and is not approved for flight.

f. AIM-9X BLK II Active Optical Target Detector (AOTD) is newly designed for Block II. The AOTD/Data Link (AOTD/DL) uses the latest laser technology allowing significant increases in sensitivity, aerosol performance, low altitude performance, and Pk (Probability of Kill). The AOTD/DL design includes a DL for 2-way platform communication. The AOTD/DL communicates with the GU over a serial interface which allows the GU to receive and transmit data so that a target position and status communication with a launching platform is possible during missile flight.

3. The GBU-53/B Small Diameter Bomb Increment II (SDB II) is a 250-lb class precision-guided, semi-autonomous, conventional, air-to-ground munition used to defeat moving targets through adverse weather from standoff range. The SDB II has deployable wings and fins and uses GPS/INS guidance, network-enabled datalink (Link-16 and UHF), and a multi-mode seeker (millimeter wave radar, imaging infrared, semi-active laser) to autonomously search, acquire, track, and defeat targets. The SDB II employs a multi-effects warhead (Blast, Fragmentation, and Shaped Charge) for maximum lethality against armored and soft targets. The SDB II weapon system consists of the tactical all-up round (AUR) weapon, a 4-place common carriage system, and mission planning system munitions application program (MAP). The carriage system is the BRU-61B/A. The BRU and the MAP are not further described here. Two other operable configurations, two maintenance training configurations, and two containers of the system are described as follows:

a. SDB II Guided Test Vehicle (GTV) is an SDB II configuration used for land or sea range-based testing of the SDB II weapon system. The GTV has common flight characteristics of an SDB II AUR, but in place of the multi-effects warhead is a Flight Termination, Tracking, and Telemetry (FTTT) subassembly that mirrors the AUR multi-effects warhead's size and mass properties, but provides safe flight termination, free flight tracking and telemetry of encrypted data from the GTV to the data receivers. The SDB II GTV can have either inert or live fuzes. All other flight control, guidance, data-link, and seeker functions are representative of the SDB II AUR.

b. SDB II Captive Carry Vehicles (CCVs), formerly known as Captive Carry Reliability Test (CCRT) vehicles are an SDB II configuration primarily used for reliability data collection during carriage. The CCV has common characteristics of an SDB II AUR but with an inert warhead and fuze. The CCV has an inert mass in place of the warhead that mimics the warhead's mass properties. The CCV is a flight capable representative of the SDB II AUR but has not yet been approved for release from any aircraft. Since all other flight control, guidance, data-link, and seeker functions are representative of the SDB II AUR, with flight release approval, this configuration could be used for any purpose where an inert round without telemetry or termination capability would be useful.

c. The SDB II Weapon Load Crew Trainer (WLCT) is a mass mockup of the tactical AUR used for load crew and maintenance training. It does not contain energetics, a live fuze, or any classified or hazardous material. It is not flight certified.

d. The SDB II Practical Explosive Ordinance Disposal Trainer (PEST) is an EOD training unit with sections and internal subassemblies which are identical to, or correlate to, the external hardware, sections and internal subassemblies of the tactical AUR. The PEST does not contain energetics, a live fuze, classified or hazardous material. It is not flight certified.

e. The SDB II single round container, nomenclature CNU-714/U, is airtight sealable and contains a BIT harness assembly that allows for BIT testing and software reprogramming without the need for removing the cover assembly. The base assembly contains a humidity indicator, a breather valve, and a desiccant port/BIT access cover on the aft side of the container. There are also two forklift pockets located on the base assembly. Internally, the CNU-714/U contains separate upper and lower cradle assemblies. The lower cradle assembly is attached to the base assembly on top of four wire rope shock insulators, which provide shock isolation during transport. The upper cradle assembly provides an interface with standard Air Force loading equipment. The CNU-714/U lower cradle assembly contains indexing blocks that allow multiple lower cradle assemblies to be placed on the ground, side-by-side, for quick loading of a BRU-61.

f. The SDB II dual round container, nomenclature CNU-715/U, is airtight sealable and contains two BIT harness assemblies that allow for BIT testing and software reprogramming without the need for removing the cover assembly. The base assembly contains a breather valve and a desiccant port/BIT access cover on the aft side of the container. The dual container has two separate lower cradle assemblies. Each lower cradle assembly is attached to the base assembly on top of four wire rope shock insulators, which provide shock isolation during transport. The lower cradles of the CNU-715/U are not detachable from the base assembly. The cover assembly contains a humidity indicator and four latch assemblies to aid in the stacking of CNU-715/U containers on top of each other. There are also two sets of forklift pockets, laterally and longitudinally, located on the base assembly.

4. The AGM-158B Joint Air-to-Surface Standoff Missile Extended Range (JASSM ER) is an extended range low-observable, highly survivable subsonic cruise missile designed to penetrate next generation air defense systems en-

route to target. It is designed to kill hard, medium-hardened, soft and area type targets. The extended range over the baseline was obtained by going from a turbo jet to a turbo-fan engine and by reconfiguring the fuel tanks for added capacity. Classification of the technical data and information on the AGM-158's performance, capabilities, systems, subsystems, operations, and maintenance will range from UNCLASSIFIED to SECRET.

a. The AGM-158B Joint Air-to-Surface Standoff Missile (JASSM) software-in-the-Loop (SIL) testing assets are required for software development, integration, and test in the lab environment as well as ground mount operations before STV or Live Fire assets can be loaded on the aircraft to execute Airworthiness, Flight Test, and Live Fire events. These assets are for testing in the contiguous United States and will not be exported. Software development will be to the extent necessary to produce Engineering Releases needed to conduct airworthiness, integration and live fire testing. Testing equipment is CLASSIFIED.

b. The AGM-158B-2 JASSM Separation Test Vehicle (STV) is equipped with Intelligent Test Instrumentation Kit (iTIK). These assets will be used as part of the airworthiness data collection process to ensure safe separation of the munition from the aircraft. These missiles will be handled and stored in custom individual containers. These two (2) missiles are for testing in the contiguous United States and will not be exported. Software development will be to the extent necessary to produce Engineering Releases needed to conduct airworthiness, integration and live fire testing.

c. The AGM-158B-2 (JASSM) Instrumented Test Vehicle (ITV) is equipped with iTIK. This asset will be utilized to capture flight data information in a ''Captive Carry'' configuration. The information collected will ensure the munition can be safely carried and is required as part of the airworthiness process prior to launch of the STV, JTV, and the Live Fire asset. These missiles will be handled and stored in custom individual containers. This missile is for testing in the contiguous United States and will not be exported. Software development will be to the extent necessary to produce Engineering Releases needed to conduct airworthiness, integration and live fire testing.

d. The AGM-158B-2 JASSM Jettison Test Vehicle (JTV) is not equipped with an iTIK. These assets will be used as part of the airworthiness data collection process to ensure safe jettison of the munition from the aircraft. These missiles will be handled and stored in custom individual containers. These two (2) missiles are for testing in the contiguous United States and will not be exported. Software development will be to the extent necessary to produce Engineering Releases needed to conduct airworthiness, integration and live fire testing.

e. The AGM-158B-2 JASSM Maintenance Training Missile (DATM) is a missile for maintenance (Weapon Load Crew) training with container.

5. The GBU-31 Joint Direct Attack Munition (JDAM) is a 2,000-lb Internal Navigation System/Global Positioning System (INS/GPS) guided precision air-to-ground munition. The GBU-31 consists of a KMU-556 warhead specific tail kit, and MK-84 bomb body.

6. The GBU-38 Joint Direct Attack Munition (JDAM) is a 500-lb Internal Navigation System/Global Positioning System (INS/GPS) guided precision air-to-ground munition. The GBU-38 consists of a KMU-572 warhead specific tail kit, and MK-82 bomb body.

7. The GBU-54 Laser Joint Direct Attack Munition (LJDAM) is a 500-lb JDAM which incorporates all the capabilities of the JDAM guidance tail it and adds a precision laser guidance set. The LJDAM gives the weapon system an optional semi-active laser guidance in addition to the Internal Navigation System/Global Positioning System (INS/GPS) guidance. This provides the optional capability to strike moving targets. The GBU-54 consists of a laser guidance set, KMU-572 warhead specific tail kit, and MK-82 bomb body.

8. The AGM-154 JSOW is used by Navy, Marine Corps, and Air Force, and allows aircraft to attack well-defended targets in day, night, and adverse weather conditions. The JSOW C and C-1 utilize GPS/INS guidance and an uncooled imaging infrared seeker for terminal guidance, Autonomous Acquisition, and provides a precision targeting, 500-lb-class tandem warhead that is the Navy's primary standoff weapon against hardened targets. The JSOW C-1 added the Link-16 datalink enabling a robust and flexible capability against high-value stationary land targets and moving maritime target capability. JSOW C-1 can fly via two dimensional and three dimensional waypoints to the target, offering the optimal path around Integrated Air Defense Systems (IADS).

The JSOW incorporates components, software, and technical design information that are considered sensitive. The following JSOW-C components being conveyed by the proposed sale include the GPS/INS, IIR seeker, INS OFP software and missile operational characteristics and performance data. These elements are essential to the ability of the JSOW-C missile to selectively engage hostile targets under a wide range of operational, tactical, and environmental conditions.

9. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

10. If a technologically advanced adversary were to obtain knowledge of the specific hardware or software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

11. A determination has been made that Finland can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

12. All defense articles and services listed in this transmittal have been authorized for release and export to Finland.

[FR Doc. 2020–27295 Filed 12–10–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Virtual Public Meetings for the Draft Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement for Gulf of Alaska Navy Training Activities

AGENCY: Department of the Navy, Department of Defense.

ACTION: Notice of availability; notice of public meeting.

SUMMARY: Pursuant of the National Environmental Policy Act (NEPA) of 1969, as implemented by the Council on Environmental Quality, and Presidential Executive Order 12114, the Department of the Navy (DON) has prepared and filed with the United States Environmental Protection Agency a draft supplement to the 2011 Gulf of Alaska (GOA) Navy Training Activities Final Environmental Impact Statement/Overseas Environmental Impact Statement (EIS/OEIS) (referred to as the 2011 GOA Final EIS/OEIS) and the 2016 GOA Navy Training Activities Final

Supplemental EIS/OEIS (referred to as the 2016 GOA Final Supplemental EIS/OEIS). In the 2020 Draft Supplemental EIS/OEIS, the DON assesses the potential environmental effects associated with continuing periodic military readiness activities in the GOA Temporary Maritime Activities Area (TMAA). This notice announces the public review and comment period and the dates of the virtual public meetings, includes information about how the public can review and comment on the document, and provides supplementary information about the environmental planning effort.

DATES: All comments must be postmarked or received online by 11:59 p.m. Pacific Standard Time on February 16, 2021, for consideration in the development of the Final Supplemental EIS/OEIS. Federal agencies and officials, Alaska Native Tribes, state and local agencies and officials, and interested organizations and individuals are encouraged to provide comments on the 2020 Draft Supplemental EIS/OEIS during the public review and comment period.

Due to COVID–19 travel and public event restrictions, the DON is holding virtual public meetings, consisting of a presentation and question and answer sessions, to discuss the Proposed Action and the draft environmental impact analysis. Visit *www.GOAEIS.com/VPM* to learn more about and attend a virtual public meeting. An audio-only option will also be available. Meetings will occur as follows:

1. Tuesday, January 19, 2021, from 3 to 4 p.m. Alaska Standard Time

2. Wednesday, February 3, 2021, from 5 to 6 p.m. Alaska Standard Time

Substantive questions for discussion with Navy representatives at the virtual public meetings can be submitted between January 11 and 18, 2021, for the January 19, 2021, meeting, and between January 26 and February 2, 2021, for the February 3, 2021, meeting. Email questions to *projectmanager@goaeis.com* or complete the form at *www.GOAEIS.com.*

ADDRESSES: Written comments may be mailed to Naval Facilities Engineering Command Northwest, Attention: GOA Supplemental EIS/OEIS Project Manager, 1101 Tautog Circle, Suite 203, Silverdale, WA 98315–1101, or submitted electronically via the project website at *www.GOAEIS.com.*

FOR FURTHER INFORMATION CONTACT: Naval Facilities Engineering Command Northwest, Attention: Ms. Kimberly Kler, GOA Supplemental EIS/OEIS Project Manager, 1101 Tautog Circle, Suite 203, Silverdale, WA 98315–1101, 360–315–5103, *projectmanager@goaeis.com.*

SUPPLEMENTARY INFORMATION: The DON's Proposed Action is to continue periodic military training activities within the GOA TMAA. Proposed training activities are similar to those that have occurred in the GOA TMAA for decades. The geographic extent of the GOA TMAA and Proposed Action, including the location, number, and frequency of major training exercises, remain unchanged from the 2016 Final Supplemental EIS/OEIS. Although the types of activities and number of events in the Proposed Action are the same as in previous documents (Alternative 1 in both the 2011 and 2016 impact analyses), there have been changes in the platforms and systems used in those activities. For example, the EA–6B aircraft and frigate, and their associated systems, have been replaced by the EA–18G aircraft, Littoral Combat Ship, and Destroyer. The 2020 Draft Supplemental EIS/OEIS includes the analysis of at-sea training activities projected to meet readiness requirements beyond 2022 and into the reasonably foreseeable future, and reflects the most up-to-date compilation of training activities deemed necessary to accomplish military readiness during that time period.

The 2020 Draft Supplemental EIS/OEIS also updates the 2011 and 2016 impact analyses with new information and analytical methods the DON developed and has used since 2016. New information includes an updated acoustic effects model, updated marine mammal density data and sea turtle hearing criteria, and other emergent best available science. The DON is preparing a Supplemental EIS/OEIS to renew required federal regulatory permits and authorizations under the Marine Mammal Protection Act and the Endangered Species Act. The DON will consult with the National Marine Fisheries Service (NMFS) and United States Fish and Wildlife Service to renew these permits and authorizations. Additionally, NMFS is a cooperating agency for this Supplemental EIS/OEIS.

The 2020 Draft Supplemental EIS/OEIS is available for electronic viewing or download at *www.GOAEIS.com.* The 2020 Draft Supplemental EIS/OEIS was distributed to federal agencies and federally recognized Alaska Native Tribes with which the DON is consulting.

All comments submitted during the public review and comment period from December 11, 2020, to February 16, 2021, will become part of the public record, and substantive comments will be addressed in the Final Supplemental EIS/OEIS.

The DON is committed to providing the public an accessible version of the 2020 Draft Supplemental EIS/OEIS during COVID–19 conditions. If you need assistance accessing the document or attending the virtual public meetings, please contact Ms. Julianne Stanford, Navy Region Northwest Public Affairs Office, at *julianne.stanford@navy.mil* or 360–867–8525. For all other queries or if you require additional information about the project, please contact Ms. Kimberly Kler, GOA Supplemental EIS/OEIS Project Manager, at *projectmanager@goaeis.com.*

Individuals interested in receiving electronic project updates can subscribe on the project website to receive notifications via email for key milestones throughout the environmental planning process.

Dated: December 3, 2020.

K. R. Callan,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2020–26950 Filed 12–10–20; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Personnel Development To Improve Services and Results for Children With Disabilities—Improving Retention of Special Education Teachers and Early Intervention Personnel

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for Personnel Development to Improve Services and Results for Children with Disabilities—Improving Retention of Special Education Teachers and Early Intervention Personnel, Assistance Listing Number 84.325P. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES:

Applications Available: December 11, 2020.

Deadline for Transmittal of Applications: February 9, 2021.

Deadline for Intergovernmental Review: April 12, 2021.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common

Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Sarah Allen, U.S. Department of Education, 400 Maryland Avenue SW, Room 5160, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7875. Email: *Sarah.Allen@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purposes of this program are to (1) help address State-identified needs for personnel preparation in special education, early intervention, related services, and regular education to work with children, including infants and toddlers, and youth with disabilities; and (2) ensure that those personnel have the necessary skills and knowledge, derived from practices that have been determined through scientifically based research, to be successful in serving those children.

Priorities: This competition includes one absolute priority and one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(v), the absolute priority and competitive preference priority are from allowable activities specified in the statute (see sections 662 and 681 of the Individuals with Disabilities Education Act (IDEA); 20 U.S.C. 1462 and 1481).

Absolute Priority: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Improving Retention of Special Education Teachers and Early Intervention Personnel.

Background:

Many local educational agencies (LEAs) and early intervention service (EIS) providers face challenges with retention [1] of qualified personnel who serve and support children with disabilities in schools, classrooms, and natural environments under IDEA (Espinoza et al., 2018; IDEA Infant and Toddlers Coordinators Association, 2019). Across all subject areas, national estimates suggest that approximately 8 percent of teachers leave the profession each year, and two-thirds of them leave for reasons other than retirement. Within special education, teacher turnover is estimated to exceed 14 percent annually (Carver-Thomas & Darling-Hammond, 2017). These staffing shortages are costly for the systems faced with repeatedly replacing those who move out of the system or leave the profession. Moreover, low retention rates among special education teachers and early intervention personnel have negative implications for the development, learning, and academic success of infants, toddlers, children, and youth with disabilities (Council for Exceptional Children, 2019). Staff turnover is disruptive to instructional programming and practices, which in turn decreases student learning and achievement (Sutcher et al., 2016).

Efforts to improve retention of special education teachers and early intervention personnel require understanding factors associated with, or contributing to, their decisions to stay, move, or leave the profession. Factors impacting retention consistently include preparation and qualifications, support for new hires, compensation, school or program characteristics, working conditions, and demographic and nonwork influences (Billingsley & Bettini, 2019; Carver-Thomas & Darling-Hammond, 2017; Mason-Williams et al., 2020). Further, policies and practices that research has shown to improve personnel retention include offering service scholarships and loan forgiveness, creating career pathway programs that bring well-prepared candidates into teaching (*e.g.,* ''Grow Your Own'' and teacher cadet programs), establishing teacher residency models in hard-to-staff districts, mentoring and induction for new hires, strengthening school principals' and administrators' understanding of special education, and providing competitive compensation (Billingsley & Bettini, 2019; Carver-Thomas & Darling-Hammond, 2017; Espinoza et al., 2018; Mason-Williams et al., 2020).

Finally, comprehensive strategies to address retention of special education teachers and EIS providers benefit from effective organizational partnerships between relevant stakeholders (Espinoza et al., 2018), including personnel preparation faculty and researchers, parents and families, professional organizations, and practitioners and administrators at the State, regional, and local levels. With the goal of ensuring alignment between preparation programs and the needs of the local systems serving children with disabilities, stronger partnerships bring stakeholders together regularly to share knowledge, address common challenges, and develop enduring relationships around shared goals. By connecting these research findings with available resources from technical assistance centers funded by the Office of Special Education Programs (OSEP), such as *The Educator Shortages in Special Education Toolkit* (Great Teachers and Leaders Center, 2020) and *A System Framework for Building High-Quality Early Intervention and Preschool Special Education Programs* (Early Childhood Technical Assistance Center, 2015), States, regional, and local systems will be better able to develop, implement, evaluate, scale-up, and sustain comprehensive retention plans, resulting in meaningful improvement in retention of special education teachers and early intervention personnel.

Over the past year, OSEP has engaged the field in numerous activities related to attracting, preparing, and retaining effective personnel and received considerable feedback that State educational agencies (SEAs) and Part C lead agencies would benefit from investments that support their efforts to improve retention. The proposed investment under the absolute priority would fund efforts by SEAs or Part C lead agencies, in collaboration with LEAs or EIS providers, to plan, implement, evaluate, scale-up, and sustain a comprehensive retention plan that uses evidence-based policies and practices to address factors contributing to low retention in these systems. This priority is consistent with the Secretary's Supplemental Priority 5: Meeting the Unique Needs of Students and Children with Disabilities and/or Those with Unique Gifts and Talents; and Supplemental Priority 8: Promoting Effective Instruction in Classrooms and Schools.

Priority:

The purpose of this priority is to fund grants to achieve, at a minimum, the following expected outcomes:

(a) Increased capacity of State, regional, and local systems to develop, implement, evaluate, scale-up, and sustain comprehensive retention plans that use evidence-based policies and practices to address identified factors contributing to low retention of special education teachers and early intervention personnel. Such a plan might include mentorship or induction

[1] For the purposes of this competition, the term ''retention'' means that special education teachers and early intervention service providers stay in their current position or field serving children with disabilities.

programs, career pathways programs, recognition and incentive programs, competitive compensation, service scholarships, or student loan repayment for continued service.

(b) Increased capacity of State, regional, and local systems to evaluate their comprehensive retention plans and how the plans are implemented.

(c) Increased capacity of State, regional, and local systems to effectively partner with a broad range of stakeholder groups—including, but not limited to, the business community, personnel preparation programs at institutions of higher education (IHEs), parent training and information centers [2] (PTIs), and other community-based organizations—needed to develop, implement, evaluate, scale-up, and sustain comprehensive retention plans that improve retention of special education teachers and early intervention personnel.

(d) Improved retention of special education teachers and early intervention personnel.

To be considered for funding under this priority, all applicants must meet the application requirements contained in the priority. All projects funded under this absolute priority also must meet the programmatic and administrative requirements specified in the priority.

Note: OSEP intends to fund projects that address retention of special education teachers and early intervention personnel. OSEP may fund high-quality applications out of rank order to ensure that projects are funded across both SEAs and Part C lead agencies.

Note: An applicant may submit an application that addresses retention of special education teachers or an application that addresses retention of early intervention personnel. An applicant may submit one application that addresses retention of special education teachers and another that addresses early intervention personnel.

Note: To be reviewed and be considered eligible to receive an award, applicants must demonstrate matching support for the proposed project at 10 percent of the total amount of the grant as specified in paragraph (f)(1) of the application requirements of this priority.

To meet the requirements of this priority, an applicant must—

(a) Demonstrate, in the narrative section of the application under ''Significance,'' how the proposed project will—

(1) Address the State, regional, or local need to retain special education teachers or early intervention personnel across the career continuum and at every level of experience. To meet this requirement, the applicant must—

(i) Present applicable State, regional, or local data demonstrating the current and projected number and percentage of special education teachers or early intervention personnel leaving their current positions (disaggregated, to the extent possible, by those retiring and those leaving for other reasons, such as promotion, moving to general education, or leaving the field);

(ii) Present applicable State, regional, or local data demonstrating the impact of teachers or early intervention personnel leaving their systems such as impacts on fiscal or academic outcomes; and

(iii) Describe factors contributing to special education teachers or early intervention personnel leaving their systems; and

(2) Address the need for improved infrastructure and partnerships with a broad range of stakeholder groups to retain special education teachers or early intervention personnel. To meet this requirement, the applicant must—

(i) Describe current State, regional, and local strategies that have been used or are being used to improve retention of special education teachers or early intervention personnel;

(ii) Describe the impact of implementing the strategies identified in paragraph (a)(2)(i) of this section;

(iii) Describe the changes in State, regional, and local infrastructure (*e.g.,* governance, finance, personnel, coordination, data, and accountability and improvement) needed to improve retention of special education teachers or early intervention personnel;

(iv) Describe the collaborative relationships with a broad range of stakeholder groups that need to be strengthened or established to improve retention of special education teachers or early intervention personnel; and

(v) Describe the likely magnitude or importance of retaining more special education teachers or early intervention personnel at State, regional, and local levels.

(b) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how the proposed project will—

(1) Ensure equal access and treatment for members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability;

(2) Achieve its goals, objectives, and intended outcomes. To meet this requirement, the applicant must provide—

(i) Measurable intended project outcomes; and

(ii) In Appendix A, the logic model [3] by which the proposed project will achieve its intended outcomes that depicts, at a minimum, the goals, activities, outputs, and intended outcomes of the proposed project;

(3) Use a conceptual framework (and provide a copy in Appendix A) to develop project plans and activities, describing any underlying concepts, assumptions, expectations, beliefs, or theories, as well as the presumed relationships or linkages among these variables, and any empirical support for this framework;

Note: The following websites provide more information on logic models and conceptual frameworks: *www.osepideasthatwork.org/logicModel* and *www.osepideasthatwork.org/resources-grantees/program-areas/ta-ta/tad-project-logic-model-and-conceptual-framework.*

(4) Use up to the first 12 months of the project period to develop a comprehensive retention plan, or a plan to evaluate, scale-up, and sustain an existing comprehensive retention plan, that uses evidence-based policies and practices that address identified factors contributing to low retention to retain special education teachers or early intervention personnel. To meet this requirement, the applicant must include—

(i) Its proposed plan to collect and analyze additional data, as appropriate, to understand the factors, including policies and practices, contributing to low retention of special education teachers or early intervention personnel at the State, regional, and local levels;

(ii) The current and additional evidence-based policies and practices that will guide the development of the comprehensive retention plan or the plan to scale-up an already existing comprehensive retention plan, and the proposed process the applicant will use to address the identified factors contributing to low retention;

[2] For the purpose of this priority, the term ''parent training and information centers'' means OSEP-funded parent training and information centers that serve parents of children of all ages (birth to 26) and all types of disabilities. Discretionary grants are awarded only to parent organizations as defined by IDEA under Assistance Listing Number 84.328. For more information, including centers located in each State and territory, see *www.parentcenterhub.org/find-your-center/.*

[3] ''Logic model'' (34 CFR 77.1) (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

(iii) Its proposed process for identifying LEAs or EIS providers that the State will partner with to develop comprehensive retention plans, or plan to scale-up already existing comprehensive retention plans, to improve the retention of special education or early intervention personnel. The applicant should indicate the extent to which the poverty level of youth served, geography (*e.g.,* rural, urban) or other demonstrated needs (*e.g.,* staff shortages, historic pattern of high turnover rates) will factor into its process for identifying LEAs or EIS providers to partner with; and

(iv) Its proposed plan for identifying and establishing meaningful partnerships, as appropriate, with a broad range of stakeholder groups, including but not limited to the business community, IHEs, PTIs, and other community-based organizations, necessary to successfully develop a comprehensive retention plan, or to evaluate, scale-up, and sustain existing comprehensive retention plans;

(5) Implement, scale-up, and sustain a comprehensive retention plan that uses evidence-based policies and practices to address identified factors contributing to low retention of special education teachers or early intervention personnel. To meet this requirement, the applicant must include its approach to—

(i) Ensure an infrastructure (*e.g.,* governance, finance, personnel, data, and accountability and improvement) is in place to implement the comprehensive retention plan at the State, regional, or local level;

(ii) Establish additional partnerships, as needed, including agreements that outline responsibilities, sharing of resources, and decision-making and communication processes among all partners;

(iii) Recruit LEAs or EIS providers to partner with to implement, evaluate, scale-up, and sustain the comprehensive recruitment plan. To meet this requirement, the applicant must include—

(A) The proposed process for identifying LEAs or EIS providers that the State will partner with to implement, evaluate, scale-up, and sustain the comprehensive retention plan, and expectations for participation, which must include the data that partners will need to be collected to demonstrate progress in implementing the comprehensive retention plan; and

(B) The proposed process the applicant will use to identify additional LEAs or EIS providers that it will partner with in years four and five if the project period is extended; and

(iv) The proposed process the applicant will use to sustain the comprehensive retention plan once Federal support ends; and

(6) Disseminate information on the effectiveness of evidence-based policies and practices used within the comprehensive retention plan and the impact of implementing the plan to other SEAs and LEAs or Part C lead agencies and local service providers to support other systems in increasing the retention of special education teachers or early intervention personnel.

(c) Demonstrate, in the narrative section of the application under ''Quality of the project evaluation,'' how—

(1) The applicant will use comprehensive and appropriate methodologies to evaluate how well the goals or objectives of the proposed project have been met, including project processes and intended outcomes. The applicant must describe performance measures for the project that include retention rates for special education teachers or early intervention personnel; and

(2) The applicant will collect, analyze, and use data related to specific and measurable goals, objectives, and intended outcomes of the project. To meet this requirement, the applicant must describe how—

(i) Retention of special education teachers or early intervention personnel and other project processes and outcomes will be measured for formative evaluation purposes, including proposed instruments, data collection methods, and proposed analyses;

(ii) Proposed evaluation methods will provide performance feedback that allows for periodic assessment of progress towards meeting the project outcomes;

(iii) Results of the evaluation will be used as a basis for improving the proposed project; and

(iv) Evaluation results will be reported to OSEP in its annual and final performance reports.

(d) Demonstrate, in the narrative section of the application under ''Adequacy of resources and quality of project personnel,'' how—

(1) The proposed project will encourage applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate;

(2) The proposed key project personnel, consultants, and subcontractors have the qualifications and experience to carry out the proposed activities and achieve the project's intended outcomes;

(3) The applicant and any key partners have adequate resources to carry out the proposed activities; and

(4) The proposed costs are reasonable in relation to the anticipated results and benefits.

(e) Demonstrate, in the narrative section of the application under ''Quality of the management plan,'' how—

(1) The proposed management plan will ensure that the project's intended outcomes will be achieved on time and within budget. To meet this requirement, the applicant must describe—

(i) Clearly defined responsibilities for key project personnel, consultants, and subcontractors, as applicable; and

(ii) Timelines and milestones for accomplishing the project tasks;

(2) Key project personnel and any consultants and subcontractors will be allocated and how these allocations are appropriate and adequate to achieve the project's intended outcomes;

(3) The proposed project will benefit from a diversity of perspectives, including those of individuals with disabilities, families of students with disabilities, administrators, teachers and personnel, faculty, technical assistance and professional development providers, PTIs, researchers, business leaders, and policymakers, among others, in its development and operation.

(f) Address the following application requirements. The applicant must—

(1) Demonstrate, in the budget information (ED Form 524, Section B) and budget narrative, matching support for the proposed project at 10 percent of the total amount of the grant;

Note: Matching support can be either cash or in-kind donations. Under 2 CFR 200.306, a cash expenditure or outlay of cash with respect to the matching budget by the grantee is considered a cash contribution. However, certain cash contributions that the organization normally considers an indirect cost should not be counted as a direct cost for the purposes of meeting matching support. Specifically, in accordance with 2 CFR 200.306(c), unrecovered indirect costs cannot be used to meet the non-Federal matching support. Under 2 CFR 200.434, third-party in-kind contributions are services or property (*e.g.,* land, buildings, equipment, materials, supplies) that are contributed by a non-Federal third party at no charge to the grantee.

The Secretary does not, as a general matter, anticipate waiving this requirement in the future. Furthermore,

given the importance of cost share or matching funds to the long-term success of the project, eligible entities must identify appropriate cost share or matching funds in the proposed three-year budget.

(2) Include, in Appendix A, personnel-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative; and

(3) Include, in the budget, attendance at a two- and one-half day meeting in conjunction with either the OSEP project directors' conference or the OSEP leadership conference in Washington, DC, during each year of the project period.

Fourth and Fifth Year of Project

The Secretary may extend a project two years beyond the initial 36 months if the grantee is achieving the intended outcomes of the project (as demonstrated by data gathered as part of the project evaluation). Each applicant must include in its application a plan and a budget for the full 60-month period. In deciding whether to extend funding the project for the fourth and fifth years, the Secretary will consider the requirements of 34 CFR 75.253(a) and will consider the success and timeliness with which the intended outcomes of the project requirements have been or are being met by the project.

Competitive Preference Priority: Within this absolute priority, we give competitive preference to applications that address the following competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 5 points to an application, depending on how well the application meets the competitive preference priority.

This priority is:

Matching Support (Up to 5 points).

An application that demonstrates matching support for the proposed project at—

(a) 20 percent of the requested Federal award (1 point);

(b) 40 percent of the total amount of the requested Federal award (2 points);

(c) 60 percent of the total amount of the requested Federal award (3 points);

(d) 80 percent of the total amount of the requested Federal award (4 points); or

(e) 100 percent of the total amount of the requested Federal award (5 points).

Applicants must address this competitive preference priority in the budget information (ED Form 524, Section B) and budget narrative.

References

Billingsley, B., & Bettini, E. (2019). Special education teacher attrition and retention: A review of the literature. *Review of Educational Research, 89*(5), 697–744. *https://doi.org/10.3102/0034654319862495.*

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Early Childhood Technical Assistance Center. (2015). *A system framework for building high-quality early intervention and preschool special education programs. https://ectacenter.org/~pdfs/pubs/ecta-system_framework.pdf.*

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Great Teachers and Leaders Center. (2020). *Educator shortages in special education: Toolkit for developing local strategies. https://gtlcenter.org/technical-assistance/toolkits/educator-shortages-special-education.*

IDEA Infant and Toddler Coordinators Association. (2019). *2019 Tipping points annual survey: State challenges. www.ideainfanttoddler.org/pdf/2019–ITCA-State-Challenges-Report.pdf.*

Mason-Williams, L., Bettini, E., Peyton, D., Harvey, A., Rosenberg, M., & Sindelar, P. (2020). Rethinking shortages in special education: Making good on the promise of an equal opportunity for students with disabilities. *Teacher Education and Special Education, 43*(1), 45–62.

Sutcher, L., Darling-Hammond, L., & Carver-Thomas, D. (2016). *A coming crisis in teaching? Teacher supply, demand, and shortages in the U.S.* Learning Policy Institute. *https://learningpolicyinstitute.org/product/coming-crisis-teaching.*

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1462 and 1481.

Note: Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR part 304.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $89,700,000 for the Personnel Development to Improve Services and Results for Children with Disabilities program for FY 2021, of which we intend to use an estimated $2,250,000 for this competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2022 from the list of unfunded applications from this competition.

Estimated Range of Awards: $700,000–$750,000.

Estimated Average Size of Awards: $725,000.

Maximum Award: We will not make an award exceeding $750,000 for a project period of 36 months for applications addressing the retention of either special education teachers or early intervention personnel.

Note: Applicants must describe, in their applications, the amount of funding being requested for each 12-month budget period.

Estimated Number of Awards: 9.

Project Period: Up to 36 months.

Note: The Department is not bound by any estimates in this notice.

III. Eligibility Information

1. *Eligible Applicants:* SEAs and Part C lead agencies are the only eligible applicants.

2. a. *Cost Sharing or Matching:* Cost sharing or matching is required for this competition.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a

negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application. Under 34 CFR 75.708(e), a grantee may contract for supplies, equipment, and other services in accordance with 2 CFR part 200.

4. *Other General Requirements:* (a) Recipients of funding under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Applicants for, and recipients of, funding must, with respect to the aspects of their proposed project relating to the absolute priority, involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768), and available at *www.govinfo.gov/content/pkg/FR–2019–02–13/pdf/2019–02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 50 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance (15 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of project services (35 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(iii) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(iv) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(v) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.

(c) *Quality of the project evaluation (20 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(iii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(iv) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(d) *Adequacy of resources and quality of project personnel (15 points).*

(1) The Secretary considers the adequacy of resources and quality of project personnel for the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of key project personnel.

(ii) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(iii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(e) *Quality of the management plan (15 points).*

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(iv) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to

comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* For the purposes of the Government Performance and Results Act of 1993 (GPRA) and reporting under 34 CFR 75.110, we have established the following performance measures for this grant program (84.325P):

(a) Number and percent of special education teachers and early intervention service providers that participated in project-funded activities that are retained in their current position, or continuing to primarily serve children with disabilities in early intervention or school settings; and

(b) Retention rate for special education teachers or EIS providers at the State, regional, or local system level that participated in project-funded activities compared to the historical retention of providers in the same State, regional, or local system(s) in years prior to participation in the proposed project.

Grantees will be required to report information on their project's performance in annual and final performance reports to the Department (34 CFR 75.590).

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Commissioner, Rehabilitation Services Administration. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2020–27356 Filed 12–9–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0149]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; The Student Support and Academic Enrichment Grant Program (Title IV, Part A) Waiver Request

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 January 11, 2021.

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.* 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 Bryan Williams, 202–453–6715.

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: The Student Support and Academic Enrichment Grant Program (Title IV, Part A) Waiver Request.

OMB Control Number: 1810–0747.

Type of Review: An extension of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 52.

Total Estimated Number of Annual Burden Hours: 156.

Abstract: The Student Support and Academic Enrichment Grant Program (Title IV, Part A) grant program intends to offer waivers, for the 2020–2021 school year only, to State educational agencies (SEAs), based on section 8401 [20 U.S.C. 7861] of the Elementary and Secondary Education Act, as reauthorized by the Every Student Succeeds Act (ESSA) in 2015, for specific requirements in the program. The purpose for this new collection is to collect waiver requests from each State wishing to take advantage of these waivers.

Dated: December 8, 2020.

Kate Mullan,

PRA Coordinator,Strategic Collections and ClearanceGovernance and Strategy Division,Office of Chief Data Officer,Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–27287 Filed 12–10–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0181]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Indian Education Professional Development (PD) Application Package

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement with change of a previously approved collection.

DATES: Interested persons are invited to submit comments on or before January 11, 2021.

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.* 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 Angela Hernandez-Marshall, 202–205–1909.

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: Indian Education Professional Development (PD) Application Package.

OMB Control Number: 1810–0580.

Type of Review: A reinstatement with change of a previously approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 40.

Total Estimated Number of Annual Burden Hours: 1,600.

Abstract: The Office of Indian Education (OIE) of the Department of Education (ED) requests a reinstatement for the Indian Education Professional Development Grant Application authorized under Title VI, Part A, of the Elementary and Secondary Education Act, as amended. The Every Student Succeeds Act (ESSA) amended the Elementary and Secondary Education Act (ESEA); included amongst those amendments was new statutory language for the Professional Development (PD) program in section 6122 of the ESSA. It is a competitive discretionary grant program. The grant application submitted for this program is evaluated on the basis of how well an applicant addresses the selection criteria, and is used to determine applicant eligibility and amount of award for projects selected for funding.

Dated: December 8, 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. 2020–27246 Filed 12–10–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Native American Career and Technical Education Program (NACTEP)

Correction

In notice document 2020–26112 beginning on page 76548 in the issue of Monday, November 30, 2020, make the following change:

On page 76548, in the third column, in the 37th through 39th lines, ''[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]'' should read ''January 29, 2021''.

[FR Doc. C1–2020–26112 Filed 12–10–20; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF ENERGY

[OE Docket No. EA–487]

Application to Export Electric Energy; Mercuria Energy America, LLC.

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of application.

SUMMARY: Mercuria Energy America, LLC. (Applicant or MEA) has applied for authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before January 11, 2021.

ADDRESSES: Comments, protests, motions to intervene, or requests for

more information should be addressed by electronic mail to *Electricity.Exports@hq.doe.gov,* or by facsimile to (202) 586–8008.

SUPPLEMENTARY INFORMATION: The Department of Energy (DOE) regulates exports of electricity from the United States to a foreign country, pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b) and 42 U.S.C. 7172(f)). Such exports require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On December 1, 2020, MEA filed an application with DOE (Application or App.) to transmit electric energy from the United States to Canada for a term of five years. MEA states that it ''is a direct, wholly-owned subsidiary of Mercuria Energy Company, LLC (MEC), a Delaware limited liability company having its principal place of business in Houston, Texas.'' App. at 1. MEA represents that it does not ''own, operate or control electric transmission or distribution facilities in the United States over which the export of wholesale electricity could have reliability, fuel use, or system stability impact,'' and that it has no ''affiliation with any entity that owns, operates, or controls electric transmission or distribution facilities in the United States over which the export of wholesale electricity could have a reliability, fuel use, or system stability impact.'' *Id.* at 3.

MEA further states that it ''will buy and sell wholesale electricity in the wholesale electricity in the wholesale electricity markets within the United States, and will export electricity transmitted across international transmission facilities to be utilized by Presidential permits issued pursuant to Executive Order 10485, as amended.'' App. at 2. MEA contends that its exports ''will not impair or tend to impede the sufficiency of electricity supplies in the United States or the regional coordination of electric utility planning or operations.'' *Id.* at 4.

MEA states that its exports ''will be purchased from other suppliers (*i.e.* generators, electric utilities, and other power marketers) voluntarily, and therefore will be surplus to the needs of the selling entities.'' App. at 3–4.

The existing international transmission facilities to be utilized by the Applicant have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the Application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning MEA's application to export electric energy to Canada should be clearly marked with OE Docket No. EA–487. Additional copies are to be provided directly to Chloe Cromarty, 20 E. Greenway Plaza, Suite 650, Houston, Texas 77046, *ccromarty@mercuria.com;* and Mark Greenberg, 20 E. Greenway Plaza, Suite 650, Houston, Texas 77046, *mgreenberg@mercuria.com.*

A final decision will be made on the Application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE determines that the proposed action will not have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of the Application will be made available, upon request, by accessing the program website at *http://energy.gov/node/11845,* or by emailing Matthew Aronoff at *matthew.aronoff@hq.doe.gov.*

Signed in Washington, DC, on December 7, 2020.

Christopher Lawrence,

Management and Program Analyst, Energy Resilience Division,Office of Electricity.

[FR Doc. 2020–27250 Filed 12–10–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–280–C]

Application to Export Electric Energy; Direct Energy Marketing Inc.

AGENCY: Office of Electricity, Department of Energy.

ACTION: Notice of application.

SUMMARY: Direct Energy Marketing Inc. (Applicant or DEMI) has applied for authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

DATES: Comments, protests, or motions to intervene must be submitted on or before January 11, 2021.

ADDRESSES: Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to *Electricity.Exports@hq.doe.gov,* or by facsimile to (202) 586–8008.

SUPPLEMENTARY INFORMATION: The Department of Energy (DOE) regulates exports of electricity from the United States to a foreign country, pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b) and 42 U.S.C. 7172(f)). Such exports require authorization under section 202(e) of the Federal Power Act (16 U.S.C. 824a(e)).

On November 13, 2020, DEMI filed an application with DOE (Application or App.) for renewal of its authorization to transmit electric energy from the United States to Canada for a term of ten years. DEMI states that it is a Delaware corporation with its principal place of business in Houston, TX. App. at 1. DEMI further represents that it ''is wholly owned by Centrica US Holdings Inc., an indirect, wholly-owned subsidiary of Centrica plc (Centrica).'' *Id.* DEMI adds that it ''does not own or control any electric generation facilities in any wholesale market in interstate commerce'' and that ''neither DEMI nor any of its affiliates own or control transmission facilities or has a electric franchised service territory or captive wholesale or retail customers.'' *Id.*

DEMI further states that it ''will purchase the power to be exported from electric utilities and federal power marketing agencies pursuant to voluntary agreements.'' App. at 3. DEMI contends that ''the electric power that [it] will export on either a firm or interruptible basis will not impair the sufficiency of the electric power supply within the United States'' and that its ''exports of electric energy to Canada will not impede or tend to impede the regional coordination of electric utility planning or operations.'' *Id.* at 3–4.

DEMI states that all its electricity exports ''will be transmitted pursuant to arrangements with utilities that own and operate existing transmission facilities and will be consistent with the export limitations and other terms and conditions contained in the existing Presidential Permits and electricity export authorizations associated with those facilities.'' App. at 4. DEMI also represents that it ''will comply with the terms and conditions contained in the authorizations issued for these cross-border facilities as well as other export limitations that DOE may deem appropriate.'' *Id.*

The existing international transmission facilities to be utilized by

the Applicant have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the Application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at the above address in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning DEMI's application to export electric energy to Canada should be clearly marked with OE Docket No. EA–280–C. Additional copies are to be provided directly to Ryan Harwell, 12 Greenway Plaza, Suite 250, Houston, TX 77046, *Ryan.Harwell@directenergy.com;* Deonne Cunningham, 12 Greenway Plaza, Suite 250, Houston, TX 77046, *Deonne.Cunningham@directenergy.com;* and Bray Dohrwardt, 12 Greenway Plaza, Suite 250, Houston, TX 77046, *Bray.Dohrwardt@directenergy.com.*

A final decision will be made on the Application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE determines that the proposed action will not have an adverse impact on the sufficiency of supply or reliability of the U.S. electric power supply system.

Copies of the Application will be made available, upon request, by accessing the program website at *http://energy.gov/node/11845,* or by emailing Matthew Aronoff at *matthew.aronoff@hq.doe.gov.*

Signed in Washington, DC, on December 7, 2020.

Christopher Lawrence,

Management and Program Analyst, Energy Resilience Division, Office of Electricity.

[FR Doc. 2020–27249 Filed 12–10–20; 8:45 am]

BILLING CODE 6450–01–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: EC21–31–000.

Applicants: Chalk Point Power, LLC, Chalk Point Steam, LLC, Dickerson Power, LLC, Lanyard Power Holdings, LLC, Morgantown Station, LLC, Morgantown Power, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act, et al. of Chalk Point Power, LLC, et al.

Filed Date: 12/4/20.

Accession Number: 20201204–5246.

Comments Due: 5 p.m. ET 12/28/20.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–45–000.

Applicants: Dickerson Power, LLC.

Description: Notice of Self-Certification of EWG Status of Dickerson Power, LLC.

Filed Date: 12/4/20.

Accession Number: 20201204–5186.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: EG21–46–000.

Applicants: Morgantown Power, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Morgantown Power, LLC.

Filed Date: 12/4/20.

Accession Number: 20201204–5190.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: EG21–47–000.

Applicants: Morgantown Station, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Morgantown Station, LLC.

Filed Date: 12/4/20.

Accession Number: 20201204–5195.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: EG21–48–000.

Applicants: Water Strider Solar, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Water Strider Solar, LLC.

Filed Date: 12/7/20.

Accession Number: 20201207–5019.

Comments Due: 5 p.m. ET 12/28/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–470–005.

Applicants: ISO New England Inc., New England Power Pool Participants Committee, New England Power Company, Eversource Energy Service Company (as agent).

Description: Compliance filing: ISO–NE & NEPOOL; Rev. in Compliance with the Order No. 841 Order on Compliance to be effective 3/1/2021.

Filed Date: 12/7/20.

Accession Number: 20201207–5088.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER19–2259–001.

Applicants: Turquoise Nevada LLC.

Description: Compliance filing: Turquoise Nevada Tariff Update to be effective 12/8/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5066.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–397–001.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Transmission Company of Illinois.

Description: Tariff Amendment: 2020–12–07_SA 3580 ATXI-City of Rolla WCA Substitute to be effective 1/13/2021.

Filed Date: 12/7/20.

Accession Number: 20201207–5052.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–573–001.

Applicants: Chalk Point Power, LLC.

Description: Tariff Amendment: Amendment to Application for Market-Based Rate Authorization to be effective 12/31/9998.

Filed Date: 12/7/20.

Accession Number: 20201207–5063.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–574–001.

Applicants: Dickerson Power, LLC.

Description: Tariff Amendment: Amendment to Application for Market-Based Rate Authorization to be effective 12/31/9998.

Filed Date: 12/7/20.

Accession Number: 20201207–5065.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–575–001.

Applicants: Lanyard Power Marketing, LLC.

Description: Tariff Amendment: Amendment to Application for Market-Based Rate Authorization to be effective 12/31/9998.

Filed Date: 12/7/20.

Accession Number: 20201207–5069.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–577–001.

Applicants: Morgantown Power, LLC.

Description: Tariff Amendment: Amendment to Application for Market-Based Rate Authorization to be effective 12/31/9998.

Filed Date: 12/7/20.

Accession Number: 20201207–5072.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–578–001.

Applicants: Morgantown Station, LLC.

Description: Tariff Amendment: Amendment to Application for Market-Based Rate Authorization to be effective 12/31/9998.

Filed Date: 12/7/20.

Accession Number: 20201207–5077.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–587–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: GIA & DSA Isabella Partners SA Nos. 1126–1127 to be effective 12/8/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5033.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–588–000.

Applicants: Horizon Power and Light, LLC.

Description: § 205(d) Rate Filing: Horizon Power and Light, LLC Supplemental Update to Market-Based Rate Tariff to be effective 12/13/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5040.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–589–000.

Applicants: Crescent Ridge LLC.

Description: Baseline eTariff Filing: Filing of Shared Facilities Agmt and Shared Facilities Easement and Lease Agmt to be effective 12/8/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5042.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–590–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to WMPA SA No. 4775; Queue No AB1–125 to be effective 8/7/2017.

Filed Date: 12/7/20.

Accession Number: 20201207–5048.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–591–000.

Applicants: Midcontinent Independent System Operator, Inc., Michigan Electric Transmission Company, LLC.

Description: § 205(d) Rate Filing: 2020–12–07_SA 3591 METC-Heartland Farms E&P (J984) to be effective 11/30/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5054.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–592–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Second Revised WMPA SA No 4083; Queue No. AF1–258 to be effective 11/5/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5082.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–593–000.

Applicants: Lone Tree Wind, LLC.

Description: Baseline eTariff Filing: Certificates of Concurrence for Shared Facilities Agmt and Easement Agmt to be effective 12/8/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5087.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–594–000.

Applicants: New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: Incorporation of Fast Start Resource start-up costs into enhanced FSR pricing to be effective 12/15/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5091.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–595–000.

Applicants: New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 205 filing: Modify Eligibility of Meter Service Entities to be effective 2/8/2021.

Filed Date: 12/7/20.

Accession Number: 20201207–5095.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–596–000.

Applicants: System Energy Resources, Inc.

Description: § 205(d) Rate Filing: SERI UPSA Ratebase Credit to be effective 10/16/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5107.

Comments Due: 5 p.m. ET 12/28/20.

Docket Numbers: ER21–597–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX-Blackjack Creek Wind Farm 1st A&R GIA to be effective 11/19/2020.

Filed Date: 12/7/20.

Accession Number: 20201207–5115.

Comments Due: 5 p.m. ET 12/28/20.

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: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27260 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–575–000]

Lanyard Power Marketing, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Lanyard Power Marketing, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 28, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the

last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27264 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–579–000]

Lanyard Power Holdings, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Lanyard Power Holdings, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 28, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27262 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–577–000]

Morgantown Power, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Morgantown Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 28, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27259 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–574–000]

Dickerson Power, LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Dickerson Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 28, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27263 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–578–000]

Morgantown Station, LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Morgantown Station, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 28, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27261 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–573–000]

Chalk Point Power, LLC; Supplemental Notice that Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Chalk Point Power, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice

and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 28, 2020.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 7, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–27265 Filed 12–10–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Wildfire Risk Reduction, Reliability, and Asset Protection (WRAP) Project, Trinity County, California (DOE/EIS–0548)

AGENCY: Western Area Power Administration, Department of Energy.

ACTION: Notice of Intent to prepare a joint Environmental Impact Statement/Environmental Impact Report and to conduct scoping meetings; Notice of Floodplain and Wetlands Involvement.

SUMMARY: The Western Area Power Administration (WAPA) and Trinity Public Utility District (Trinity PUD) are proposing a proactive Wildfire Risk Reduction, Reliability, and Asset Protection (WRAP) Project to reduce fire risk to the surrounding communities and public lands, as well as to increase electric reliability to maintain critical services in local communities. WAPA and Trinity PUD will prepare a joint Environmental Impact Statement (EIS) and Environmental Impact Report (EIR) in accordance with the National Environmental Policy Act of 1969 (NEPA), U.S. Department of Energy (DOE) NEPA Implementing Procedures, Council on Environmental Quality (CEQ) regulations for implementing NEPA, and the California Environmental Quality Act (CEQA) as codified in California's Public Resource Code, and the Guidelines for Implementation of the California Quality Act (CEQA Guidelines) in Title 14 of the California Code of Regulations. Portions of the proposed action may affect floodplains or wetlands, so this Notice of Intent (NOI) also serves as a notice of proposed floodplain or wetlands action in accordance with DOE floodplain and wetlands review requirements.

DATES: WAPA invites public comments on the scope of the WRAP EIS/EIR during a 45-day public scoping period. WAPA will provide a notice in local media outlets of the dates of the scoping period and scoping meetings. Public notice of the date and time of the public scoping meetings will also be posted on the Project website at *https://www.wapa.gov/regions/SN/environment/Pages/WRAP.aspx.*

ADDRESSES: Written comments on the scope of the EIS/EIR and requests to be added to the EIS/EIR distribution list may be submitted by any of the following methods:

- Electronic comments via the Project website at: *https://www.wapa.gov/regions/SN/environment/Pages/WRAP.aspx*.
- *Email: saare@wapa.gov*.
- *U.S. Mail:* Tish Saare, Western Area Power Administration, 114 Parkshore Dr., Folsom, CA 95630.

WAPA will consider all comments on the scope of the EIS received or postmarked by the end of the scoping period. The public is invited to submit comments on the proposed WRAP Project for WAPA's consideration at any time during the EIS process.

FOR FURTHER INFORMATION CONTACT: For additional information or to have your name added to our mailing list, contact Tish Saare, Western Area Power Administration, 114 Parkshore Dr., Folsom, CA 95630, telephone (916) 847–3608, email at *saare@wapa.gov*.

For general information on DOE's NEPA review process, contact Brian Costner, Office of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0119, email *AskNEPA@hq.doe.gov,* telephone (202) 586–4600 or (800) 472–2756, facsimile (202) 586–7031.

For more information related to Trinity PUD's participation, contact Mr. Andy Lethbridge, Electric Superintendent, 26 Ponderosa Ln, Weaverville, CA 96093, telephone (530) 623–5537, email *alethbridge@trinitypud.com.*

SUPPLEMENTARY INFORMATION: WAPA is a power marketing administration within DOE. WAPA has a statutory responsibility to make the necessary arrangements to deliver Federal power to Federally authorized water projects and to market and deliver cost-based Federal power in excess of that needed to meet Federal load to wholesale preference customers in regions within the central and western United States. WAPA's preference customers include Federal and State agencies, Native American tribes, electric cooperatives, municipal utilities, public utility districts, irrigation districts, and water districts. Trinity PUD receives the majority of its power from WAPA's Trinity Interconnect 60-kilovolt (kV) Transmission Line.

Trinity PUD is the local electric utility provider for Trinity County, California. It provides most of the customers in Trinity County with 100-percent renewable hydroelectric energy from the Trinity Dam. Trinity PUD supplies power through its 604 miles of power lines that are located in rugged and mountainous terrain. Its service area covers approximately 2,100 square miles in Trinity County and is sparsely

populated, with fewer than 12 customers per mile of line.

The areas surrounding WAPA's and Trinity PUD's electric transmission and distribution systems in Trinity County are particularly vulnerable to fire risk due to the dense vegetation and steep terrain. The proposed WRAP Project would reduce these fire risks by expanding WAPA's and Trinity PUD's existing transmission/distribution rights-of-way (ROWs) and implementing a proactive, integrated vegetation management program within the expanded ROWs.

WAPA has determined that an EIS is the appropriate level of review under NEPA. WAPA will prepare the EIS in accordance with NEPA, DOE's NEPA Implementing Procedures, and the CEQ regulations for implementing NEPA. WAPA will be the lead Federal agency for the NEPA EIS review process, and the U.S. Forest Service (USFS), Bureau of Land Management (BLM), and Bureau of Reclamation (BOR) will be cooperating agencies. WAPA intends to prepare a joint EIS/EIR for the proposed WRAP Project. Trinity PUD will be the lead agency for the CEQA EIR review process. As portions of the proposed action may affect floodplains and wetlands, this NOI also serves as a notice of proposed floodplain or wetland action in accordance with DOE floodplain and wetland environmental review requirements (10 CFR parts 1021 and 1022).

Purpose and Need for Agency Action: The purpose of WRAP is to: (1) Reduce the risk of wildfire by proactive vegetation management; (2) enhance protection of the WAPA and Trinity PUD electrical transmission and distribution line systems; (3) improve the reliability of power delivery to Trinity PUD under WAPA's contract; (4) improve transmission line access by road improvement; and (5) protect the health and safety of the Trinity County community and surrounding biological and natural resources from transmission- and distribution-related wildfires.

Proposed Action and Alternatives: In accordance with the proposed Project purpose and need, WAPA and Trinity PUD propose the WRAP Project.

WAPA proposes to expand the width of its ROW for its 17.5-mile, 60–kV transmission line between Trinity Substation and Weaverville Switchyard from 80 feet to up to 130 feet on USFS, BLM, and private lands. This transmission line provides the majority of the electricity to the Trinity PUD system.

Trinity PUD proposes to expand its utility ROW width from 20 feet to up to 130 feet for its overhead transmission and distribution system (216.8 miles) in high-fire risk areas on USFS, BLM, BOR, and private or other lands. The existing ROW easement for the underground distribution lines would not change.

The proposed Project would also include the improvement of WAPA's existing legal access roads using best management practices for routine access road maintenance and associated rehabilitation. Trinity PUD would maintain their existing local access roads to the standards set by the land managers.

Vegetation in the ROW may be cleared using a combination of mechanical, manual, and herbicidal control methods. Manual methods may include cutting, girdling, topping and trimming, slash disposal/fuels reduction techniques, and burning. Mechanical methods would be used in areas in which vegetation can be removed non-selectively. Most pieces of mechanical equipment are not safe to operate on slopes over 30-to 35-percent; mechanical methods are also constrained where soils are susceptible to compaction or erosion. Herbicidal control is another option that WAPA and Trinity PUD are exploring as an option to manage vegetation. Only those herbicides that have been approved for use in ROW maintenance based on evaluations of toxicity, solubility, soil adsorption potential, and persistence in water and soil would be used. Additionally, herbicides would only be applied by individuals with applicator licenses/certificates and in accordance with label requirements.

In order to maintain long-term vegetation clearances along the expanded ROWs, the proposed Project would include an updated and improved operation and maintenance plan (O&M Plan) and GIS database of all assets and sensitive resources along the subject ROWs. As part of the updated O&M Plan and GIS database, the proposed Project would develop Standard Operating Procedures, which would be implemented for all O&M tasks, as well as Project Conservation Measures that would be implemented to protect specific sensitive species in the ROW.

As part of the proposed Project, WAPA and Trinity PUD would submit applications for ROW authorizations for the expansion of transmission and distribution line ROWs on BLM and USFS administered lands. Trinity PUD would also amend its Interagency Agreement with BOR. In addition, the proposed Project may include timber sale contracts with the USFS, BLM, BOR, and private landowners for merchantable timber resulting from ROW expansions and vegetation removal.

No Action Alternative: NEPA requires WAPA to consider a no action alternative. The no action alternative serves as a baseline to measure the environmental impacts of action alternatives. No action does not mean no change; the no action alternative would include current vegetation management, access road maintenance, and other ongoing O&M activities within existing ROWs. There would be no ROW expansion under the no action alternative. As part of the EIS/EIR process, WAPA will consider a no action alternative.

Notice of Floodplain or Wetlands Involvement: Floodplains and wetlands may be present in the Project area. As the proposal may involve action in floodplains or wetlands, this NOI serves as a notice of proposed floodplain or wetland action. The EIS/EIR will include an assessment of impacts to floodplains and wetlands. If needed, WAPA will prepare a floodplain statement of findings following DOE regulations for compliance with floodplains and wetlands environmental review requirements and include that statement in the EIS/EIR.

Preliminary Identification of Environmental Issues: WAPA proposes to analyze potential short-term environmental impacts, such as those from implementation, and potential long-term environmental impacts of maintaining the expanded ROW. DOE's guidance for the preparation of an EIS/EIR recommends the use of a sliding-scale approach when evaluating environmental impacts. This approach would focus the analysis and discussion of impacts on significant environmental issues in proportion to the level of the potential impacts. WAPA identified the following preliminary list of impact areas for evaluation in the EIS/EIR:

- Air Quality and Greenhouse Gas Emissions
- Biological Resources
- Cultural and Tribal Resources
- Energy
- Hazards and Hazardous Materials
- Hydrology and Water Quality
- Land Use and Recreation
- Noise and Vibration
- Population and Housing
- Soils and Mineral Resources
- Transportation
- Utilities/Service Systems/Public Services
- Visual Resources
- Wildfire and Forestry Resources

This list is not intended to be all-inclusive or to imply a predetermination

of impacts. WAPA invites interested stakeholders to suggest specific issues, including possible mitigation measures, within these general categories, or other categories not included above, to be considered in the EIS/EIR.

Public Participation: The purpose of the scoping process is to identify issues, concerns, possible alternatives, and potential environmental impacts that WAPA should analyze in the EIS/EIR. There will be two scoping meetings, one in the morning and one in the evening on the date determined, to accommodate and encourage public participation. Each meeting will use Zoom Webinar and will be virtual or online consistent with statewide restrictions with in-person meetings because of the COVID–19 pandemic.

WAPA will also announce the public scoping meetings in local news media and by posting on the Project environmental website at *https://www.wapa.gov/regions/SN/environment/Pages/WRAP.aspx* at least 14 days before the meetings.

The public will have the opportunity to learn about the Project, view maps, and present comments on the scope of the WRAP EIS/EIR. Representatives from WAPA and Trinity PUD will be available to answer questions and provide additional information to meeting attendees.

In addition to providing comments at the webinar public scoping meetings, stakeholders may submit written comments as described in the **ADDRESSES** section above. WAPA will consider all comments postmarked or received during the public scoping period identified in the **DATES** section above. The public is also invited to submit comments on the proposed Project for WAPA's consideration at any time during the EIS process.

WAPA will coordinate with appropriate Federal, State, and local agencies, and potentially affected Native American tribes during the preparation of the EIS/EIR. Agencies with legal jurisdiction or special expertise are invited to participate as cooperating agencies in preparation of the EIS, as defined in 40 CFR 1501.8(a).[1] Designated cooperating agencies have responsibilities to support the NEPA process, as specified in 40 CFR 1501.8(b).[2] WAPA will contact tribes and inform them of the planned EIS/EIR. Government-to-government consultations will be conducted in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 FR 67249); the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951); DOE-specific guidance on tribal interactions; and other applicable Federal and State natural and cultural resources laws and regulations.

Upon completion of the scoping period, WAPA will draft an EIS/EIR. A Notice of Availability of the Draft EIS/EIR will be published in the **Federal Register**, which will begin a minimum 45-day public comment period. WAPA will announce how to comment on the Draft EIS/EIR and will hold two public hearings during the comment period. People who would like to receive a copy of the Draft EIS/EIR should submit a request as provided in the **ADDRESSES** section above. For those requesting to be added to the distribution list, you are encouraged to download the EIS/EIR and other documents from the above website; however, if you prefer to be mailed a copy, please specify the format of the EIS/EIR that you would like to receive (CD or printed) and a preference for either the complete EIS/EIR or the Summary only. WAPA will maintain information about the process, including documents, meeting information, and important dates, on the Project website given above. The EIS/EIR, along with other Project information, will be available for download from the Project website. Please visit the Project website for current information.

Signing Authority

This document of the Department of Energy was signed on December 1, 2020, by Mark A. Gabriel, Administrator, Western Area 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 December 7, 2020

Treena V. Garrett,

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

[FR Doc. 2020–27147 Filed 12–10–20; 8:45 am]

BILLING CODE 6450–01–P

[1] CEQ revised its NEPA implementing regulations, effective September 14, 2020. *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,* 85 FR 43304, 43361 (July 16, 2020).

[2] *See id.* at 85 FR 43361–43362.

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9054–3]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed November 30, 2020 10 a.m. EST Through December 7, 2020 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

EIS No. 20200249, Final Supplement, USFS, WV, Mountain Valley Pipeline and Equitrans Expansion Project, Review Period Ends: 01/11/2021, Contact: Ken Arney, Regional Forester 888–603–0261.

EIS No. 20200250, Draft Supplement, USN, AK, Gulf of Alaska Navy Training Activities, Comment Period Ends: 02/16/2021, Contact: Kimberly Kler 360–315–5103.

EIS No. 20200251, Final, USCG, GU, ADOPTION—Mariana Islands Training and Testing Final EIS–OEIS, Contact: Maile Norman 808–535–3264.

The United States Coast Guard (USCG) has adopted the United States Navy Final EIS No. 20150136, filed 5/15/2015 with EPA. USCG was a cooperating agency on this project. Therefore, republication of the document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20200252, Final Supplement, USCG, GU, ADOPTION—Mariana Islands Training and Testing, Contact: Maile Norman 808–535–3264.

The United States Coast Guard (USCG) has adopted the United States Navy Final Supplemental EIS No. 20200155, filed 5/29/2020 with EPA. USCG was a cooperating agency on this project. Therefore, republication of the

document is not necessary under Section 1506.3(b)(2) of the CEQ regulations.

EIS No. 20200253, Final, BR, CO, Paradox Valley Unit of the Colorado River Basin Salinity Control Program, Review Period Ends: 01/11/2021, Contact: Ed Warner 970–248–0654.

EIS No. 20200254, Final, USFS, WY, Snow King Mountain Resort On-Mountain Improvements, Review Period Ends: 01/11/2021, Contact: Sean McGinnes and Anita DeLong 307–739–5415 x30741.

EIS No. 20200255, Second Final Supplemental, USACE, MS, Final Supplement No. 2 to the 1982 Yazoo Area Pump Project Final EIS, Review Period Ends: 01/11/2021, Contact: Sara Thames 601–631–5894.

EIS No. 20200256, Revised Draft, USACE, LA, Upper Barataria Basin, Louisiana Feasibility Study, Comment Period Ends: 01/25/2021, Contact: Patricia Naquin 504–862–1544.

EIS No. 20200257, Draft, BLM, AK, Central Yukon Resource Management Plan, Comment Period Ends: 03/11/2021, Contact: Michelle Ethun 907–474–2253.

EIS No. 20200258, Final Supplement, BIA, NV, Arrow Canyon Solar Project, Review Period Ends: 01/11/2021, Contact: Chip Lewis 602–379–6750.

EIS No. 20200259, Final, NOAA, TX, Flower Garden Banks National Marine Sanctuary Expansion, Review Period Ends: 01/11/2021, Contact: G.P. Schmahl 409–621–5151 x102.

Amended Notice

EIS No. 20200212, Third Draft Supplemental, USFS, AK, Kensington Gold Mine Plan of Operations Amendment 1, Comment Period Ends: 01/04/2021, Contact: Matthew Reece 907–789–6274.

Revision to FR Notice Published 10/30/2020; Extending the Comment Period from 12/14/2020 to 1/4/2021.

EIS No. 20200217, Draft, USACE, TX, Coastal Texas Protection and Restoration Feasibility Study, Comment Period Ends: 01/13/2021, Contact: Jeff Pinsky 409–766–3039.

Revision to FR Notice Published 10/30/2020; Extending the Comment Period from 12/14/2020 to 01/13/2021.

EIS No. 20200236, Final Supplement, USACE, AL, Allatoona Lake Water Supply Storage Reallocation Study and Updates to Weiss and Logan Martin Reservoirs Project Water Control Manuals, Alabama and Georgia (or Allatoona-Coosa Reallocation Study), Review Period Ends: 01/11/2021, Contact: Mr. Mike Malsom 251–690–2023.

Revision to FR Notice Published 11/20/2020; Extending the Comment Period from 12/21/2020 to 01/11/2021.

Dated: December 8, 2020.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2020–27266 Filed 12–10–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

Charter Renewal for the Great Lakes Advisory Board

AGENCY: Environmental Protection Agency (EPA)

ACTION: Notice of charter renewal.

SUMMARY: Notice is hereby given that the Environmental Protection Agency (EPA) has determined that, in accordance with the provisions of the Federal Advisory Committee Act (FACA), the EPA Great Lakes Advisory Board is a necessary committee which is in the public's interest. Accordingly, the Advisory Board will be renewed for an additional two-year period. The purpose of the Advisory Board is to provide advice and recommendations to the EPA Administrator through the Great Lakes National Program Manager on matters related to the Great Lakes Restoration Initiative and on domestic matters related to the implementation of the Great Lakes Water Quality Agreement. The Advisory Board's major objectives are to provide advice and recommendations on: Great Lakes protection and restoration activities; long term goals, objectives and priorities for Great Lakes protection and restoration; and other issues identified by the Great Lakes Interagency Task Force/Regional Working Group.

FOR FURTHER INFORMATION CONTACT: Edlynzia Barnes, Designated Federal Officer (DFO), Great Lakes National Program Office, Environmental Protection Agency, 77 W Jackson Boulevard, Chicago IL; telephone number: 312–886–6249; email address: *Barnes.Edlynzia@epa.gov.*

Kurt Thiede,

Regional Administrator, Great Lakes National Program Manager.

[FR Doc. 2020–27317 Filed 12–10–20; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

Sunshine Act Meetings; Notice of an Open Meeting of the Board of Directors of the Export-Import Bank of the United States

TIME AND DATE: Tuesday, December 22, 2020 at 10:00 a.m.

PLACE: The meeting will be held via teleconference.

STATUS: The meeting will be open to public observation for Item Number 1 only.

MATTERS TO BE CONSIDERED: Credit Risk Appetite—Linkage to the Budget Cost Level.

CONTACT PERSON FOR MORE INFORMATION: Joyce B. Stone (202–257–4086). Members of the public who wish to attend the meeting via audio only teleconference should register via *https://attendee.gotowebinar.com/register/7315218396872121868* by noon Monday, December 21, 2020. Individuals will be directed to a Webinar registration page and provided call-in information.

Joyce B. Stone,

Assistant Corporate Secretary.

[FR Doc. 2020–27445 Filed 12–9–20; 4:15 pm]

BILLING CODE 6690–01–P

FARM CREDIT SYSTEM INSURANCE CORPORATION

Regular Meeting; Farm Credit System Insurance Corporation Board

AGENCY: Farm Credit System Insurance Corporation.

ACTION: Notice, regular meeting.

SUMMARY: Notice is hereby given, in accordance with the provisions of Article VI of the Bylaws of the Farm Credit System Insurance Corporation (FCSIC), that a regular meeting of the Board of Directors of FCSIC will be held.

DATES: December 17, 2020, at 10:00 a.m. EDT, until such time as the Board may conclude its business. *Note: Because of the COVID–19 pandemic, we will conduct the board meeting virtually. If you would like to observe the open portion of the virtual meeting, see instructions below for board meeting visitors.*

ADDRESSES: To observe the open portion of the virtual meeting, go to *FCSIC.gov*, select ''News & Events,'' then ''Board Meetings.'' There you will find a description of the meeting and ''Instructions for board meeting visitors.'' See **SUPPLEMENTARY**

INFORMATION for further information about attendance requests.

FOR FURTHER INFORMATION CONTACT: Dale Aultman, Secretary to the Board of the Farm Credit System Insurance Corporation, (703) 883–4009. TTY is (703) 883–4056.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public and parts will be closed. If you wish to observe the open portion, follow the instructions above in the ''ADDRESSES'' section at least 24 hours before the meeting.

Assistance: If you need assistance for accessibility reasons or if you have any questions, contact Dale Aultman, Secretary to the Farm Credit Administration Board, at (703) 883–4009. The matters to be considered at the meeting are as follows:

A. Open Session

Approval of Minutes

- September 24, 2020 Regular Board Minutes

B. Quarterly Business Reports

- Financial Reports
- Report on Insured Obligations
- Report on Annual Performance Plan

C. Closed Session—Risk Management Reports

- Report on Insurance Risk

D. Closed Session—Audit Committee

- Federal Managers Financial Integrity Act Review
- Audit Plan for the Year Ended December 31, 2020
- Executive Session of the Audit Committee with Auditor

Dated: December 8, 2020.

Dale Aultman,

Secretary, Farm Credit System Insurance Corporation.

[FR Doc. 2020–27302 Filed 12–10–20; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1180; FRS 17268]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 9, 2021. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1180.

Title: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, state, local, or tribal government and not for profit institutions.

Number of Respondents: 2,490 respondents; 2,490 responses.

Estimated Time per Response: 0.5 to 2 hours.

Frequency of Response: One-time and on occasion reporting requirements, twice within 12 years reporting requirement, 6, 10 and 12-years reporting requirements and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for these collections are contained in 47 U.S.C. 151, 154, 301, 303, 307, 308, 309, 310, 316, 319, 325(b), 332, 336(f), 338, 339, 340, 399b, 403, 534, 535, 1404, 1452, and 1454 of the Communications Act of 1934.

Total Annual Burden: 4,980 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The FCC adopted the Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions Report and Order, FCC 14–50, on May 15, 2014, published at 79 FR 48442 (Aug. 15, 2014). The Commission seeks to extend for a period of three years from the Office of Management and Budget (OMB) some of the information collection requirements contained in FCC 14–50. The Commission will use the information to ensure compliance with required filings of notifications, certifications, license renewals, license cancelations, and license modifications. Also, such information will be used to minimize interference and to determine compliance with Commission's rules.

The following is a description of the information collection requirements approved under this collection:

Section 27.14(k) requires 600 MHz licensees to demonstrate compliance with performance requirements by filing a construction notification with the Commission, within 15 days of the applicable benchmark.

Section 27.14(t)(6) requires 600 MHz licensees to make a renewal showing as a condition of each renewal. The showing must include a detailed description of the applicant's provision of service during the entire license period and address: (i) The level and quality of service provided by the applicant (including the population served, the area served, the number of subscribers, the services offered); (ii) the date service commenced, whether service was ever interrupted, and the duration of any interruption or outage; (iii) the extent to which service is provided to rural areas; (iv) the extent to which service is provided to qualifying tribal land as defined in 47 CFR 1.2110(f)(3)(i); and (v) any other factors associated with the level of service to the public.

Section 27.17(c) requires 600 MHz licensees to notify the Commission

within 10 days of discontinuance if they permanently discontinue service by filing FCC Form 601 or 605 and requesting license cancellation.

Section 27.1321(b) previously designated as 27.19(b) requires 600 MHz licensees with base and fixed stations in the 600 MHz downlink band within 25 kilometers of Very Long Baseline Array (VLBA) observatories to coordinate with the National Science Foundation (NSF) prior to commencing operations.

Section 27.1321(c) previously designated as 27.19(c) requires 600 MHz licensees that intend to operate base and fixed stations in the 600 MHz downlink band in locations near the Radio Astronomy Observatory site located in Green Bank, Pocahontas County, West Virginia, or near the Arecibo Observatory in Puerto Rico, to comply with the provisions in 47 CFR 1.924.

Section 74.602(h)(5)(ii) requires 600 MHz licensees to notify the licensee of a studio-transmitter link (TV STL), TV relay station, or TV translator relay station of their intent to commence wireless operations and the likelihood of harmful interference from the TV STL, TV relay station, or TV translator relay station to those operations within the wireless licensee's licensed geographic service area. The notification is to be in the form of a letter, via certified mail, return receipt requested and must be sent not less than 30 days in advance of approximate date of commencement of operations.

Section 74.602(h)(5)(iii) requires all TV STL, TV relay station and TV translator relay station licensees to modify or cancel their authorizations and vacate the 600 MHz band no later than the end of the post-auction transition period as defined in 47 CFR 27.4.

These rules which contain information collection requirements are designed to provide for flexible use of this spectrum by allowing licensees to choose their type of service offerings, to encourage innovation and investment in mobile broadband use in this spectrum, and to provide a stable regulatory environment in which broadband deployment would be able to develop through the application of standard terrestrial wireless rules. Without this information, the Commission would not be able to carry out its statutory responsibilities.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–27217 Filed 12–10–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[17294]

Open Commission Meeting, Thursday, December 10, 2020

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, December 10, 2020, which is scheduled to commence at 10:30 a.m. Due to the current COVID–19 pandemic and related agency telework and headquarters access policies, this meeting will be in a wholly electronic format and will be open to the public on the internet via live feed from the FCC's web page at *www.fcc.gov/live* and on the FCC's YouTube channel.

Item No.	Bureau	Subject
1	WIRELINE COMPETITION	TITLE: Securing the Communications Supply Chain (WC Docket No. 18–89). SUMMARY: The Commission will consider a Report and Order that would require Eligible Telecommunications Carriers to remove equipment and services that pose an unacceptable risk to the national security of the United States or the security and safety of its people, would establish the Secure and Trusted Communications Networks Reimbursement Program, and would establish the procedures and criteria for publishing a list of covered communications equipment and services that must be removed.
2	WIRELINE COMPETITION AND PUBLIC SAFETY & HOMELAND SECURITY.	TITLE: National Security Matter. SUMMARY: The Commission will consider a national security matter.
3	INTERNATIONAL	TITLE: National Security Matter. SUMMARY: The Commission will consider a national security matter.
4	OFFICE OF ENGINEERING AND TECHNOLOGY.	TITLE: Allowing Earlier Equipment Marketing and Importation Opportunities (ET Docket No. 20–382); Petition to Expand Marketing Opportunities for Innovative Technologies (RM–11857). SUMMARY: The Commission will consider a Notice of Proposed Rulemaking that would propose updates to its marketing and importation rules to permit, prior to equipment authorization, conditional sales of radiofrequency devices to consumers under certain circumstances and importation of a limited number of radiofrequency devices for certain pre-sale activities.
5	MEDIA	TITLE: Promoting Broadcast Internet Innovation Through ATSC 3.0 (MB Docket No. 20–145). SUMMARY: The Commission will consider a Report and Order that would modify and clarify existing rules to promote the deployment of Broadcast Internet services as part of the transition to ATSC 3.0.
6	MEDIA	TITLE: Florida Community Radio, Inc., Construction Permit for Proposed NCE Station DWRBD (FM), Horseshoe Beach, Florida. SUMMARY: The Commission will consider an Order on Reconsideration concerning the expiration of the construction permit of Florida Community Radio, Inc, for a new noncommercial educational FM station at Horseshoe Beach, Florida.
7	CONSUMER & GOVERNMENTAL AFFAIRS.	TITLE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Consumer Law Center Petition for Reconsideration and Request for Stay Pending Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling; Professional Services Council Petition for Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling (CG Docket No. 02–278).

Item No.	Bureau	Subject
		SUMMARY: The Commission will consider an Order on Reconsideration of its previous interpretation of the Telephone Consumer Protection Act that permitted certain government and government contractor calls without consumers' prior express consent.
8	ENFORCEMENT	TITLE Implementing Section 10(a) of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) (EB Docket No. 20–374).
		SUMMARY: The Commission will consider a Notice of Proposed Rulemaking that would begin the process of implementing section 10(a) of the TRACED Act, which directs the Commission, no later than June 30, 2021, to ''prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating'' to violations of section 227(b) or 227(e) of the Communications Act.
9	WIRELINE COMPETITION	TITLE: Modernizing the E-Rate Program for Schools and Libraries (WC Docket No. 13–184).
		SUMMARY: The Commission will consider an Order that would amend the invoice filing deadline rule to enhance the efficient administration of the E-Rate Program and ensure program participants have sufficient time to complete the invoice payment process.
10	OFFICE OF MANAGING DIRECTOR	TITLE: Amendment of Part 1 of the Commission's Rules (MD Docket No. 20–64).
		SUMMARY: The Commission will consider an Order that would modify its rules to require the electronic payment of fees for activities delegated to the FCC's Media Bureau.

The meeting will be webcast with open captioning at: *www.fcc.gov/live.* Open captioning will be provided as well as a text only version on the FCC website. Other reasonable accommodations for people with disabilities are available upon request. In your request, include a description of the accommodation you will need and a way we can contact you if we need more information. Last minute requests will be accepted but may be impossible to fill. Send an email to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530.

Additional information concerning this meeting may be obtained from the Office of Media Relations, (202) 418–0500. Audio/Video coverage of the meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.*

Federal Communications Commission.

Dated: December 3, 2020.

Marlene Dortch,

Secretary.

[FR Doc. 2020–27216 Filed 12–10–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors, Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal extend for three years, without revision, the Reporting, Recordkeeping, and Disclosure Requirements Associated with Regulation BB (FR BB; OMB No. 7100–0197).

DATES: Comments must be submitted on or before February 9, 2021.

ADDRESSES: You may submit comments, identified by FR BB, 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.* Include the OMB 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 are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be available at *https://www.reginfo.gov/public/do/PRAMain,* if approved. These

documents will also be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection

Report title: Reporting, Recordkeeping, and Disclosure Requirements Associated with Regulation BB.

Agency form number: FR BB.

OMB control number: 7100–0197.

Frequency: Annually.

Respondents: State Member Banks (SMBs), with the exception of special purpose banks that do not perform commercial or retail banking services by granting credit to the public in the ordinary course of business, other than as incident to their specialized operations. These banks include bankers' banks and banks that engage only in one or more of the following activities: Providing cash management controlled disbursement services or serving as correspondent banks, trust companies, or clearing agents.

Estimated number of respondents: Assessment area delineation, 117; Loan data: Small business and small farm, 113; Loan data: Community development, 98; Loan data: Home Mortgage Disclosure Act (HMDA) out of Metropolitan Statistical Areas (MSA), 117; Request for designation as a wholesale or a limited purpose bank, 1; Request for strategic plan approval, 2; Affiliate lending data, 5; Data on lending by a consortium or a third party, 12; Small business and small farm loan register, 113; Consumer loan data, 28; Other loan data, 20; and Public file and public notice, 778.

Estimated average hours per response: Assessment area delineation, 2; Loan data: Small business and small farm, 8; Loan data: Community development, 13; Loan data: HMDA out of MSA, 253; Request for designation as a wholesale or a limited purpose bank, 4; Request for strategic plan approval, 275; Affiliate lending data, 38; Data on lending by a consortium or a third party, 17; Small business and small farm loan register, 219; Consumer loan data, 326; Other loan data, 25; and Public file and public notice, 10.

Estimated annual burden hours: Assessment area delineation, 234; Loan data: Small business and small farm, 904; Loan data: Community development, 1,274; Loan data: HMDA out of MSA, 29,601; Request for designation as a wholesale or a limited purpose bank, 4; Request for strategic plan approval, 550; Affiliate lending data, 190; Data on lending by a consortium or a third party, 204; Small business and small farm loan register, 24,747; Consumer loan data, 9,128; Other loan data, 500; and Public file and public notice, 7,780.

General description of report: The Community Reinvestment Act (CRA) directs the Board, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (collectively, the agencies) to evaluate financial institutions' (banks and savings associations) records of helping to meet the credit needs of their entire communities, including low- and moderate-income areas, consistent with the safe and sound operation of the institutions. The CRA is implemented through regulations issued by the agencies. The Board's regulation applies to SMBs.

Legal authorization and confidentiality: The FR BB is authorized by section 806 of the CRA, which permits the Board to issue ''[r]egulations to carry out the purposes of [the CRA]''; section 11 of the Federal Reserve Act, which permits the Board to ''require such statements and reports as it deems necessary'' of state member banks; and section 9 of the Federal Reserve Act, which permits the Board to examine state member banks.

Most of the recordkeeping, reporting, and disclosure requirements of Regulation BB are mandatory. However, there are several limited parts of the collection that are required to obtain a benefit: Specifically, the request for designation as a wholesale or limited purpose bank, the strategic plan, and the recordkeeping and reporting requirements associated with data regarding consumer loans and lending performance, affiliate lending data, and data on lending by a consortium or a third party.

Most of the information collected under Regulation BB is not considered confidential. However, if a respondent elects to submit a strategic plan pursuant to 12 CFR 228.27, the respondent may submit additional information to the Board relating to the strategic plan on a confidential basis, so long as the goals in the plan are sufficiently specific to enable the public and the Board to judge the merits of the plan. The Board will determine whether the additional information is entitled to confidential treatment on a case-by-case basis.

To the extent a respondent submits information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, the respondent may request confidential treatment pursuant to exemption 8 of the Freedom of Information Act (FOIA). To the extent a respondent submits nonpublic commercial or financial information which is both customarily and actually treated as private by the respondent, the respondent may request confidential treatment pursuant to exemption 4 of the FOIA.

Board of Governors of the Federal Reserve System, December 7, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–27341 Filed 12–10–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and

regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association.

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 whether the proposed transaction complies with the standards enumerated in the HOLA (12 U.S.C. 1467a(e)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than January 11, 2021.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *The G. Jeffrey Records, Jr. 2020 Family Trust, Oklahoma City, Oklahoma;* to become a savings and loan holding company by acquiring voting shares of Midland Financial Co., and thereby indirectly acquire voting shares of MidFirst Bank, both of Oklahoma City, Oklahoma.

Board of Governors of the Federal Reserve System, December 8, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–27327 Filed 12–10–20; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors, Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision, the Reporting Requirements Associated with Regulation XX (FR XX; OMB No. 7100–0363) and the Financial Company (as defined) Report of Consolidated Liabilities (FR XX–1; OMB No. 7100–0363). The revisions are effective immediately.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Report title: Reporting Requirements Associated with Regulation XX; Financial Company (as defined) Report of Consolidated Liabilities.

Agency form number: FR XX; FR XX–1.

OMB control number: 7100–0363.

Frequency: Event-generated; annual.

Respondents: Insured depository institutions, bank holding companies, savings and loan holding companies, any other companies that control insured depository institutions, nonbank financial companies designated by the Financial Stability Oversight Council (Council) for supervision by the Board, or foreign banks or companies that are treated as a bank holding company for purposes of the Bank Holding Company Act of 1956 (BHC Act); Certain financial companies that do not otherwise report consolidated financial information to the Board or another Federal banking agency.

Estimated number of respondents: FR XX (Section 251.3(e))–1; FR XX (Sections 251.4(b) and (c))–1; FR XX–1–37.

Estimated average hours per response: FR XX (Section 251.3(e))–6; FR XX (Sections 251.4(b) and (c))–20; FR XX–1–2.

Estimated annual burden hours: FR XX (Section 251.3(e))–6; FR XX (Sections 251.4(b) and (c))–20; FR XX–1–74.

General description of report: The Board's Regulation XX—Concentration Limit (12 CFR part 251) implements section 14 of the BHC Act,[1] which establishes a financial sector concentration limit that generally prohibits a financial company from merging or consolidating with, or otherwise acquiring, another company if the resulting company's liabilities upon consummation would exceed 10 percent of the aggregate liabilities of all financial companies (a covered acquisition). Under section 14 of the BHC Act and Regulation XX, a financial company means (1) an insured depository institution, (2) a bank holding company, (3) a savings and loan holding company, (4) any other company that controls an insured depository institution, (5) a nonbank financial company designated by the Council for supervision by the Board, or (6) a foreign bank or company that is treated as a bank holding company for purposes of the BHC Act. Regulation XX includes certain reporting requirements that apply to financial companies, and the FR XX–1 collects information from certain financial companies that do not otherwise report consolidated financial information to the Board or another Federal banking agency.

Legal authorization and confidentiality: The FR XX and the FR XX–1 are authorized by section 14 of the BHC Act, which, in relevant part, expressly authorizes the Board to issue ''regulations implementing this section'' and ''interpretations or guidance regarding the application of this section to an individual financial company or to financial companies in general'' (12 U.S.C. 1852(d)). The Board also has the authority to require reports from bank holding companies (12 U.S.C. 1844(c)), savings and loan holding companies (12 U.S.C. 1467a(b) and (g)), state member banks (12 U.S.C. 248(a) and 324), and state-licensed branches and agencies of foreign banks, other than insured branches (12 U.S.C. 3105(c)(2)). The obligation to respond is mandatory.

[1] 12 U.S.C. 1852.

Individual respondents may request that information submitted to the Board through the FR XX or FR XX–1 be kept confidential. If a respondent requests confidential treatment, the Board will determine whether the information is entitled to confidential treatment on a case-by-case basis. To the extent a respondent submits nonpublic commercial or financial information in connection with the FR XX or FR XX–1, which is both customarily and actually treated as private by the respondent, the respondent may request confidential treatment pursuant to exemption 4 of the Freedom of Information Act (FOIA) (5 U.S.C. 552(b)(4)). The entity should separately designate such information as ''confidential commercial information'' or ''confidential financial information'' as appropriate, and the Board will treat such designated information as confidential to the extent permitted by law, including the FOIA.

Current actions: On August 21, 2020, the Board published a notice in the **Federal Register** (85 FR 51713) requesting public comment for 60 days on the extension, with revision, of the FR XX and FR XX–1. The Board proposes to revise the FR XX to account for the reporting provision located at section 251.3(e). This provision of the regulation implements the Council's recommendation to allow a financial company that does not use U.S. generally accepted accounting principles (GAAP) to use another appropriate accounting standard or method of estimation for determining compliance with section 14 of the BHC Act, while ensuring that the Board has an opportunity to review the appropriateness of the company's proposed approach. The Board proposes to revise the due date for the FR XX–1 report. The FR XX–1 implements section 251.6(a) of Regulation XX, which requires a financial company that does not otherwise report consolidated financial information to the Board or another Federal banking agency to report to the Board its consolidated liabilities as of the previous calendar year-end. Regulation XX provides that this report must be submitted by March 31 of each year. However, the instructions to the FR XX–1 currently state that the report must be submitted 90 calendar days after the December 31 as of date or, if the submission deadline falls on a weekend or holiday, the first business day after the weekend or holiday. Under these instructions, the FR XX–1 could be due prior to March 31 (in a leap year) or after March 31 (if March 31 falls on a weekend or holiday). In order to ensure that the due date of the FR XX–1 coincides with the date set forth in Regulation XX, the Board proposes to revise the FR XX–1 so that it is due by March 31 of the year following the December 31 as of date. The comment period for this notice expired on October 20, 2020. The Board did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, December 7, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–27342 Filed 12–10–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision, the Consolidated Holding Company Report of Equity Investments in Nonfinancial Companies (FR Y–12; OMB No. 7100–0300) and the Annual Report of Merchant Banking Investments Held for an Extended Period (FR Y–12A; OMB No. 7100–0300). The revisions are applicable for the December 31, 2020 reporting date.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Final Approval under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection:

Report Title: Consolidated Bank Holding Company Report of Equity Investments in Nonfinancial Companies, and the Annual Report of Merchant Banking Investments Held for an Extended Period.

Agency form number: FR Y–12 and FR Y–12A, respectively.

OMB control number: 7100–0300.

Effective Date: December 31, 2020.

Frequency: FR Y–12, quarterly and semiannually; and FR Y–12A, annually.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), U.S. intermediate holding companies (IHCs), and financial holding companies (FHCs) that hold merchant banking investments that are approaching the end of the holding periods permissible under Regulation Y.[1]

Number of respondents: FR Y–12 quarterly, 22; FR Y–12 semiannual, 7; and FR Y–12A, 91.

Estimated average hours per response: FR Y–12, 16.5; and FR Y–12A, 7.5.

Estimated annual reporting hours: FR Y–12 quarterly, 1,452; FR Y–12 semiannual, 231; and FR Y–12A, 683.

General description of report: The mandatory FR Y–12 report collects information from certain domestic bank

[1] In 2012, the Board indicated that it would require supervised securities holding companies (''SHCs'') to file the FR Y–12 and FR Y–12A reports. 77 FR 32881, 32883 (June 4, 2012). However, no such revisions were ever made to include SHCs as respondents on either report. Upon reflection, the Board has determined that it would not be appropriate at this time to add supervised SHCs to the respondent panel for the FR Y–12 or FR Y–12A reports. A supervised SHCs would not be subject to the restrictions on nonbanking activities that limit the investments of other holding companies. Therefore, any information gathered about SHCs' investments on the FR Y–12 would be of limited use, and would not be comparable to data gathered from other holding companies. Moreover, adding supervised SHCs to the FR Y–12 reporting panel would require significant revisions to the FR Y–12 instructions in order to account for the differences in legal treatment between supervised SHCs and the other respondents. Such revisions could lead to confusion among current FR Y–12 reporters. With respect to the FR Y–12A, the Board is not proposing to add supervised SHCs to the respondent panel because supervised SHCs are not restricted in their ability to make investments in nonfinancial companies, and their investments are not subject to the merchant bank holding periods that apply to FHC investments.

holding companies (BHCs), savings and loan holding companies (SLHCs), and U.S. intermediate holding companies (IHCs) on their equity investments in nonfinancial companies. Respondents report the FR Y–12 either quarterly or semi-annually based on criteria in the report. The mandatory FR Y–12A report is filed annually by financial holding companies (FHCs) that hold merchant banking investments that are approaching the end of the holding periods permissible under the Board's Regulation Y.

Legal authorization and confidentiality: The Board is authorized to collect information on the FR Y–12 and FR Y–12A reports from BHCs (including BHCs that are FHCs) pursuant to section 5(c) of the Bank Holding Company Act (BHC Act), 12 U.S.C. 1844(c)(1)(A); from SLHCs pursuant to section 10(b)(2) of the Home Owners' Loan Act, 12 U.S.C. 1467a(b)(2), as amended by sections 369(8) and 604(h)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act); and from IHCs pursuant to section 5(c) of the BHC Act, 12 U.S.C. 1844(c)(1)(A), as well as pursuant to sections 102(a)(1) and 165 of the Dodd-Frank Act, 12 U.S.C. 5311(a)(1) and 5365 [2] and Regulation YY, 12 CFR 252.153(b)(2).

In addition, with respect to the FR Y–12A report, section 4(k)(7)(A) of the BHC Act, 12 U.S.C. 1843(k)(7)(A), authorizes the Board and the Treasury Department to jointly develop implementing regulations governing merchant banking activities for purposes of section 4(k)(4)(H) of the BHC Act. Section 4(k)(4)(H) of the BHC Act, 12 U.S.C. 1843(k)(4)(H), and subpart J of the Board's Regulation Y, 12 CFR 225.170 *et seq.,* authorize a BHC that has made an effective FHC election to acquire merchant banking investments that are not otherwise permissible for an FHC. Section 10(c)(2)(H) of HOLA, as amended by section 606(b) of the Dodd-Frank Act, 12 U.S.C. 1467a(c)(2)(H), and section 8(a) of the International Bank Act, 12 U.S.C. 3106(a), extend certain authorities and requirements of the BHC Act to SLHCs and to foreign banks, respectively.

The obligation to respond to the FR Y–12 and FR Y–12A reports is mandatory. The Board does not consider information collected on the FR Y–12 report to be confidential, and the completed version of this report generally is made available to the public upon request. However, in certain instances, specific information collected on an individual institution's FR Y–12 report may be exempt from disclosure pursuant to exemption 4 of the Freedom of Information Act (FOIA), which protects from public disclosure ''trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential'' (5 U.S.C. 552(b)(4)). A reporting holding company may request confidential treatment for the specific data items the company believes should be withheld pursuant to exemption 4 of the FOIA, as provided in the Board's Rules Regarding Availability of Information (12 CFR part 261.15). A request for confidential treatment should be submitted in writing concurrently with the submission of the FR Y–12 report. This written request must identify the specific data for which confidential treatment is sought and must provide the legal justification for which confidentiality is requested. The Federal Reserve will review any such request on a case-by-case basis to determine if confidential treatment is appropriate. The Federal Reserve may subsequently release information for which confidential treatment is requested, if (1) disclosure of such information is required by law (other than 5 U.S.C. 552); (2) the reporting holding company requested confidential treatment pursuant to 5 U.S.C. 552(b)(4) and more than 10 years have passed since the date of the submission unless the reporting company has requested and provided justification for a longer designation period; or (3) less than 10 years have passed since the request, but the Board believes that the information cannot be withheld from disclosure under 5 U.S.C. 552(b)(4), and the reporting holding company is provided with written notice of the Board's views and with an opportunity to object to the Board's disclosure.

Current actions: On August 21, 2020, the Board published an initial notice in the **Federal Register** (85 FR 51719) requesting public comment for 60 days on the extension, with revision, of the FR Y–12 and the extension, without revision, of the FR Y–12A. The Board revised the FR Y–12 by (1) adding a new column to Schedules A and C to capture unrealized holding gains (losses) on equity securities not held for trading recognized as income in accordance with Accounting Standards Update (ASU 2016–01, ''Recognition and Measurement of Financial Assets and Financial Liabilities''); (2) adding guidance to the instructions for the reporting of equity securities in accordance with ASU 2016–01; and (3) making other minor clarifications and conforming edits to the form and instructions. The revisions to the FR Y–12 are applicable as of the December 31, 2020, reporting date. The comment period for this notice expired on October 20, 2020. The Board did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, December 7, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–27345 Filed 12–10–20; 8:45 am]

BILLING CODE 6210–01–P

[2] Section 165(b)(2) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(2), refers to ''foreign-based bank holding company.'' Section 102(a)(1) of the Dodd-Frank Act, 12 U.S.C. 5311(a)(1), defines ''bank holding company'' for purposes of Title I of the Dodd-Frank Act to include foreign banking organizations that are treated as bank holding companies under section 8(a) of the International Banking Act, 12 U.S.C. 3106(a). The Board has required, pursuant to section 165(b)(1)(B)(iv) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(1)(B)(iv), certain of the foreign banking organizations that are subject to section 165 of the Dodd-Frank Act to form U.S. intermediate holding companies. Accordingly, the parent foreign-based organization of a U.S. IHC is treated as a BHC for purposes of the BHC Act and section 165 of the Dodd-Frank Act. Because section 5(c) of the BHC Act authorizes the Board to require reports from subsidiaries of BHCs, section 5(c) provides additional authority to require U.S. IHCs to report the information contained in the FR Y–12 and FR Y–12A reports.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0201; Docket No. 2020–0053; Sequence No. 6]

Submission for OMB Review; Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019–009)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision and extension of a previously approved information collection requirement regarding representations and reporting associated with implementation of Federal Acquisition Regulation (FAR) rule 2019–009, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment.

DATES: Submit comments on or before January 11, 2021.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *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. Additionally, submit a copy to GSA through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019–009). Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: FAR Policy at telephone 202–969–4075, or *farpolicy@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and any Associated Form(s)

9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019–009).

B. Need and Uses

This information collection supports implementation of subparagraph (a)(1)(B) of Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232). This section prohibits executive agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, on or after August 13, 2020, unless an exception applies or a waiver has been granted.

This requirement is implemented in the FAR through the provision at FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, the clause at FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, and the provision at FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation.

Information collected under the provision at FAR 52.204–24 will be used to identify if an offeror uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, and their intended use in order to determine whether the prohibition applies.

Information collected under the clause at FAR 52.204–25 will consist of reports from contractors who have identified, post-award, the use of any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, and requires a disclosure that will be used by agency personnel to identify and consult with legal counsel and the program office on next steps regarding the prohibited equipment or services.

If the Government seeks a waiver from the prohibition, the offeror will be required to provide a full and complete laydown of the presence of covered telecommunications or video surveillance equipment or services in the entity's supply chain, a phase-out plan to eliminate such covered telecommunications equipment or services from the offeror's systems, and any other information necessary for the agency to process the waiver.

Information collected under the provision at FAR 52.204–26 will be used to identify if an offeror uses any covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

C. Annual Burden

The first notice for this information collection was published prior to the second interim rule that published on August 2 at 85 FR 53126. The information collection has been updated to reflect the second interim rule that added the representation in FAR 52.204–26.

The annual public reporting burden for this collection of information is estimated as follows:

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Provision: 52.204–24
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 81,902.
Average Responses per Respondent: 380.
Total Estimated Number of Responses: 31,083,433.
Average Time (for both positive and negative representations) per Response: 3 hours.
Total Annual Time Burden: 93,250,299.
Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 5,140.
Average Responses per Respondent: 5.
Total Estimated Number of Responses: 25,700.
Average Time per Response: 3 hours.
Total Annual Time Burden: 77,100.
Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Waiver from Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 20,000.
Average Responses per Respondent: 1.
Total Estimated Number of Responses: 20,000.
Average Time per Response: 160 hours.
Total Annual Time Burden: 3,200,000.
Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Covered Telecommunications Equipment or Services—Representation.
FAR Provision: 52.204–26
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 387,967.
Average Responses per Respondent: 1.

Total Estimated Number of Responses: 387,967.

Average Time per Response: 1 hour.

Total Annual Time Burden: 387,967.

The public reporting burden for this collection of information consists of a representation to identify whether an offeror uses covered telecommunications equipment or services for each offer as required by FAR 52.204–26 and 52.204–24, information required for a waiver from the prohibition in FAR 52.204–25, and reports of identified use of covered telecommunications equipment or services as required by FAR 52.204–25.

The representation at FAR 52.204–24 is estimated to average 3 hours per response to review the prohibitions, research the source of the product or service, and complete the additional detailed disclosure, if applicable. Reports required by FAR 52.204–25 are estimated to average 3 hours per response, including the time for reviewing definitions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the report.

If the Government seeks a waiver from the prohibition, the offeror will be required to provide a full and complete laydown of the presence of covered telecommunications or video surveillance equipment or services in the entity's supply chain and a phase-out plan to eliminate such covered telecommunications equipment or services from the offeror's systems. There is no way to estimate the total number of waivers at this time. For the purposes of complying with the PRA analysis, DoD, GSA, and NASA estimate 20,000 waivers; however there is no data for the basis of this estimate. This estimate may be higher or lower once the rule is in effect.

The representation at FAR 52.204–26 must be completed by each offeror at least annually. This provision requires an offeror to represent whether it ''does'' or ''does not'' use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. The representation at FAR 52.204–26 is estimated to average 1 hour per response to review and complete the representation.

D. Public Comments

The first interim rule to implement Section 889(a)(1)(B) was published in the **Federal Register** at 85 FR 42665 on July 14, 2020 and included the information collection for the updates to FAR at 52.204–24 and 52.204–25. The request for public comment (60-day notice) on that information collection was published separately at 85 FR 50026 on August 17, 2020. Subsequently, a second interim rule was published at 85 FR 53126 on August 27, 2020 that added an information collection requirement for the provision at FAR 52.204–26 and included a request for public comment (60-day notice) on the revised information collection.

A total of four comments were received on the 60-day notice published on August 17th, and no comments were received on the revised information collection in response to the second interim rule. The comments did not address Paperwork Reduction Act issues. None of the commenters expressed an opinion on whether these collections of information are needed; whether the estimated number of burden hours is accurate; or ways to minimize the burden of the collection of information. We have not changed the estimate of the burden in the rule.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.*

Please cite OMB Control No. 9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019–009).

William F. Clark,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2020–27211 Filed 12–10–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[30Day–21–0055]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Agency for Toxic Substances and Disease Registry (ATSDR) has submitted the information collection request titled ''ATSDR Communication Activities Survey (ACAS)'' to the Office of Management and Budget (OMB) for review and approval. ATSDR previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on 04/03/2020 to obtain comments from the public and affected agencies. ATSDR did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

ATSDR 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* 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

ATSDR Communication Activities Survey (ACAS) (OMB Control No. 0923–0055, Exp. 06/30/2020)—Reinstatement with Change—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The Agency for Toxic Substances and Disease Registry (ATSDR) is seeking a

three-year Paperwork Reduction Act clearance for this reinstatement with change information collection request (ICR) titled the ''ATSDR Communication Activities Survey (ACAS)'' (OMB Control No. 0923–0055, expiration date 06/30/2020).

ATSDR serves the public through responsive public health actions to promote healthy and safe environments and to prevent harmful exposures. The agency aims to work effectively with communities in proximity to hazardous waste sites by listening to and understanding their health concerns and seeking their guidance on where, when, and how to take public health actions.

Community members are key participants in the agency's public health assessment process and should be actively involved in decisions that impact their community. Thus, agency goals for this ICR are to continue to ascertain the effectiveness of, the differences in, and the consistency of the delivery of ATSDR activities and respondent perceptions across sites and over time. ATSDR will use the ACAS to: (1) Determine how effectively it's site teams engage community members; (2) discover how well ATSDR provides effective, clear, and consistent communication and information on how to promote healthy and safe environments; (3) understand whether the agency's activities are helping the communities address environmental issues; and (4) improve ATSDR's activities to make a greater impact within the communities served.

Over the next three years, ATSDR will continue to conduct the ACAS at communities where ATSDR and state or local agencies have implemented site activities to address environmental issues. For each engaged community, the ACAS will be used to assess a set of effectiveness indicators for ATSDR site-specific activities about the respondents' involvement, knowledge, satisfaction, observations, and opinions about ATSDR's community engagement and educational outreach efforts to inform communities. The indicators will measure ATSDR effectiveness in the following respondent areas: (1) Their involvement with the site activities; (2) how they received, and prefer to receive, ATSDR information; (3) their knowledge and understanding of ATSDR site activities and how to reduce hazardous exposures; (4) their observations and opinions of ATSDR's role in community preparedness; (5) their self-evaluation on their risk of exposure to possible environmental hazards; (6) their demographic profile; (7) their environmental concerns; and (8) any additional feedback.

ATSDR has assessed its recent uses of the ACAS and proposes several changes to increase the utility and efficiency of this survey. During 2018, 125 surveys were collected from seven sites (62% paper/38% online). ATSDR proposes to eliminate telephone surveys, given that none were requested. Thus, the estimated time burden and number of respondents for the ACAS has been reapportioned between hardcopy and online collections. ATSDR would like to remove one question and add three additional questions on the ACAS. As an additional change, ATSDR will no longer seek PRA clearance to provide incentives for community members who respond to the ACAS.

In addition, ATSDR would like to pilot using text messaging as a way of collecting data quickly; thus, ATSDR proposes to conduct a highly abbreviated three-question form of the survey via SMS text messaging using ''Poll Everywhere'' software. Respondents, using their own cell phones, will text their answers to a number generated by the software. ATSDR does not propose to offer incentives for those who respond to the SMS Text Survey.

ATSDR anticipates that approximately six to seven sites will be engaged for feedback per year (or about 20 sites over the next three years). Each year, ATSDR will recruit approximately 367 individuals, aged 18 and older, to participate in the ACAS or the abbreviated SMS Text Survey where ATSDR is holding public community meetings. Therefore, respondents will include approximately 52 to 61 community members and agency stakeholders per meeting (6 to 7 meetings per year). The community members may include, but are not limited to, the general public, community leaders, faith-based leaders, and business leaders. The agency stakeholders may include, but are not limited to, state and local environmental health department employees, such as environmental health assessors, toxicologists, and departmental officials. The mix of respondents will be approximately 75% community members (n=275 per year) and 25% agency stakeholders (n=92 per year).

For meetings where the ACAS is offered, trained ATSDR staff will have a table set up at the entrance of the community meeting where community meeting attendees will pick up a fact sheet which explains what ATSDR does, and the purpose of ATSDR's site activities and the two different survey options. At the end of these ATSDR public community meetings, there will be an announcement to ask interested attendees to take the ACAS. All interested attendees will sign in (n=167) and provide their preferred mode for taking the ACAS (in-person or online). The ACAS will preferably be self-administered right after the public community meetings. If this is not a convenient time for the respondent, the ACAS may be completed online. When offered, we estimate that most respondents will choose the self-administered ACAS (n=103) and fewer will choose the online ACAS (n=64). For purposes of burden estimation, 125 (75%) of the respondents will be community members and 42 will be agency stakeholders (25%).

We will offer the abbreviated SMS Text Survey at selected sites where the number of meeting attendees is large. Sign-in for this mode of collection will not be required. For purposes of burden estimation, ATSDR anticipates that an additional 200 respondents will consent to this abbreviated SMS Text Survey each year; we have apportioned the respondent type as applied to the ACAS (150 community members and 50 agency stakeholders).

ATSDR is requesting an increase in the annual number of responses from 334 in 2017 to 534 in 2020, and an increase in the annual time burden from 49 hours in 2017 to 58 hours in 2020. These increases are based on the addition of the pilot SMS Text Survey. There are no costs to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)
Community Members	ACAS Sign In Sheet	125	1	2/60
	Hardcopy ACAS	77	1	15/60
	Online ACAS	48	1	15/60

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)
Agency Stakeholders	SMS Text Survey	150	1	3/60
	ACAS Sign In Sheet	42	1	2/60
	Hardcopy ACAS	26	1	15/60
	Online ACAS	16	1	15/60
	SMS Text Survey	50	1	3/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–27322 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-21–21BL; Docket No. CDC–2020–0120]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled, ''Evaluation of the Overdose Data to Action Technical Assistance Hub''. This proposed collection will be used to monitor and evaluate the effectiveness and impact of technical assistance (TA) provided to Overdose Data to Action (OD2A) program recipients funded to implement opioid surveillance and prevention efforts in their jurisdictions.

DATES: CDC must receive written comments on or before February 9, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0120 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

5. Assess information collection costs.

Proposed Project

Evaluation of the Overdose Data to Action Technical Assistance Hub—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Division of Overdose Prevention (DOP), at Centers for Disease Control and Prevention (CDC) requests a three-year OMB approval to support the evaluation of technical assistance (TA) provided for the Overdose Data to Action (OD2A) program. OD2A is a cooperative agreement (CDC–RFA–CE19–1904) funded in 2019 to focus on comprehensive and interdisciplinary opioid overdose prevention efforts in 47 state health departments, 16 localities, Puerto Rico, Washington DC, and the North Mariana Islands. This program consists of two required components– a surveillance component and a prevention component. OD2A recipients implement a combination of activities across ten strategies within these components in order to gain access to high quality, complete, and timelier data on opioid prescribing and overdoses and to use those data to inform prevention and response efforts in their jurisdictions.

Training and technical assistance (TA) is essential to building knowledge and strengthening the capacity of recipients to implement and evaluate OD2A program strategies. CDC will develop and deploy a TA hub (hereafter referred to as the OD2A TA Center) to deliver comprehensive technical assistance and training to support the

successful implementation and evaluation of surveillance and prevention activities. The OD2A TA Center is designed to enhance the efficiency, coordination, and effectiveness of TA efforts by streamlining and centralizing the provision of overdose surveillance and prevention TA. TA to OD2A recipients is divided into four different levels with multiple modes of TA delivery and involves a wide range of TA providers including CDC staff, internal and external subject matter experts (SMEs) and program partners as well as ICF staff.

The evaluation consists of two web-based surveys designed to collect process and outcome measures about TA access, utilization, and outcomes across all 66 OD2A recipient programs. The Technical Assistance Feedback Form will be administered to collect immediate feedback following individual TA encounters and group events such as webinars and in-person trainings. The Annual OD2A TA Survey will be distributed twice (mid-point and final) to assess satisfaction with overall TA provided and the extent to which TA supports informed implementation of OD2A strategies. The information obtained through this evaluation will allow TA providers to assess OD2A recipients' experience and utility of knowledge and resources gained through individual TA support, peer-to-peer sessions, and other group trainings. Ultimately, the evaluation data will inform subsequent rounds of TA and allow TA providers to make necessary adjustments to the overall TA strategy for continuous quality improvement. This will ensure recipients have the support necessary to implement strategies that will improve opioid surveillance and prevention policies and practices within their communities.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
OD2A Recipients	TA Feedback Form	671	2	5/60	112
Annual OD2A TA Survey		440	1	15/60	110
Total					222

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–27325 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–20OT]

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 ''Mycoplasma genitalium Treatment Failure Registry'' 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 June 5, 2020 to obtain comments from the public and affected agencies. CDC did not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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* 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

Mycoplasma genitalium Treatment Failure Registry—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC), Division of STD Prevention requests a three-year approval of an information collection request for the Mycoplasma genitalium Treatment Failure Registry, which will entail use of a standardized Case Report Form.

The primary goal of this activity is to establish a registry to monitor cases of Mycoplasma genitalium (*M. genitalium)* treatment failure in the United States. The project objectives are as follows: (1) Using existing clinical data, describe demographic and behavioral factors among patients with documented Mycoplasma genitalium who fail current CDC-recommended treatment, (2) Using existing clinical data, describe antibiotic regimens utilized among patients with *Mycoplasma genitalium* treatment failure, including documentation of clinical and

microbiologic cure, (3) Using existing laboratory specimens, monitor genetic mutations associated with macrolide or fluroquinolone antibiotic resistance.

Data captured on the standardized Case Report Form will be analyzed to determine outcomes from usage of second-line antibiotic therapy for *M.gentialium.* These data may inform future CDC STD Treatment Guidelines. There are an estimated 100 respondents (anticipated to report once per year) who will be clinicians in private and public health care settings. The data collection is necessary as there are no current national recommendations for patients who fail current CDC-recommended therapy for *M. genitalium.* Each case report form is anticipated to take up to 60 minutes to complete. This data collection provides CDC with information to determine which second-line treatments are most clinically effective, as well as determining antibiotic resistance patterns of *M. genitalium* throughout the US. There are no costs to respondents other than their time. The estimated annualized burden hours for this data collection are 100 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	No. of Respondents	No. responses per respondent	Average burden per response (in hours)
Physician or Nurse Practitioner.	M. genitalium Treatment Failure Registry Case Report Form	100	1	1

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–27326 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

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, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)-DP21–002, Epidemiologic Cohort Study of Interstitial Cystitis.

Date: March 30, 2021.

Time: 10:00 a.m.–6:00 p.m., EST.

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Jaya Raman Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway, Mailstop F80, Atlanta, Georgia 30341, Telephone: (770) 488–6511, *JRaman@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit,Office of the Chief Operating Officer,Centers for Disease Control and Prevention.

[FR Doc. 2020–27229 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Centers for Disease Control and Prevention (CDC)/Health Resources and Services Administration (HRSA) Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Treatment (CHACHSPT); Notice of Charter Renewal

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of charter renewal.

SUMMARY: This gives notice under the Federal Advisory Committee Act of October 6, 1972, that the Centers for Disease Control and Prevention (CDC)/Health Resources and Services Administration (HRSA) Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Treatment (CHACHSPT), Centers for Disease Control and Prevention, Department of Health and Human Services, has been renewed for a 2-year period through November 25, 2022.

FOR FURTHER INFORMATION CONTACT: Jonathan Mermin, MD, MPH, Designated Federal Officer, Centers for Disease Control and Prevention (CDC)/Health Resources and Services Administration (HRSA) Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Treatment (CHACHSPT), CDC, HHS, 1600 Clifton Road NE, Mailstop US8–6, Atlanta, Georgia 30329–4027; Telephone (404) 639–8000, *JMermin@cdc.gov.*

SUPPLEMENTARY INFORMATION: The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–27227 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2020–0124]

Advisory Committee on Immunization Practices (ACIP)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC), announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. The meeting will be webcast live via the World Wide Web.

DATES: The meeting will be held on December 18, 2020 from 12 p.m. to 6 p.m., EST and December 20, 2020 from 12 p.m. to 6 p.m., EST (times subject to change, see the ACIP website for any updates: *http://www.cdc.gov/vaccines/acip/index.html*).

Written comments must be received on or before December 21, 2020.

ADDRESSES: For more information on ACIP please visit the ACIP website: *http://www.cdc.gov/vaccines/acip/index.html.*

You may submit comments, identified by Docket No. CDC–2020–0124 by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Docket No. CDC–2020–0124, c/o Attn: December 18 and 20, 2020 ACIP Meeting, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H24–8, Atlanta, GA 30329–4027.

Instructions: All submissions received must include the Agency name and Docket Number. All relevant comments received in conformance with the *https://www.regulations.gov* suitability policy will be posted without change to *https://www.regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Stephanie Thomas, ACIP Committee Management Specialist, Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases, 1600 Clifton Road NE, MS–H24–8, Atlanta, GA 30329–4027; Telephone: 404–639–8367; Email: *ACIP@cdc.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 41 CFR 102–3.150(b), less than 15 calendar days' notice is being given for this meeting due to the exceptional circumstances of the COVID–19 pandemic and rapidly evolving COVID–19 vaccine development and regulatory processes. The Secretary of Health and Human Services has determined that COVID–19 is a Public Health Emergency. A notice of this ACIP meeting has also been posted on CDC's ACIP website at: *http://www.cdc.gov/vaccines/acip/index.html.* In addition, CDC has sent notice of this ACIP meeting by email to those who subscribe to receive email updates about ACIP.

Purpose: The committee is charged with advising the Director, CDC, on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under provisions of the Affordable Care Act, section 2713 of the Public Health Service Act, immunization recommendations of the ACIP that have been approved by the Director of the Centers for Disease Control and Prevention and appear on CDC immunization schedules must be covered by applicable health plans.

Matters To Be Considered: The agenda will include discussions on COVID–19 vaccine. A recommendation vote(s) is scheduled. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda visit *https://www.cdc.gov/vaccines/acip/meetings/meetings-info.html.*

Meeting Information: The meeting will be webcast live via the World Wide Web; for more information on ACIP please visit the ACIP website: *http://www.cdc.gov/vaccines/acip/index.html.*

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials are part of the public record and are subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket. CDC does not accept comment by email.

Written Public Comment: Written comments must be received on or before December 21, 2020. Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the December 20, 2020 ACIP meeting must submit a request at *http://www.cdc.gov/vaccines/acip/meetings/* no later than 11:59 p.m., EST, December 18, 2020 according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by 12:00 p.m., EST, December 19, 2020. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to 3 minutes, and each speaker may only speak once per meeting.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–27454 Filed 12–9–20; 4:15 pm]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–20NE]

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 Feeding My Baby and Me: Infant Feeding Practices Study III 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 May 15, 2020 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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* 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

Feeding My Baby and Me: Infant Feeding Practices Study III—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

A child's first two years of life can have profound impacts on their later dietary behaviors and health outcomes. Early feeding behaviors (*e.g.,* breastfeeding; timing of complementary food introduction; intake of different foods and beverages such as fruits, vegetables, sugar sweetened beverages; and, maternal and infant feeding styles) can play a role in the establishment of later dietary behaviors and may be associated with health outcomes (*e.g.,* risk of infections, obesity, and weight gain). However, limited data is available to track how prenatal and maternal practices impact infant feeding and health in the early years of life. Findings from the Feeding My Baby and Me: Infant Feeding Practices Study III (''FMB&M–IFPS III'') will be used to fill research gaps on how feeding behaviors, patterns, and practices change over the first two years of life and the health-related impacts; inform multiple federal agency efforts targeting maternal and infant and toddler nutrition through work in hospitals, with health care providers, with early care and education providers, and outreach to families and caregivers; and provide context to documents such as the *U.S. Dietary Guidelines for Americans,* which will include pregnant women and children birth to 24 months of age for the first time in 2020–2025.

CDC requests OMB approval for a new information collection designed to address current gaps in knowledge and strengthen programmatic efforts aimed at promoting optimal nutrition and health in children less than two years of age. FMB&M–IFPS III will be a longitudinal study of pregnant women and their new baby for two years. Throughout the study planning period, CDC engaged with subject matter experts from multiple federal agencies including the National Institutes of Health (NIH), the U.S. Department of Agriculture (USDA), and the Food and Drug Administration (FDA) to ensure that FMB&M–IFPS III applies lessons learned from previous studies and represents the priorities and needs of numerous stakeholders. The new study design is based on updated methodology and questions, and recruitment of a new cohort of study participants.

CDC will collect information about mother's intentions, behaviors, feeding decisions, and practices from pregnancy through their child's first two years of life and how these change; child health outcomes; and emerging issues related to infant and toddler feeding practices. Data will be collected using web-based surveys at multiple time points. This includes (1) a prenatal survey, (2) 14 follow-up surveys after the baby is born, and (3) 2–4 maternal dietary data recalls. CDC estimates that 7,477 pregnant women, ages 18–49, must be screened in order to obtain complete data on 2,500 study participants. The goal is to recruit equal proportions of non-Hispanic white, non-Hispanic black, and Hispanic participants.

OMB approval is requested for three years. Participation is voluntary, and there are no costs to respondents other than their time. The total estimated annualized burden hours are 5,051.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Pregnant/Postpartum Women	Study Screener	2,492	1	3/60
	Study Consent	1,570	1	5/60
	Prenatal Survey	1,413	1	20/60
	24-Hour Dietary Recall—Prenatal	919	1	24/60

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
	Replicate 24-Hour Dietary Recall—Prenatal	90	1	24/60
	Request for notification of child's birth	1,413	1	2/60
	Birth Screener	1,368	1	2/60
	1-Month Survey	1,231	1	20/60
	2-Month Survey	1,192	1	15/60
	3-Month Survey	1,153	1	15/60
	24-Hour Dietary Recall—Month 3	750	1	24/60
	Replicate 24-Hour Dietary Recall—Month 3	73	1	24/60
	4-Month Survey	1,117	1	15/60
	5-Month Survey	1,081	1	15/60
	6-Month Survey	1,046	1	15/60
	8-Month Survey	1,013	1	15/60
	10-Month Survey	980	1	20/60
	12-Month Survey	949	1	15/60
	15-Month Survey	919	1	15/60
	18-Month Survey	889	1	15/60
	21-Month Survey	861	1	15/60
	24-Month Survey	833	1	15/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–27321 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

CDC/Mine Safety and Health Research Advisory Committee (MSHRAC); Notice of Charter Renewal

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of Charter Renewal.

SUMMARY: This gives notice that under the Federal Advisory Committee Act of October 6, 1972, that the MSHRAC, Centers for Disease Control and Prevention (CDC), Department of Health and Human Services, has been renewed for a 2-year period through November 30, 2022.

FOR FURTHER INFORMATION CONTACT: George W. Luxbacher, Designated Federal Officer, CDC/Mine Safety and Health Research Advisory Committee (MSHRAC), CDC, HHS, 1600 Clifton Road NE, MS–E20, Atlanta, Georgia 30329–4027; Telephone (404) 498–2808, *GLuxbacher@cdc.gov.*

SUPPLEMENTARY INFORMATION: The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–27228 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Board of Scientific Counselors, National Center for Health Statistics BSC, NCHS). This meeting is open to the public limited only by the audio (via teleconference) lines available. The public is welcome to listen to the meeting, please use the following URL *https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm* that points to the BSC homepage. Further information and meeting agenda will be available on the BSC website including instructions for accessing the live meeting broadcast.

DATES: This meeting will be held on January 27, 2021, from 11:00 a.m.—5:30 p.m., EST.

ADDRESSES: The teleconference access is*https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm.*

FOR FURTHER INFORMATION CONTACT: Sayeedha Uddin, M.D., M.P.H., Executive Secretary, NCHS/CDC, Board of Scientific Counselors, 3311 Toledo Road, Room 2627, Hyattsville, Maryland 20782; Telephone (301) 458–4303, Email *SUddin@cdc.gov.*

SUPPLEMENTARY INFORMATION: *PURPOSE:* This committee is charged with providing advice and making recommendations to the Secretary, Department of Health and Human Services; the Director, CDC; and the Director, NCHS, regarding the scientific and technical program goals and objectives, strategies, and priorities of NCHS.

Matters to be Considered: The meeting agenda includes welcome remarks and a Center update by NCHS leadership; presentation on National Center for Health Statistics Strategic Planning; presentation on integrating Pulse and RANDS Surveys into the National Health Interview Survey; the National Health and Nutrition Examination Survey update; and update on the National Ambulatory Medical Care Survey workgroup. Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been

delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–27226 Filed 12–10–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS- 1758–PN]

Medicare Program; Request for an Exception to the Prohibition on Expansion of Facility Capacity Under the Hospital Ownership and Rural Provider Exceptions to the Physician Self-Referral Prohibition

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with request for comment.

SUMMARY: The Social Security Act prohibits a physician-owned hospital from expanding its facility capacity, unless the Secretary of the Department of Health and Human Services grants the hospital's request for an exception to that prohibition after considering input on the hospital's request from individuals and entities in the community where the hospital is located. The Centers for Medicare & Medicaid Services has received a request from a physician-owned hospital for an exception to the prohibition against expansion of facility capacity. This notice solicits comments on the request from individuals and entities in the community in which the physician-owned hospital is located. Community input may inform our determination regarding whether the requesting hospital qualifies for an exception to the prohibition against expansion of facility capacity.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 11, 2021.

ADDRESSES: In commenting, refer to file code CMS–1758–PN.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-*1758*-PN, P.O. Box 8010, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-*1758*-PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Patricia Taft at 410–786–4561 or Joi Hosley at 410–786–2194; *POH-ExceptionRequests@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

Section 1877 of the Social Security Act (the Act), also known as the physician self-referral law— (1) prohibits a physician from making referrals for certain designated health services payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship, unless the requirements of an applicable exception are satisfied; and (2) prohibits the entity from filing claims with Medicare (or billing another individual, entity, or third party payer) for any improperly referred designated health services. A financial relationship may be an ownership or investment interest in the entity or a compensation arrangement with the entity. The statute establishes a number of specific exceptions and grants the Secretary of the Department of Health and Human Services (the Secretary) the authority to create regulatory exceptions for financial relationships that do not pose a risk of program or patient abuse.

Section 1877(d) of the Act sets forth exceptions related to ownership or investment interests held by a physician (or an immediate family member of a physician) in an entity that furnishes designated health services. Section 1877(d)(2) of the Act provides an exception for ownership or investment interests in rural providers (the ''rural provider exception''). In order to qualify for the rural provider exception, the designated health services must be furnished in a rural area (as defined in section 1886(d)(2) of the Act) and substantially all the designated health services furnished by the entity must be furnished to individuals residing in a rural area, and, in the case where the entity is a hospital, the hospital meets the requirements of section 1877(i)(1) of the Act no later than September 23, 2011. Section 1877(d)(3) of the Act provides an exception for ownership or investment interests in a hospital located outside of Puerto Rico (the ''whole hospital exception''). In order to qualify for the whole hospital exception, the referring physician must be authorized to perform services at the hospital, the ownership or investment interest must be in the hospital itself (and not merely in a subdivision of the hospital), and the hospital meets the requirements of section 1877(i)(1) of the Act no later than September 23, 2011.

II. Prohibition on Facility Expansion

Section 6001(a)(3) of the Patient Protection and Affordable Care Act (Affordable Care Act) (Pub. L. 111–148) amended the rural provider and whole hospital exceptions to provide that a hospital may not increase the number of operating rooms, procedure rooms, and beds beyond that for which the hospital was licensed on March 23, 2010 (or, in the case of a hospital that did not have a provider agreement in effect as of this date, but did have a provider agreement in effect on December 31, 2010, the effective date of such provider agreement). Thus, since March 23, 2010, a physician-owned hospital that seeks to avail itself of either exception is

prohibited from expanding facility capacity unless it qualifies as an ''applicable hospital'' or ''high Medicaid facility'' (as defined in sections 1877(i)(3)(E), (F) of the Act and 42 CFR 411.362(c)(2), (3) of our regulations) and has been granted an exception to the prohibition by the Secretary. Section 6001(a)(3) of the Affordable Care Act added new section 1877(i)(3)(A)(i) of the Act, which required the Secretary to establish and implement an exception process to the prohibition on expansion of facility capacity for hospitals that qualify as an ''applicable hospital.'' Section 1106 of the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) amended section 1877(i)(3)(A)(i) of the Act to require the Secretary to establish and implement an exception process to the prohibition on expansion of facility capacity for hospitals that qualify as either an ''applicable hospital'' or a ''high Medicaid facility.'' These terms are defined at sections 1877(i)(3)(E) and 1877(i)(3)(F) of the Act.

The requirements for qualifying as an applicable hospital are set forth at § 411.362(c)(2) and the requirements for qualifying as a high Medicaid facility are set forth at § 411.362(c)(3). An applicable hospital means a hospital: (1) That is located in a county in which the percentage increase in the population during the most recent 5-year period (as of the date that the hospital submits its request for an exception to the prohibition on expansion of facility capacity) is at least 150 percent of the percentage increase in the population growth of the State in which the hospital is located during that period, as estimated by the Bureau of the Census; (2) whose annual percent of total inpatient admissions under Medicaid is equal to or greater than the average percent with respect to such admissions for all hospitals in the county in hospital is located during the most recent 12-month period for which data are available (as of the date that the hospital submits its request for an exception to the prohibition on expansion of facility capacity); (3) that does not discriminate against beneficiaries of federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries; (4) that is located in a state in which the average bed capacity in the state is less than the national average bed capacity; and (5) that has an average bed occupancy rate that is greater than the average bed occupancy rate in the State in which the hospital is located. The regulations at § 411.362(c)(2)(ii), (iv), and (v) specify acceptable data sources for determining whether a hospital qualifies as an applicable hospital. A ''high Medicaid facility'' means a hospital that—(1) is not the sole hospital in a county; (2) with respect to each of the three most recent 12-month periods for which data are available, has an annual percent of total inpatient admissions under Medicaid that is estimated to be greater than such percent with respect to such admissions for any other hospital located in the county in which the hospital is located; and (3) does not discriminate against beneficiaries of federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries. Section 411.362(c)(3)(ii) specifies the acceptable data sources for determining whether a hospital qualifies as a high Medicaid facility. On November 30, 2011, we published the CY 2012 OPPS/ASC final rule in the **Federal Register**, which set forth the process for a hospital to request an exception from the prohibition on facility expansion (the exception process) at § 411.362(c) and related definitions § 411.362(a) (76 FR 74122).

Section 1877(i)(3)(A)(ii) of the Act provides that individuals and entities in the community in which the provider requesting the exception is located must have an opportunity to provide input with respect to the provider's application for the exception. For further information, we refer readers to the CMS website at: *http://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Physician_Owned_Hospitals.html.*

III. Exception Request Process

On November 30, 2011, we published a final rule in the **Federal Register** (76 FR 74122, 74517 through 74525) that, among other things, finalized § 411.362(c), which specified the process for submitting, commenting on, and reviewing a request for an exception to the prohibition on expansion of facility capacity. We published a subsequent final rule in the **Federal Register** on November 10, 2014 (79 FR 66770) that made certain revisions. These revisions include, among other things, permitting the use of data from an external data source or data from the Hospital Cost Report Information System (HCRIS) for specific eligibility criteria.

As stated in regulations at § 411.362(c)(5), we will solicit community input on the request for an exception by publishing a notice of the request in the **Federal Register**. Individuals and entities in the hospital's community will have 30 days to submit comments on the request. Community input must take the form of written comments and may include documentation demonstrating that the physician-owned hospital requesting the exception does or does not qualify as an applicable hospital or high Medicaid facility as such terms are defined in § 411.362(c)(2) and (3).

In the November 30, 2011 final rule (76 FR 74522), we gave examples of community input, such as documentation demonstrating that the hospital does not satisfy one or more of the data criteria or that the hospital discriminates against beneficiaries of Federal health programs. However, we noted that these were examples only and that we will not restrict the type of community input that may be submitted. If we receive timely comments from the community, we will notify the hospital, and the hospital will have 30 days after such notice to submit a rebuttal statement (§ 411.362(c)(5)).

A request for an exception to the facility expansion prohibition is considered complete as follows:

- If the request, any written comments, and any rebuttal statement include

only HCRIS data: (1) The end of the 30-day comment period if the Centers for Medicare & Medicaid Services (CMS) receives no written comments from the community; or (2) the end of the 30-day rebuttal period if CMS receives written comments from the community, regardless of whether the physician-owned hospital submitting the request submits a rebuttal statement (§ 411.362(c)(5)(i)).

- If the request, any written comments, or any rebuttal statement include data from an external data source, no later than: (1) 180 Days after the end of the 30-day comment period if CMS receives no written comments from the community; and (2) 180 days after the end of the 30-day rebuttal period if CMS receives written comments from the community, regardless of whether the physician-owned hospital submitting the request submits a rebuttal statement (§ 411.362(c)(5)(ii)).

If we grant the request for an exception to the prohibition on expansion of facility capacity, under our current regulations, the expansion may occur only in facilities on the hospital's main campus and may not result in the number of operating rooms, procedure rooms, and beds for which the hospital is licensed to exceed 200 percent of the hospital's baseline number of operating rooms, procedure rooms, and beds (§ 411.362(c)(6)). The CMS decision to

grant or deny a hospital's request for an exception to the prohibition on expansion of facility capacity must be published in the **Federal Register** in accordance with our regulations at § 411.362(c)(7).

IV. Hospital Exception Request

As permitted by section 1877(i)(3) of the Act and our regulations at § 411.362(c), the following physician-owned hospital has requested an exception to the prohibition on expansion of facility capacity:

Name of Facility: Solutions Medical Consulting, LLC d/b/a Serenity Springs Hospital

Location: 1495 Frazier Road, Ruston, Louisiana 71270–1632

Basis for Exception Request: High Medicaid Facility

We seek comments on this request from individuals and entities in the community in which the hospital is located. We encourage interested parties to review the hospital's request, which is posted on the CMS website at: *http://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Physician_Owned_Hospitals.html.* We solicit public comments regarding whether the hospital qualifies as a high Medicaid facility. Under § 411.362(c)(3), a high Medicaid facility is a hospital that satisfies all of the following criteria:

- Is not the sole hospital in the county in which the hospital is located.
- With respect to each of the 3 most recent 12-month periods for which data are available as of the date the hospital submits its request, has an annual percent of total inpatient admissions under Medicaid that is estimated to be greater than such percent with respect to such admissions for any other hospital located in the county in which the hospital is located.
- Does not discriminate against beneficiaries of Federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries.

Individuals and entities wishing to submit comments on the hospital's request should review the ''DATES'' and ''ADDRESSES'' sections above and state whether or not they are in the community in which the hospital is located.

V. 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.*).

VI. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the *DATES* section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Seema Verma, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: December 8, 2020.

Lynette Wilson,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2020–27354 Filed 12–10–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; ORR–3 and ORR–4 Report Forms for the Unaccompanied Refugee Minors Program (OMB #0970–0034)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, HHS.

ACTION: Request for Public Comment.

SUMMARY: The Office of Refugee Resettlement (ORR) is requesting a 3-year extension of the ORR–3 and ORR–4 Report Forms (OMB #0970–0034, expiration 01/31/2021). ORR proposes revisions to improve clarity, secure outcome-based data, increase compliance with reporting requirements, and reduce burden.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

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.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

Description: The ORR–3 Report is submitted within 30 days of the minor's initial placement in the state, within 60 days of a change in the minor's status (*e.g.,* change in legal responsibility, change in foster home placement, change in immigration data), and within 60 days of termination from the program. The ORR–4 Report is submitted every 12 months beginning on the first anniversary of the initial placement date, to record outcomes of the minor's progress.

Respondents: Unaccompanied Refugee Minors (URM) State Agencies, URM Provider Agencies, and Youth Participants.

Annual Burden Estimates: URM State Agencies.

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
ORR–3 Unaccompanied Refugee Minors Placement Report	15	432	0.25	1,620	540
ORR–4 Unaccompanied Refugee Minors Outcomes Report	15	282	0.50	2,115	705

Estimated Total Annual Burden Hours (State Agencies): 1,245.

Annual Burden Estimates: URM Provider Agencies.

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
ORR–3 Unaccompanied Refugee Minors Placement Report	24	270	0.50	3,240	1,080
ORR–4 Unaccompanied Refugee Minors Outcomes Report	24	162	1.0	3,888	1,296

Estimated Total Annual Burden Hours (Provider Agencies): 2,376.

Annual Burden Estimates: Youth Participants.

Instrument	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
ORR–4 Unaccompanied Refugee Minors Outcomes Report	1032	3	0.50	1,548	516

Estimated Total Annual Burden Hours (Youth Participants): 516.

Total Estimated Annual Burden Hours: 4,137.

Authority: 8 U.S.C. 1522(d).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–27194 Filed 12–10–20; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2019–D–1647, FDA–2019–D–1652, and FDA–2019–D–1650]

Performance Criteria for Safety and Performance Based Pathway; Guidances for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of three device-specific final guidance documents for the Safety and Performance Based Pathway—specifically, ''Spinal Plating Systems—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff,'' ''Orthopedic Non-Spinal Metallic Bone Screws and Washers—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff,'' and ''Magnetic Resonance (MR) Receive-only Coil—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff.'' The device-specific guidances identified in this notice were developed in accordance with the final guidance entitled ''Safety and Performance Based Pathway.''

DATES: The announcement of the guidances is published in the **Federal Register** on December 11, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2019–D–1647 for ''Spinal Plating Systems—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff,'' Docket No. FDA–2019–D–1652 for ''Orthopedic Non-Spinal Metallic Bone Screws and Washers—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff,'' and Docket No. FDA–2019–D–1650 for ''Magnetic Resonance (MR) Receive-only Coil—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff

between 9 a.m. and 4 p.m., Monday through Friday, 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance documents are available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidances. Submit written requests for a single hard copy of the guidance document entitled ''Spinal Plating Systems—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff,'' ''Orthopedic Non-Spinal Metallic Bone Screws and Washers—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff,'' or ''Magnetic Resonance (MR) Receive-only Coil—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Jason Ryans, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1613, Silver Spring, MD 20993–0002, 301–796–4908.

SUPPLEMENTARY INFORMATION:

I. Background

These device-specific guidance documents provide performance criteria for premarket notification (510(k)) submissions to support the optional Safety and Performance Based Pathway, as described in the guidance entitled ''Safety and Performance Based Pathway.'' [1] As described in that guidance, substantial equivalence is rooted in comparisons between new devices and predicate devices. However, the Federal Food, Drug, and Cosmetic Act does not preclude FDA from using performance criteria to facilitate this comparison. If a legally marketed device performs at certain levels relevant to its safety and effectiveness, and a new device meets those levels of performance for the same characteristics, FDA could find the new device as safe and effective as the legally marketed device. Instead of reviewing data from direct comparison testing between the two devices, FDA could support a finding of substantial equivalence with data demonstrating the new device meets the level of performance of an appropriate predicate device(s). Under this optional Safety and Performance Based Pathway, a submitter could satisfy the requirement to compare its device with a legally marketed device by, among other things, independently demonstrating that the device's performance meets performance criteria as established in the above-listed guidances, rather than using direct predicate comparison testing for some of the performance characteristics.

A notice of availability of the draft guidances ''Spinal Plating Systems'' and ''Orthopedic Non-Spinal Metallic Bone Screws and Washers'' appeared in the **Federal Register** of September 20, 2019 (84 FR 49528). A notice of availability of the draft guidance ''Magnetic Resonance Coil'' appeared in the **Federal Register** of December 9, 2019 (84 FR 67272). FDA considered comments received on the ''Spinal Plating Systems'' guidance and revised the guidance as appropriate by clarifying the types of plates that are excluded from the scope of the guidance (*i.e.,* occipital plates) and the lack of a specified minimum plate thickness. FDA considered comments received on the ''Orthopedic Non-Spinal Metallic Bone Screws and Washers'' guidance and revised the guidance as appropriate by expanding the scope of appropriate materials, clarifying the type of appropriate screw and washer design features, and clarifying the expectations for performance test methods and criteria. FDA considered comments received on the ''Magnetic Resonance Coil'' guidance and revised the guidance as appropriate by clarifying that the guidance is intended for receive-only magnetic resonance coils, expanding performance test methods with applicable FDA-recognized consensus standards, and clarifying the relation between performance testing and evaluations of interoperability.

These guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidances represent the current thinking of FDA on performance criteria for ''Spinal Plating Systems,'' ''Orthopedic Non-Spinal Metallic Bone Screws and Washers,'' and ''Magnetic Resonance Coil.'' They do not establish any rights for any person and are 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. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-/assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* These guidance documents are also available at *https://www.regulations.gov* and at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of either ''Spinal Plating Systems—Performance Criteria for Safety and Performance Based

[1] Available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/safety-and-performance-based-pathway.*

Pathway; Guidance for Industry and Food and Drug Administration Staff'' (document number 19008), ''Orthopedic Non-Spinal Metallic Bone Screws and Washers—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff'' (document number 19009), or ''Magnetic Resonance (MR) Receive-only Coil—Performance Criteria for Safety and Performance Based Pathway; Guidance for Industry and Food and Drug Administration Staff'' (document number 19011) may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While these guidances contain no collection of information, they do 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 these guidances. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
''Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff''.	Q-submissions	0910–0756

Dated: December 7, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27248 Filed 12–10–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA- 2019–N–4203]

Advisory Committee; Bone, Reproductive and Urologic Drugs Advisory Committee; Renewal

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; renewal of advisory committee.

SUMMARY: The Food and Drug Administration (FDA) is announcing the renewal of the Bone, Reproductive and Urologic Drugs Advisory Committee by the Commissioner of Food and Drugs (the Commissioner). The Commissioner has determined that it is in the public interest to renew the Bone, Reproductive and Urologic Drugs Advisory Committee for an additional 2 years beyond the charter expiration date. The new charter will be in effect until the March 23, 2022, expiration date.

DATES: Authority for the Bone, Reproductive and Urologic Drugs Advisory Committee will expire on March 23, 2022 unless the Commissioner formally determines that renewal is in the public interest.

FOR FURTHER INFORMATION CONTACT: Kalyani Bhatt, Division of Advisory Committee and Consultant Management, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, email: *BRUDAC@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to 41 CFR 102–3.65 and approval by the Department of Health and Human Services pursuant to 45 CFR part 11 and by the General Services Administration, FDA is announcing the renewal of the Bone, Reproductive and Urologic Drugs Advisory Committee. The Committee is a discretionary Federal advisory committee established to provide advice to the Commissioner.

The Bone, Reproductive and Urologic Drugs Advisory Committee advises the Commissioner or designee in discharging responsibilities as they relate to helping to ensure safe and effective drugs for human use and, as required, any other product for which FDA has regulatory responsibility.

The Committee reviews and evaluates data on the safety and effectiveness of marketed and investigational human drug products for use in the practice of osteoporosis and metabolic bone disease, obstetrics, gynecology, urology and related specialties, and makes appropriate recommendations to the Commissioner.

Under its Charter, the Committee shall consist of a core of 11 voting members including the Chair. Members and the Chair are selected by the Commissioner or designee from among authorities knowledgeable in the fields of osteoporosis and metabolic bone disease, obstetrics, gynecology, urology, pediatrics, epidemiology, or statistics and related specialties. Members will be invited to serve for overlapping terms of up to 4 years. Almost all non-Federal members of this committee serve as Special Government Employees. The core of voting members may include one technically qualified member, selected by the Commissioner or designee, who is identified with consumer interests and is recommended by either a consortium of consumer-oriented organizations or other interested persons. In addition to the voting members, the Committee may include one non-voting representative member who is identified with industry interests. There may also be an alternate industry representative.

Further information regarding the most recent charter and other information can be found at *https://www.fda.gov/advisory-committees/human-drug-advisory-committees/bone-reproductive-and-urologic-drugs-advisory-committee-formerly-reproductive-health-drugs-advisory* or by contacting the Designated Federal Officer (see **FOR FURTHER INFORMATION CONTACT**). In light of the fact that no change has been made to the Committee name or description of duties, no amendment will be made to 21 CFR 14.100.

This document is issued under the Federal Advisory Committee Act (5 U.S.C. app.). For general information related to FDA advisory committees, please check *https://www.fda.gov/AdvisoryCommittees/default.htm.*

Dated: December 8, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27289 Filed 12–10–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–3787]

Electromagnetic Compatibility of Medical Devices; Draft Guidance for Industry and Food and Drug Administration Staff; Availability; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is extending the comment period for the notice of availability that appeared in the **Federal Register** of November 17, 2020. In the notice of availability, FDA requested comments on the draft guidance for industry and FDA staff entitled ''Electromagnetic Compatibility of Medical Devices.'' The Agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the document published on November 17, 2020 (85 FR 73276). Submit either electronic or written comments on the draft guidance by February 16, 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–2015–D–3787 for ''Electromagnetic Compatibility (EMC) of Medical Devices.'' 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, 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled ''Electromagnetic Compatibility (EMC) of Medical Devices'' to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Seth J. Seidman, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 62, Rm. 1108, Silver Spring, MD 20993–0002, 301–796–2477; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of November 17, 2020, FDA published a notice of availability with a 60-day comment period to request comments on the draft guidance for industry and FDA staff entitled ''Electromagnetic Compatibility of Medical Devices.''

The Agency has received a request for a 30-day extension of the comment period. The request conveyed concern that the current 60-day comment period does not allow sufficient time to develop a meaningful or thoughtful response.

FDA has considered the request and is extending the comment period for the

notice of availability for 30 days, until February 16, 2021. The Agency believes that a 30-day extension allows adequate time for interested persons to submit comments without significantly delaying guidance on these important issues.

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 the electromagnetic compatibility of medical devices. 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. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products* or from the Center for Biologics Evaluation and Research at *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances.* This guidance document is also available at *https://www.regulations.gov* and at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of ''Electromagnetic Compatibility (EMC) of Medical Devices'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please include the complete title and the document number 16040 to identify the guidance you are requesting.

Dated: December 8, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27350 Filed 12–10–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2226]

Cheese Products Deviating from Identity Standard; Temporary Permit for Market Testing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a temporary permit has been issued to Bongards Creameries (the applicant) to market test several pasteurized standardized cheeses that deviate from the U.S. standards of identity for cheese products. The temporary permit will allow the applicant to evaluate commercial viability of the products and to collect data on consumer acceptance of the products.

DATES: This permit is effective for 15 months, beginning on the date the applicant introduces or causes introduction of the test products into interstate commerce, but not later than March 11, 2021.

FOR FURTHER INFORMATION CONTACT: Marjan Morravej, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2371.

SUPPLEMENTARY INFORMATION: We are giving notice that we have issued a temporary permit to Bongards Creameries. We are issuing the temporary permit in accordance with 21 CFR 130.17, which addresses temporary permits for interstate shipments of experimental packs of food varying from the requirements of standards of identity issued under section 401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 341).

The permit covers interstate marketing test of several pasteurized standardized cheeses. The test products deviate from the standards of identity for cheese products under 21 CFR 133.167, 133.169, 133.170, and 133.173. For the purpose of this permit, natamycin, which is not permitted under the standards of identity for these cheese products, would be added as a mold inhibitor in the standardized cheeses. The inhibitor would be incorporated into blended and processed cheese just prior to pasteurization and further cast into slices (or packaging into loaves or other final forms as in the case of pasteurized process cheese spread). Natamycin, which is stable under typical thermal processing conditions for pasteurized cheeses, would be added directly to cheese blends just prior to pasteurization, as is done with other mold inhibitors such as sorbic acid, sodium propionate, and their approved variants. The final concentration of natamycin would not exceed 20 parts per million and would be effective at producing process and blended slices with a shelf life of up to 150 days before seeing mold growth.

The purpose of the temporary permit is to allow the applicant to market test the products throughout the United States. The permit will allow the applicant to evaluate commercial viability of the products and to collect data on consumer acceptance of the products.

This permit provides for the temporary marketing of a maximum of 100 million pounds (45,359,237 kg) of the test products. The test products will be manufactured at the Bongards Creamery facilities located at 13200 County Rd. 51, Bongards, MN 55368, and 3001 Hwy. 45 Bypass West, Humboldt, TN 38343.

Bongards Creameries will produce, market test, and distribute the test products throughout the United States. The following sliced cheese products will be market tested: American Pasteurized Process Cheese, Reduced Fat and Reduced Sodium American Pasteurized Process Cheese, Restricted Melt American Pasteurized Process Cheese, American Swiss Pasteurized Process Cheese, White American Pasteurized Process Cheese, American with Jalapeno Pasteurized Process Cheese, Pasteurized Blended Cheddar Cheese, Pasteurized Reduced Fat Cheddar Cheese, Pasteurized Blended Swiss Cheese, Pasteurized Blended Pepper Jack Cheese, Pasteurized Blended Low-Moisture Part Skim Mozzarella Cheese, and Pasteurized Blended Provolone Cheese.

In addition, the following products will be market tested for further manufacturing: Yellow Restricted Melt Process American Slice, Yellow Reduced Fat/Reduced Sodium Process American Slice, Yellow Reduced Sodium Process American Slice, and Yellow Process American Cheese Food Slice.

Each ingredient used in the food must be declared on the labels as required by the applicable sections of 21 CFR part 101. This permit is effective for 15 months, beginning on the date the applicant introduces or causes the introduction of the test products into

interstate commerce, but not later than March 11, 2021.

Dated: December 7, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27197 Filed 12–10–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2197]

VistaPharm, Inc., et al.; Withdrawal of Approval of 10 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is withdrawing approval of 10 abbreviated new drug applications (ANDAs) from multiple applicants. The applicants notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: Approval is withdrawn as of January 11, 2021.

FOR FURTHER INFORMATION CONTACT: Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1676, Silver Spring, MD 20993–0002, 240–402–6980, *Martha.Nguyen@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The applicants listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications under the process described in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
ANDA 040323	Prednisolone Syrup, 15 milligrams (mg)/5 milliliters (mL)	VistaPharm, Inc., 7265 Ulmerton Rd., Largo, FL 33771
ANDA 075782	Valproic Acid Syrup, 250 mg/5 mL	Do.
ANDA 076188	Fosinopril Sodium Tablets, 10 mg, 20 mg, and 40 mg	Upsher-Smith Laboratories, LLC, 6701 Evenstad Dr., Maple Grove, MN 55369
ANDA 076189	Mirtazapine Tablets, 15 mg, 30 mg, and 45 mg	Do.
ANDA 077537	Glyburide Tablets, 1.25 mg, 2.5 mg, and 5 mg	Aurobindo Pharma USA, Inc., 279 Princeton-Hightstown Rd., East Windsor, NJ 08520
ANDA 077672	Stavudine Capsules, 15 mg, 20 mg, 30 mg, and 40 mg	Do.
ANDA 085055	Tylenol W/Codeine No. 1 (acetaminophen and codeine phosphate) Tablets, 300 mg; 7.5 mg. Tylenol W/Codeine No. 2 (acetaminophen and codeine phosphate) Tablets, 300 mg; 15 mg. Tylenol W/Codeine No. 3 (acetaminophen and codeine phosphate) Tablets, 300 mg; 30 mg. Tylenol W/Codeine No. 4 (acetaminophen and codeine phosphate) Tablets, 300 mg; 60 mg.	Janssen Pharmaceuticals, Inc., 1000 U.S. Route 202, P.O. Box 300, Raritan NJ 08869
ANDA 087266	Lindane Shampoo, 1%	Olta Pharmaceuticals Corp. (an Akorn Company), 1925 West Field Ct., Suite 300, Lake Forest, IL 60045
ANDA 087313	Lindane Lotion, 1%	Do.
ANDA 089003	Phenytoin Sodium Injection, 50 mg/mL	Fresenius Kabi USA, LLC, Three Corporate Dr., Lake Zurich, IL 60047

Therefore, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn as of January 11, 2021. Approval of each entire application is withdrawn, including any strengths and dosage forms inadvertently missing from the table. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on January 11, 2021 may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: December 8, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27303 Filed 12–10–20; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0529]

Qualification Process for Drug Development Tools; Guidance for Industry; Availability; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice entitled ''Qualification Process

for Drug Development Tools; Guidance for Industry; Availability'' that appeared in the **Federal Register** of November 25, 2020. The document announced the availability of a final guidance for industry and FDA staff that met the 21st Century Cures Act's requirement to issue guidance on this qualification process and elaborated on the new qualification process and transparency requirements and discusses the taxonomy for biomarkers and other drug development tools. The document was published with incorrect information in the Paperwork Reduction Act of 1995 section. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Chris Leptak, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6461, Silver Spring, MD 20993–0002, 301–796–0017; or Stephen Ripley, Center for Biologics Evaluation and Research, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002; 240–402–7911.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 25, 2020 (85 FR 75334), in FR Doc. 2020–26051, the following correction is made:

On page 75336, in the first column, under the heading, ''II. Paperwork Reduction Act of 1995'', the paragraph is corrected to read:

''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 pertaining to submissions of investigational new drug applications have been approved under OMB control number 0910–0014; the collections of information pertaining to submissions of new drug applications and abbreviated new drug applications have been approved under OMB control number 0910–0001; and the collections of information pertaining to submissions of biologics license applications in 21 CFR part 601 have been approved under OMB control number 0910–0338.''

Dated: December 8, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27288 Filed 12–10–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–0064]

Pre-Submission Consultation Process for Animal Food Additive Petitions or Generally Recognized as Safe Notices; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA, we, or Agency) is announcing the availability of a final guidance for industry #262 entitled ''Pre-Submission Consultation Process for Animal Food Additive Petitions or Generally Recognized as Safe (GRAS) Notices.'' The guidance provides uniform, consistent process information to industry to facilitate effective and efficient review of pre-consultation submissions for animal food additives or GRAS notices for intended use in animal food.

DATES: The announcement of the guidance is published in the **Federal Register** on December 11, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- Mail/Hand delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–D–0064 for ''Pre-Submission Consultation Process for Animal Food Additive Petitions or Generally Recognized as Safe (GRAS) Notices.'' 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, 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.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855. 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: William Burkholder, Center for Veterinary Medicine (HFV–229), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–5900, *william.burkholder@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of February 13, 2020 (85 FR 8297), FDA published the notice of availability for a draft guidance entitled ''Pre-Submission Consultation Process for Animal Food Additive Petitions or Generally Recognized as Safe (GRAS) Notices,'' giving interested persons until April 13, 2020, to comment on the draft guidance.

FDA received two comments on the draft guidance and those comments were considered as the guidance was finalized. Editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated February 2020.

This guidance provides uniform, consistent process information to industry to facilitate effective and efficient review of pre-consultation submissions for animal food additive petitions or GRAS substances and preparation of food use authorization requests.

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on the pre-submission consultation process for animal food additive petitions or GRAS notices for intended use in animal food. 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 in 21 CFR 570.17 and 571.1 have been approved under OMB control number 0910–0546; the collections of information under 21 CFR part 570, subpart E have been approved under OMB control number 0910–0342; and the collections of information under 21 CFR part 58 have been approved under OMB control number 0910–0119.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/animal-veterinary/guidance-regulations/guidance-industry, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 7, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–27256 Filed 12–10–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Standardized Work Plan Form for Use with Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements OMB No. 0906–0049—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR have been provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30 day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than January 11, 2021.

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.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

A 60-day **Federal Register** Notice was published in the **Federal Register** on September 15, 2020, Vol. 85, No. 179, pp.57221–57222. There were no public comments.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Standardized Work Plan Form for Use with Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements, OMB No. 0906–0049—Revision

Abstract: HRSA's Bureau of Health Workforce requires applicants of training and research grants and cooperative agreements to submit work plans via the Standardized Work Plan (SWP) form.

The information in the SWP describes the timeframes and progress required during the grant period of performance to address each of the needs detailed in the Purpose and Need section of the application, as required in the Notice of Funding Opportunity announcement.

Applicants use the SWP form when they submit their proposals, and award recipients and Project Officers use the SWP information to assist in monitoring progress once HRSA makes the awards. HRSA proposes a revision to the SWP to include a Quarterly Progress Update (QPU) for award recipients to provide information to HRSA on a quarterly basis on each activity listed in the SWP.

Need and Proposed Use of the Information: The information collected by the SWP form standardizes and streamlines the data used by HRSA in reviewing applications and monitoring awardees. The form asks applicants to provide a description of the activities or steps the applicant will take to achieve

each of the objectives proposed during the entire period of performance. The current standardized format and data submission by applicants increases efficiency in reviewing, awarding, and monitoring each project.

This revision to the clearance package will incorporate an additional form for participants, the QPU. The QPU is completed via HRSA's Electronic Handbook and prompts recipients to report on progress of activities that were submitted using the SWP in the original application. The QPU will automatically populate activities from the recipient's SWP form on a quarterly basis. For each activity listed in the submitted SWP for any particular quarter within the project period, recipients will select and submit a single selection response for each activity status from a pull-down menu with five options: Activity is on Schedule, Activity is Complete, Timing is off track, Activity will be missed if action is not taken, and Activity cannot be achieved. Information provided will be utilized by the program staff to regularly assess overall progress of program requirements and analyze data in order to monitor award recipient compliance and track progress against proposed targets and goals. Information gathered will allow for an improved and more efficient method for identifying whether projects' goals are being advanced or achieved, as set forth in 45 CFR 75.342. Program staff will also use information provided over the period of performance to see emerging trends and to assess whether an award recipient requires technical assistance to address challenges that the award recipient may be experiencing with the implementation of the project. Seeking OMB approval comports with the regulatory requirement imposed by 45 CFR 75.206(a), Paperwork clearances.

Likely Respondents: Recipients of HRSA Bureau of Health Workforce's research and training grants and cooperative agreements.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total annual burden hours
Standardized Work Plan (SWP)	1,000	1	1,000	1.00	1,000
Quarterly Progress Update (QPU) Form	1,000	4	4,000	.10	400
Total	[1] 1,000	–	5,000	–	1,400

[1] The 1,000 Standardized Work Plan (SWP) respondents reflects the number of new grant applications submitted annually. The 1,000 Quarterly Progress Update (QPU) respondents reflects the current volume of funded, active grants.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–27318 Filed 12–10–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Charles A. Downs (Respondent), former Adjunct Assistant Professor, Arizona Health Sciences Center, University of Arizona (UA). Respondent engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Center for Advancing Translation Sciences (NCATS), National Institutes of Health (NIH), grant UL1 TR000454. The administrative actions, including supervision for a period of four (4) years, were implemented beginning on November 18, 2020, and are detailed below.

FOR FURTHER INFORMATION CONTACT: Elisabeth A. Handley, Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Charles A. Downs, University of Arizona: Based on the report of an investigation conducted by UA and analysis conducted by ORI in its oversight review, ORI found that Respondent, former Adjunct Assistant Professor, Arizona Health Sciences Center, UA, engaged in research misconduct in research supported by PHS funds, specifically NCATS, NIH, grant UL1 TR000454.

Respondent neither admits nor denies ORI's findings of research misconduct. Respondent and ORI desire to close this matter without further expense of time and other resources and thus have entered into a Voluntary Settlement Agreement (Agreement).

ORI found that Respondent engaged in research misconduct by intentionally, knowingly, or recklessly falsifying and/or fabricating data included in the following six (6) grant applications submitted for PHS funds:

- R01 NR016242–01, submitted to the National Institute of Nursing Research (NINR), NIH
- R01 NR016242–01A1, submitted to NINR, NIH
- R01 NR016957–01, submitted to NINR, NIH
- R01 NR016957–01A1, submitted to NINR, NIH

- R01 HL142576–01, submitted to National Heart, Lung, and Blood Institute (NHLBI), NIH
- R01 NR016957–02, submitted to NINR, NIH

ORI found that Respondent knowingly, intentionally, or recklessly falsified and/or fabricated histological images and bar graphs of fluorescent signal data for the production of reactive oxygen species (ROS) in rat lung tissue slices and isolated alveolar type-2 cells by reusing and relabeling previously published figures to represent results from different experiments in twelve (12) figures and related text included in six (6) grant applications. Specifically, Respondent falsified data in:

- Figures 4 and 5 in R01 NR016242–01
- Figures 2 and 3 in R01 NR016242–01A1
- Figures 3A and 3B in R01 NR016957–01
- Figures 3A and 3B in R01 NR016957–01A1
- Figures 3A and 3B in R01 HL142576–01
- Figures 3A and 3B in R01 NR016957–02

Respondent entered into an Agreement and agreed to the following:

(1) Respondent agreed to have his research supervised for a period of four (4) years beginning on November 18, 2020. Respondent agrees that prior to the submission of an application for PHS support for a research project on which Respondent's participation is proposed and prior to Respondent's participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of Respondent's duties is submitted to ORI for approval. The supervision plan must be designed to ensure the scientific integrity of Respondent's research contribution. Respondent agrees that he shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI. Respondent agrees to maintain responsibility for compliance with the agreed upon supervision plan.

(2) The requirements for Respondent's supervision plan are as follows:

i. A committee of 2–3 senior faculty members at the institution who are familiar with Respondent's field of research, but not including Respondent's supervisor or collaborators, will provide oversight and guidance for a period of four (4) years from the effective date of the Agreement. The committee will review primary data from Respondent's laboratory on a quarterly basis and submit a report to ORI at six (6) month intervals, setting forth the committee meeting dates and Respondent's compliance with appropriate research standards and confirming the integrity of Respondent's research.

ii. The committee will conduct an advance review of any PHS grant applications (including supplements, resubmissions, etc.), manuscripts reporting PHS-funded research submitted for publication, and abstracts. The review will include a discussion with Respondent of the primary data represented in those documents and will include a certification to ORI that the data presented in the proposed application/publication are supported by the research record.

(3) Respondent agreed that for a period of four (4) years beginning on November 18, 2020, any institution employing him shall submit, in conjunction with each application of PHS funds, or report, manuscript, or abstract involving PHS-supported research in which Respondent is involved, a certification to ORI that the data provided by Respondent are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported in the application, report, manuscript, or abstract.

(4) If no supervisory plan is provided to ORI, Respondent agreed to provide certification to ORI at the conclusion of the supervision period that he has not engaged in, applied for, or had his name included on any application, proposal, or other request for PHS funds without prior notification to ORI.

(5) Respondent agreed to exclude himself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of four (4) years, beginning on November 9, 2020.

Dated: December 8, 2020.

Elisabeth A. Handley,

Director, Office of Research Integrity, Office of the Assistant Secretary for Health.

[FR Doc. 2020–27309 Filed 12–10–20; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection: 60-Day Comment Request; Generic Clearance to Support the Safe to Sleep® Campaign at the Eunice Kennedy Shriver National Institute for Child Health and Human Development

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATE: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Lorena Kaplan, M.P.H., CHES, Office of Communications, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, National Institutes of Health, 31 Center Drive, Room 2A32, Bethesda, Maryland 20892, or call non-toll free number (301) 496–6670 or Email your request, including your address to *lorena.kaplan@nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be

collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Generic Clearance to Support the Safe to Sleep® Campaign at the *Eunice Kennedy Shriver* National Institute for Child Health and Human Development (NICHD), 0925–0701, exp., date 02/28/2021, REVISION, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD), National Institutes of Health (NIH).

Need and Use of Information Collection: This is a request for a revision to a generic clearance used for submissions specific to the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) Safe to Sleep® (STS) public education campaign. Submissions for the STS campaign will be used to assess the understanding and reach of STS campaign materials and messages, and to monitor and improve campaign activities such as training workshops and overall implementation. The purpose of this information collection is to monitor and modify campaign activities, to plan future campaign activities, to develop messages and materials, and to develop distribution and outreach strategies that are effective at communicating their message to bring about the intended response, awareness, and/or behavioral change for the target audiences. This generic clearance will enable the NICHD to: (1) More efficiently assess the implementation of campaign activities; (2) better understand the target audiences' knowledge, attitudes, and beliefs toward STS messages and materials; (3) better understand how the campaign activities have influenced the target audiences' behaviors and practices; and (4) monitor and improve activities such as trainings, materials, and messages. Having a way to gather feedback on the STS campaign activities is critical to assessing the reach and effect of campaign efforts. Data collected for the campaign can inform where future STS campaign resources can produce the most meaningful results.

Data collected for the STS campaign generic clearance will be used by a number of audiences, including STS campaign staff, NICHD leadership, STS campaign collaborators, Federal SUID/SIDS Workgroup members, SUID/SIDS stakeholders, clinical and maternal and child health professionals. These audiences may use the information collections to: (1) Develop new campaign messages, materials, and/or training curricula; (2) monitor and improve campaign activities; (3) make decisions about campaign activities; (4) inform current campaign activities; and (5) inform and/or change practices and behaviors of program participants.

Examples of the types of information collections that could be included under this generic clearance include: *Focus groups and key informant interviews* with parents/caregivers and/or health professionals to get feedback on distribution and outreach activities, and/or campaign messages; and *Surveys* with parents/caregivers and/or health professionals to: (1) Assess the usefulness of the new STS campaign materials, including print and on-line multi-media materials, (2) track outreach experiences of program participants, (3) assess training participants' changes in knowledge related to safe infant sleep behavior and implementation of learned outreach and education methods, and (4) assess program participants' resource needs.

The sub-studies for this generic clearance will be small in scale, designed to obtain results frequently and quickly to guide campaign development and implementation, inform campaign direction, and be used internally for campaign management purposes. NICHD's current scope and capacity for STS generic sub-studies is non-existent and this request would fill this gap.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 13,305.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response, in hours	Total Annual Burden Hours
Focus Groups	General Public	215	1	1	215
Interviews	General Public	50	1	1	50
Pre-/Post-Tests	General Public	3,000	2	15/60	1,500
Pre-/Post-Tests	Health Professionals	20,000	2	15/60	10,000
Surveys	Health Professionals	3,000	1	30/60	1,500
Tracking/Feedback Form	Health Educators	20	2	1	40
Total		26,285	49,305		13,305

Dated: December 7, 2020.

Jennifer M. Guimond,

Project Clearance Liaison, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health.

[FR Doc. 2020–27192 Filed 12–10–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request a copy of these documents, call or email the SAMHSA Reports Clearance Officer at (240) 276–0361 or *carlos.graham@samhsa.hhs.gov.*

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the

information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Networking Suicide Prevention Hotlines—Evaluation of Imminent Risk (OMB No. 0930–0333)—REVISION

The Substance Abuse and Mental Health Services Administration's (SAMHSA), Center for Mental Health Services (CMHS) funds a National Suicide Prevention Lifeline Network (''Lifeline''), consisting of a toll–free telephone number that routes calls from anywhere in the United States to a network of local crisis centers. In turn, the local centers link callers to local emergency, mental health, and social service resources. This project is a revision of the Evaluation of Imminent Risk and builds on previously approved data collection activities [Evaluation of Networking Suicide Prevention Hotlines Follow–Up Assessment (OMB No. 0930–0274) and Call Monitoring of National Suicide Prevention Lifeline Form (OMB No. 0930–0275)]. The extension data collection is an effort to advance the understanding of crisis hotline utilization and its impact.

The overarching purpose of the proposed Evaluation of Imminent Risk data collection is to evaluate hotline counselors' management of imminent risk callers and third party callers concerned about persons at imminent risk, assess counselor adherence to the *Lifeline Policies and Guidelines for Helping Callers at Imminent Risk of Suicide,* and identify the types of interventions implemented with imminent risk callers. Specifically, the Evaluation of Imminent Risk will collect data, using the Imminent Risk Form, to inform the network's knowledge of the extent to which counselors are aware of and being guided by Lifeline's imminent risk guidelines; counselors' definitions of imminent risk; the rates of active rescue of imminent risk callers; the types of rescue and non-rescue interventions used; barriers to intervention; and the circumstances in which active rescue is initiated, including the caller's agreement to receive the intervention. To capture differences across centers, the form also collects information on counselors' employment status and hours worked/volunteered, level of education, license status, training status, source of safety planning protocols, and responsibility for follow up.

Clearance is being requested for the activity to assess the knowledge, actions, and practices of counselors to aid callers who are determined to be at imminent risk for suicide and who may require active rescue. This evaluation will allow researchers to examine and understand the actions taken by counselors to aid imminent risk callers, the need for active rescue, the types of interventions used, and, ultimately, improve the delivery of crisis hotline services to imminent risk callers. A total of nine centers will participate in this evaluation. Thus, SAMHSA is requesting OMB review and approval of the Imminent Risk Form.

Crisis counselors at nine participating centers will record information discussed with imminent risk callers on the Imminent Risk Form, which does not require direct data collection from callers. As with previously approved evaluations, callers will maintain anonymity. Participating counselors will be asked to complete the form for 100% of their imminent risk calls. At centers with high call volumes, data collection may be limited to designated shifts. The Imminent Risk Form contains minor changes from the earlier data collection with revised options of either receiving emergency department services or crisis stabilization centers services while the caller was determined to be at imminent risk for suicide. The prior option was for the emergency department or hospital services. This form requests information in 15 content areas, each with multiple sub-items and response options. Response options include open-ended, yes/no, Likert-type ratings, and multiple choice/check all that apply. The form also requests demographic information on the caller, the identification of the center and counselor submitting the form, and the date of the call. Specifically, the form is divided into the following sections: (1) Counselor information, (2) center information, (3) call characteristics (*e.g.,* line called, language spoken, participation of third party), (4) suicidal desire, (5) suicidal intent, (6) suicidal capability, (7) buffers to suicide, (8) interventions agreed to by caller or implemented by counselor without caller's consent, (9) whether imminent risk was reduced enough such that active rescue was not needed, (10) interventions for third party callers calling about a person at imminent risk, (11) whether supervisory consultation occurred during or after the call, (12) barriers to getting needed help to the person at imminent risk, (13) steps taken to confirm whether emergency contact was made with person at risk, (14) outcome of attempts to rescue person at risk, and (15) outcome of attempts to follow-up on the case. The form also includes an Additional Counselor Training section that counselors complete only when applicable. The form will take approximately 15 minutes to complete and will be completed by the counselor after the call. It is expected that a total of 440 forms will be completed by 116 counselors over the two-year data collection period.

The estimated response burden to collect this information is annualized over the requested two-year clearance period and is presented below:

TOTAL AND ANNUALIZED BURDEN: RESPONDENTS, RESPONSES AND HOURS

Instrument	Number of respondents	Responses/respondent	Total responses	Hours per response	Total hour burden
National Suicide Prevention Lifeline—Imminent Risk Form	116	1.9	220	.26	57

Send comments to Carlos Graham, SAMHSA Reports Clearance Officer at *carlos.graham@samhsa.hhs.gov.* Written comments should be received by February 9, 2021.

Carlos Graham,

Social Science Analyst.

[FR Doc. 2020–27247 Filed 12–10–20; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2020–0029; OMB No. 1660–0142]

Agency Information Collection Activities: Proposed Collection; Comment Request; Survivor Sheltering Assessment

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the revision of the collection Survivor Sheltering Assessment to include an alternate streamlined form and exchange of information process with the state, tribal, and territorial (STT) governments.

DATES: Comments must be submitted on or before February 9, 2021.

ADDRESSES: To avoid duplicate submissions to the docket, please use the following means to submit comments:

Online. Submit comments at *www.regulations.gov* under Docket ID FEMA–2020–0029. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via the link on the homepage of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher Shoup, Privacy Project Lead, Reporting & Analytics Division, FEMA Recovery Directorate; *christopher.shoup@fema.dhs.gov,* 202.733.7544. You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: FEMA Emergency Non-Congregate Sheltering during the COVID–19 Public Health Emergency (Interim) FP 104–009–18. This policy defines the framework, policy details, and requirements for determining eligible work and costs for sheltering in response to declarations as defined in the Robert T. Stafford Act for PA or the Fire Management Assistance Grant (FMAG) programs. FEMA provides Public Assistance (PA) funding to state, tribal, and territorial (STT) governments (aka PA Applicants) for costs related to emergency sheltering for survivors. Typically, sheltering occurs in facilities with large open spaces, such as schools, churches, community centers, armories, or other similar facilities rather than in non-congregate environments, which are locations where each individual or household has living space that offers some level of privacy (*e.g.,* hotels, motels, casinos, dormitories, retreat camps, etc.). However, FEMA recognizes that sheltering operations during the COVID–19 Public Health Emergency may require STT's to consider additional strategies to ensure that survivors are sheltered in a manner that does not increase the risk of exposure to or further transmission of COVID–19. FEMA will provide flexibility to STTs to take measures to safely conduct non-congregate sheltering activities. FEMA will encourage STTs operating non-congregate shelters to collect basic shelter resident data. If there is a subsequent Major Disaster Declaration that includes the Individual Assistance (IA) program, FEMA and STTs may begin a bi-lateral exchange of data to coordinate and expedite assistance to shelter residents. This data exchange will enable FEMA to share additional disaster survivor data on losses and needs to STT shelter managers facilitating a coordinated effort to provide resources to shelter residents. This data also provides STTs increased ability for shelter planning and shelter population management.

Collection of Information

Title: Survivor Sheltering Assessment.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0142.

FEMA Forms: FEMA Form 009–0–42, Survivor Sheltering Assessment; FEMA Form 009–0–42AV, Survivor Sheltering Assessment-Alternate Version.

Abstract: FEMA will encourage state, tribal, and territorial (STT) governments operating non-congregate shelters to collect basic shelter resident data. If there is a subsequent Major Disaster Declaration that includes the Individual Assistance (IA) program, FEMA and STTs may begin a bi-lateral exchange of data to coordinate and expedite assistance to shelter residents. This data exchange will enable FEMA to share additional disaster survivor data on losses and needs to STT shelter managers facilitating a coordinated effort to provide resources to shelter residents. This data also provides STTs increased ability for shelter planning and shelter population management.

Affected Public: Individuals or Households, State, Tribal or Territorial Government.

Estimated Number of Respondents: 51,200.

Estimated Number of Responses: 51,200.

Estimated Total Annual Burden Hours: 8,535.

Estimated Total Annual Respondent Cost: $320,489.

Estimated Respondents' Operation and Maintenance Costs: N/A.

Estimated Respondents' Capital and Start-Up Costs: N/A.

Estimated Total Annual Cost to the Federal Government: $306,276

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to: (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (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.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2020–27355 Filed 12–10–20; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2020–0049]

Privacy Act of 1974; System of Records

AGENCY: U.S. Department of Homeland Security.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the U.S. Department of Homeland Security (DHS) proposes to modify a current DHS system of records titled, ''DHS/ALL–047 Records Related to DHS Personnel, Long-Term Trainees, Contractors, and Visitors During a Declared Public Health Emergency System of Records,'' and retitle it, ''DHS/ALL–047 Records Related to DHS Personnel, Long-Term Trainees, Contractors, Mission Support Individuals, and Visitors During a Declared Public Health Emergency System of Records.'' This system of records describes DHS's collection, use, and maintenance of records on individuals associated with DHS and its facilities during a declared public health emergency. DHS is updating this system of records to more clearly articulate the relevant authorities and purpose; modify the categories of individuals to include individuals who support DHS missions, but were outside the previously defined categories of individuals; modify the categories of records to include those records collected and disclosed in accordance with the requirements of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act); and add an additional routine use. This modified system will be included in DHS's inventory of record systems.

DATES: Submit comments on or before January 11, 2021. This modified system will be effective upon publication. New or modified routine uses will be effective January 11, 2021.

ADDRESSES: You may submit comments, identified by docket number DHS–2020–0049 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Constantina Kozanas, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

Instructions: All submissions received must include the agency name and docket number DHS–2020–0049. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general and privacy questions, please contact: Constantina Kozanas, (202) 343–1717, *Privacy@hq.dhs.gov,* Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528–0655.

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary of the Department of Health and Human Services (HHS) may, under section 319 of the Public Health Service (PHS) Act (codified at 42 U.S.C. 247d), declare that: (a) A disease or disorder presents a public health emergency; or (b) that a public health emergency, including significant outbreaks of infectious disease or bioterrorist attacks, otherwise exists. The declaration lasts for the duration of the emergency or 90 days but may be extended by the Secretary of HHS. Congress must be notified of the declaration within 48 hours. The U.S. Department of Homeland Security (DHS) must ensure the safety of its workforce, including when the Secretary of HHS or the responsible, designated State official determines and declares that a public health emergency exists. Responses to public health emergencies depend on the nature of the emergency, but in the context of infectious disease or other events that can cause widespread harm to the health of DHS personnel and others in DHS facilities, in order to ensure a safe and secure workspace, DHS may collect information on DHS personnel (*i.e.,* employees, detailees, interns, and volunteers), contractors, long-term trainees, mission support individuals, and visitors at or on buildings, grounds, and properties that are owned, leased, or used by DHS.

This system of records covers information collected on DHS personnel, contractors, long-term trainees, mission support individuals, and visitors at or on buildings, grounds, and properties that are owned, leased, or used by DHS who have contracted or may have been exposed to a suspected or confirmed disease or illness that is the subject of a declared public health emergency or who must undergo preventative testing for a disease or illness that is the subject of a declared public health emergency as a requirement of federal, state, or local public health orders. The information collected may include identifying and contact information of individuals who have been suspected or confirmed to have contracted a disease or illness, or who have been exposed to an individual who had been suspected or confirmed to have contracted a disease or illness, related to a declared public health emergency; individual circumstances and dates of suspected exposure; testing results, symptoms, and treatments; and health status information. DHS maintains this information to reduce the spread of the disease or illness among DHS personnel, contractors, long-term trainees, mission support individuals, and visitors at or on buildings, grounds, and properties that are owned, leased, or used by DHS. In certain instances, depending on the type of record collected and maintained, for federal employees, this information will also be maintained and covered by Office of Personnel Management/Government-10 Employee Medical File System Records (75 FR 35099, June 21, 2010). However, any collection and use of records covered by the DHS/ALL–047 Records Related to DHS Personnel, Long-Term Trainees, Contractors, Mission Support Individuals, and Visitors During a Declared Public Health Emergency System of Records is only permitted during times of a declared public health emergency and when the circumstances permit the Department to collect and maintain such information on the various categories of DHS personnel, contractors, long-term trainees, mission support individuals, and visitors at or on buildings, grounds, and properties that are owned, leased, or used by DHS.

It must first be determined that the circumstances surrounding the declared public health emergency permit the Department to collect and maintain the information that may fall within the scope of this system of records. To make this determination, these circumstances must be examined in conjunction with all applicable laws, including the U.S. Constitution, federal privacy laws, federal labor and employment laws, and federal workforce health and safety laws. Different laws may apply

depending upon the type of information at issue, who the information pertains to, who collected the information, and how the information is collected, maintained, and used by the Department.

For instance, when collecting information on DHS employees, there are several employment laws that govern the collection, dissemination, and retention of employee medical information. These employment laws include the Americans with Disability Act (ADA), the Rehabilitation Act of 1973 (Rehab Act), and the Occupational Safety and Health Act of 1970 (OSH Act). Generally, under federal employment laws, medical information pertaining to employees is confidential and may be obtained by an employer only for certain reasons and only at certain points in the employment relationship. During a public health emergency, an employer may be permitted to collect certain employee medical information that it would not otherwise be permitted to collect depending upon the circumstances. Whether an employer is permitted to collect otherwise confidential employee medical information during a public health emergency depends upon whether an employee or a potential employee poses a ''direct threat'' to others within the meaning of the Americans with Disabilities Act of 1990, the Americans with Disabilities Amendments Act of 2008, and the Rehabilitation Act of 1973. Again, this system of records will apply if it is determined that the circumstances permit the Department to legally collect the employee medical information at issue in the first instance.

Further, this system of records notice (SORN) is being updated to include a reference to the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. 2000ff to ff–11. Title II of GINA prohibits employment discrimination based on genetic information, including family medical history; restricts the circumstances under which employers may lawfully acquire applicants' and employees' genetic information; and prohibits the disclosure of applicants' and employees' genetic information, with limited exceptions, including those stated in 42 U.S.C. 2000ff–5(b) and 29 CFR 1635.9(b). DHS may request the circumstances of an individual's suspected or actual exposure to a disease or illness that is the subject of a declared public health emergency, including the source of exposure. Although it is not the intent for DHS to collect family medical information, an individual may indicate that they were exposed to specific family members who have been diagnosed with, or are suspected to have, the disease or illness in question. To the extent this information may be acquired inadvertently, such information will be kept as a ''confidential medical record'' and maintained separately from an employee's general medical files, pursuant to 42 U.S.C. 2000ff–5(a) and 29 CFR 1635.9(a).

This SORN is also being updated to include DHS mission support individuals in the categories of individuals. DHS mission support individuals include those who are assigned from other federal, state, local, or private agencies to support DHS missions and operations at or on buildings, grounds, and properties that are owned, leased, or used by DHS. For example, the Federal Emergency Management Agency (FEMA) may collect information from non-DHS individuals, including those from a state agency, that have been assigned to work a disaster response in support of DHS and FEMA.

Additionally, this SORN is being published to update the authorities and categories of records to include records that are required to be reported to public health officials in accordance with the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), as cited in the authorities' section below. The CARES Act requires ''[e]very laboratory that performs or analyzes a test that is intended to detect or to diagnose a possible case of COVID–19 to report the results from each such test to the Secretary of HHS in such form and manner, and at such timing and frequency, as the Secretary may prescribe until the end of the Secretary's Public Health Emergency declaration with respect to COVID–19 or any extension of such declaration.'' As provided for by HHS guidance, laboratory entities are required to report certain data for all testing completed, for each individual tested, within 24 hours of results being known or determined, on a daily basis to the appropriate state or local public health department based on the individual's residence. To the extent permitted by law, this information may be collected, and subsequently shared with state and local public health officials, as a result of DHS contracting with laboratories to analyze tests to determine whether a DHS employee, long-term trainee, mission support individual, or contractor had contracted the disease or illness. This additional change to include testing reporting requirements is reflected in the updated purpose section of this SORN.

DHS is adding Routine Use I, permitting the sharing of information to the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel. Instances of this disclosure may occur if high-ranking DHS personnel are impacted and disclosure of their status is important to uphold public confidence in DHS.

Consistent with DHS's information sharing mission, information stored in the DHS/ALL–047 Records Related to DHS Personnel, Long-Term Trainees, Contractors, Mission Support Individuals, and Visitors During a Declared Public Health Emergency System of Records may be shared with other DHS Components that have a need to know the information to carry out their mission essential functions, but only if it is first determined that the information may be shared under all other applicable laws and DHS policies.

In addition, to the extent permitted by law, DHS may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this SORN.

This modified system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which federal government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. Additionally, the Judicial Redress Act (JRA) provides covered persons with a statutory right to make requests for access and amendment to covered records, as defined by the JRA, along with judicial review for denials of such requests. In addition, the JRA prohibits disclosures of covered records, except as otherwise permitted by the Privacy Act.

Below is the description of the DHS/ALL–047 Records Related to DHS Personnel, Long-Term Trainees, Contractors, Mission Support Individuals, and Visitors During a Declared Public Health Emergency System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

U.S. Department of Homeland Security (DHS)/ALL–047 Records Related to DHS Personnel, Long-Term Trainees, Contractors, Mission Support Individuals, and Visitors During a Declared Public Health Emergency System of Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the DHS Headquarters and Component offices in Washington, DC and field offices, and contractor-owned and operated facilities.

SYSTEM MANAGER(S):

Chief, Medical Quality & Risk Reduction Branch, Workforce Health and Safety, Office of the Chief Human Capital Officer, U.S. Department of Homeland Security, *OCHCOPrivacyOfficer@hq.dhs.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 319 of the Public Health Service (PHS) Act (42 U.S.C. 274d); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116–136, Div. B., Title VIII, sec. 18115, 134 Stat. 574 (codified in 42 U.S.C. 274d note); DHS Chief Medical Officer's authorities pursuant to 6 U.S.C. sec. 350 and 6 U.S.C. sec. 597; 6 U.S.C. sec. 464; 21 U.S.C. 360bbb–3; 40 U.S.C. 1315; American with Disabilities Act, including 42 U.S.C. 12112(d)(3)(B), 29 CFR 602.14, 1630.2(r), 1630.14(b)(1), (c)(1), (d)(4); Medical Examinations for Fitness for Duty Requirements, including 5 CFR part 339; Workforce safety federal requirements, including the Occupational Safety and Health Act of 1970, Executive Order 12196, 5 U.S.C. 7902; 29 U.S.C. Chapter 15 (*e.g.,* 29 U.S.C. 668), 29 CFR part 1904, 29 CFR 1910.1020, and 29 CFR 1960.66; Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. secs. 2000ff to ff–11, and 29 CFR part 1635; and United States Coast Guard authorities, including 10 U.S.C. Subtitle A, Part II, Chapter 55, Medical and Dental Care, as applicable, 14 U.S.C. 504(a)(17), 14 U.S.C. 936, 14 U.S.C. 3705, 42 U.S.C. 253, 32 CFR part 199, and 42 CFR 31.2–31.10.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to maintain records to protect the Department's workforce and respond to a declared public health emergency. For instance, DHS may use the information collected to conduct contact tracing (*i.e.,* the subsequent identification, monitoring, and support of a confirmed or probable case's close contacts who have been exposed to, and possibly infected with, the disease or illness at or on buildings, grounds, and properties that are owned, leased, or used by DHS); institute preventative testing to permit entry to buildings, grounds, and properties that are owned, leased, or used by DHS to minimize exposure; and fulfill testing reporting requirements, to the extent permitted by law.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Department personnel (including employees, detailees, interns, and volunteers), long-term trainees (such as Federal Law Enforcement Training Centers (FLETC) students), contractors, mission support individuals, and visitors (all other federal employees, applicants, and members of the public) at or on buildings, grounds, and properties that are owned, leased, or used by DHS who are suspected or confirmed to have a disease or illness that is the subject of a declared public health emergency, or may have been or could have been exposed to someone who is suspected or confirmed to have a disease or illness that is the subject of a declared public health emergency, or who must undergo preventative testing for a disease or illness that is the subject of a declared public health emergency as a requirement of federal, state, or local public health orders.

CATEGORIES OF RECORDS IN THE SYSTEM:

For DHS personnel, long-term trainees, contractors, and mission support individuals, the following information may be collected:

- Individual's full name;
- Preferred phone number(s);
- DHS duty location, facility, and specific work space accessed;
- Preferred email address(es);
- Individual's supervisor's name, address, and contact information, and/or the contractor's supervisor/contracting officer representative name, address, and contact information;
- Date(s) and circumstances of the individual's suspected or actual exposure to disease or illness including symptoms, as well as locations within DHS workplace where an individual may have contracted or been exposed to the disease or illness; and names and contact information of other employees, long-term trainees, contractors, mission support individuals, or visitors that the individual interacted with at or on a DHS workspace, facility, or grounds during time the individual was suspected to or had contracted the disease or illness;
- Current work status of the individual (*e.g.,* administrative leave, sick leave, teleworking, in the office, deployed to the field) and affiliated leave status information;
- Other individual information directly related to the disease or illness (*e.g.,* testing results/information, symptoms, treatments (*e.g.,* vaccines), source of exposure);
- Other information for verification purposes when disclosed to third-parties; and
- Information collected in accordance with CARES Act reporting requirements or other HHS statutory, regulatory, and administrative reporting requirements.

For visitors at or on buildings, grounds, and properties that are owned, leased, or used by DHS, the following information may be collected:

- Full name;
- Preferred phone number(s);
- Preferred email address(es);
- Date(s) and time(s) of entrance and exit from DHS workspaces, facilities, and grounds;
- Name(s) of all individuals encountered while in or at DHS workspaces, facilities, and grounds.
- Information indicating plans on entering a DHS workspace, facility, or grounds in the near future; and
- Other records covered by DHS/ALL–024 Facility and Perimeter Access Control and Visitor Management System of Records (75 FR 5609, February 3, 2010) that are relevant and necessary to achieve the purpose of this SORN.

RECORD SOURCE CATEGORIES:

When permitted by applicable law, records may be obtained from DHS personnel, long-term trainees, contractors, mission support individuals, and visitors at or on buildings, grounds, and properties that are owned, leased, or used by DHS; their family members; federal, state, local, tribal, territorial, and foreign government agencies; employers and other entities and individuals who may provide relevant information on a suspected or confirmed disease or illness that is the subject of a declared public health emergency.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information

contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows, to the extent permitted by other applicable laws as described herein:

A. To the Department of Justice (DOJ), including the U.S. Attorneys Offices, or other federal agency conducting litigation or proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee or former employee of DHS in his/her official capacity;

3. Any employee or former employee of DHS in his/her individual capacity, only when DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) DHS suspects or has confirmed that there has been a breach of the system of records; (2) DHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DHS (including its information systems, programs, and operations), the federal government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another federal agency or federal entity, when DHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the federal government, or national security, resulting from a suspected or confirmed breach.

G. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

H. To appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations, to the extent permitted by law, and in consultation with DHS legal counsel, for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats; appropriate notice will be provided of any identified health risk.

I. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or when disclosure is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular case would constitute a clearly unwarranted invasion of personal privacy.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

DHS stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door. The records may be stored on magnetic disc, tape, and digital media. Medical information collected is maintained on separate forms and in separate medical files and are treated as a confidential medical record.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

DHS may retrieve records by any of the categories of records, including name, location, testing ID number, date of exposure, or work status.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

DHS is in the process of developing a records schedule for declared public health emergency records. However, to the extent applicable, to ensure compliance with Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Genetic Information Nondiscrimination Act of 2008 (GINA), medical information must be ''maintained on separate forms and in separate medical files and be treated as a confidential medical record.'' 42 U.S.C. 12112(d)(3)(B); 42 U.S.C. sec 2000ff–5(a); 29 CFR 1630.14(b)(1), (c)(1), (d)(4)(i); and 29 CFR 1635.9(a). This means that medical information and documents must be stored separately from other personnel records. As such, the Department must keep medical records for at least one year from creation date. 29 CFR 1602.14. Further, any records compiled under this SORN and incorporated into an occupational individual medical case record pursuant to the OSH Act must be maintained in accordance with 5 CFR part 293.511(b) and 29 CFR 1910.1020(d), and must be destroyed 30 years after employee separation or when the Official Personnel Folder (OPF) is destroyed, whichever is longer, in accordance with NARA General Records Schedule (GRS) 2.7, Item 60, and NARA records retention schedule DAA–GRS–2017–0010–0009, to the extent applicable. Visitor processing records are covered by GRS 5.6, Items 110 and 111, and must be destroyed when either two or five years old, depending on security level, but may be retained longer if required for business use, pursuant to DAA–GRS–2017–0006–0014 and –0015.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

DHS safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. DHS has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

Individuals seeking access to and notification of any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the Chief Privacy Officer or the appropriate Headquarters

or component's FOIA Officer whose contact information can be found at *http://www.dhs.gov/foia* under ''Contact Information.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, U.S. Department of Homeland Security, Washington, DC 20528–0655. Even if neither the Privacy Act nor the Judicial Redress Act provide a right of access, certain records about you may be available under the Freedom of Information Act.

When an individual is seeking records about himself or herself from this system of records or any other Departmental system of records, the individual's request must conform with the Privacy Act regulations set forth in 6 CFR part 5. The individual must first verify his/her identity, meaning that the individual must provide his/her full name, current address, and date and place of birth. The individual must sign the request, and the individual's signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, an individual may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition, the individual should:

- Explain why he or she believes the Department would have information being requested;
- Identify which component(s) of the Department he or she believes may have the information;
- Specify when the individual believes the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records;

If the request is seeking records pertaining to another living individual, the request must include an authorization from the individual whose record is being requested, authorizing the release to the requester.

Without the above information, the component(s) may not be able to conduct an effective search, and the individual's request may be denied due to lack of specificity or lack of compliance with applicable regulations.

CONTESTING RECORD PROCEDURES:

For records covered by the Privacy Act individuals may make a request for amendment or correction of a record of the Department about the individual by writing directly to the Department component that maintains the record, unless the record is not subject to amendment or correction. The request should identify each particular record in question, state the amendment or correction desired, and state why the individual believes that the record is not accurate, relevant, timely, or complete. The individual may submit any documentation that would be helpful. If the individual believes that the same record is in more than one system of records, the request should state that and be addressed to each component that maintains a system of records containing the record.

NOTIFICATION PROCEDURES:

See ''Record Access Procedures'' above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

85 FR 45914 (July 30, 2020).

* * * * *

Constantina Kozanas,

Chief Privacy Officer, U.S. Department of Homeland Security.

[FR Doc. 2020–27204 Filed 12–10–20; 8:45 am]

BILLING CODE 9112–FP–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2001–11120]

Intent To Request Extension From OMB of One Current Public Collection of Information: Imposition and Collection of Passenger Civil Aviation Security Service Fees

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-Day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0001, abstracted below that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves air carriers maintaining an accounting system for the passenger civil aviation security service fees collected and reporting this information to TSA on a quarterly basis, as well as retaining the data used for these reports for three fiscal years.

DATES: Send your comments by February 9, 2021.

ADDRESSES: Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh at the above address, or by telephone (571) 227–2062.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (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 ICR documentation will be available at *http://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Consistent with the requirements of Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs, and E.O. 13777, Enforcing the Regulatory Reform Agenda, TSA is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents.

Information Collection Requirement

OMB Control Number 1652–0001; Imposition and Collection of Passenger Civil Aviation Security Service Fees. In accordance with 49 U.S.C. 44940 and relevant TSA Regulations, *see* 49 CFR part 1510, TSA imposes a Passenger Civil Aviation Security Service Fee (September 11th Security Fee) on passengers of both foreign and domestic air carriers (''air carriers'') on air

transportation originating at airports in the United States.

The September 11th Security Fee is collected by TSA and transmitted to the U.S. Treasury Department to offset the Federal Government's costs of providing civil aviation security services and other purposes designated by section 44940. This information collection requires air carriers to submit to TSA information regarding the amount of September 11th Security Fees an air carrier has imposed, collected, refunded to passengers, and remitted to TSA. The retention of this data is necessary for TSA to ensure the proper imposition, collection, and regulation the September 11th Security Fee. Additionally, TSA collects the information to monitor carrier compliance with the fee requirements and for auditing purposes. Air carriers are required to retain this information for three years. Specifically, information collected during a given fiscal year (October 1 through September 30) must be retained through three subsequent fiscal years. For example, information collected during fiscal year 2020 must be retained through fiscal year 2023.

TSA's regulations require air carriers to impose and collect the fee on passengers, and to submit the fee to TSA by the final day of the calendar month following the month in which the fee was collected. *See* 49 CFR 1510.13. Air carriers are further required to submit quarterly reports to TSA, which indicate the amount of the fees imposed, collected, and refunded to passengers, and remitted to TSA. *See* 49 CFR 1510.17.

Each air carrier that collects security service fees from more than 50,000 passengers annually is also required to submit to TSA an annual independent audit, performed by an independent certified public accountant, of its security service fee activities and accounts. *See* 49 CFR 1510.15. Although the annual independent audit requirements were suspended on January 23, 2003 (*see* 68 FR 3192), TSA conducts its own audits of the air carriers. *See* 49 CFR 1510.11. Notwithstanding the suspension of the audit requirements, air carriers must establish and maintain an accounting system to account for the security service fees imposed, collected, refunded to passengers and remitted to TSA. *See* 49 CFR 1510.15(a).

TSA is seeking an extension of this collection to require air carriers to continue submitting the quarterly reports to TSA, and to require air carriers to retain the information for three fiscal years after the fiscal year in which the information was collected. This requirement includes retaining the source information for the quarterly reports remitted to TSA as well as the calculations performed to create the reports submitted to TSA. Should the annual audit requirement be reinstated, the requirement would include information and documents reviewed and prepared for the independent audit; the accountant's working papers, notes, worksheets, and other relevant documentation used in the audit; and, if applicable, the specific information leading to the accountant's opinion, including any determination that the accountant could not provide an audit opinion. Although TSA suspended the independent audit requirement, TSA conducts audits of the air carriers, and therefore, requires air carriers to retain and provide the same information as required for the quarterly reports and independent audits.

TSA has incorporated minor adjustments to the figures used to estimate the costs of this ICR. The adjustments consider changes in the number of regulated air carriers and various administrative cost rates since the previous extension. TSA estimates that 170 total respondent air carriers will each spend approximately 1 hour to prepare and submit each quarterly report. TSA estimates that these respondents will incur a total of 680 hours (170 carriers × 4 quarterly reports × 1 hour per report) to satisfy the quarterly reporting requirements annually.

TSA estimates 274 total responses from all respondent air carriers (170 plus 104, should the annual audit requirement be reinstated), with 2,760 burden hours (680 hours for quarterly reports and 2,080 hours for audits) annually to satisfy the quarterly report and audit requirements.

TSA estimates that the 170 air carriers will each incur an average cost of $456.56 annually to satisfy the quarterly reporting requirement. This estimate includes $383.36 in labor for preparation of each quarterly report (4 reports × $95.84 per hour, each quarterly report is estimated to take 1 hour to prepare), $71.00 in annual records storage related costs, and $2.20 for postage to submit the report (4 stamps at 55 cents each). TSA estimates an aggregate annual cost of $77,615.20 ($456.56 cost × 170 air carriers) for all air carriers to prepare, store, and submit quarterly reports and a cost of $232,845.60 for the three-year extension period requested.

Should TSA reinstate the audit requirement, TSA estimates that 104 air carriers, of the 170 total respondent carriers that collect fees from more than 50,000 passengers annually, would be required to submit annual audits. These carriers would take approximately 20 hours for audit preparation, for a total of 2,080 hours (104 carriers × 20 hours per audit) annually. Air carriers required to submit annual audits would incur an average cost of $2,508.20 per audit. This estimate includes $2,433.40 in labor for preparation of each audit (20 hours per report × $121.67 per hour), $71.00 in annual records storage related costs, and $3.80 for postage to submit the report. TSA estimates an aggregate annual cost of $13,042.64 ($2,508.20 cost × 104 air carriers × .05 likelihood of audit to occur) for all air carriers to prepare, store, and summit the annual audit should the requirement be reinstated and $39,127.92 for the three-year extension period requested.

Dated: December 8, 2020.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Information Technology.

[FR Doc. 2020–27283 Filed 12–10–20; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7027–N–38]

60-Day Notice of Proposed Information Collection: Energy Efficient Mortgages (EEMs) OMB Control No.: 2502–0651

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 9, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or

speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Energy Efficient Mortgages.

OMB Approval Number: 2502–0561.

Type of Request: Extension of currently approved collection.

Form Number: N/A.

Description of the need for the information and proposed use: Lenders provide the required information to determine the eligibility of a mortgage to be insured under Section 106 of the Energy Policy Act of 1992 (formerly 42 U.S.C. 12712 note; transferred to 12 U.S.C. 1701z–16). Section 2123 of the Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110–289, approved July 30, 2008) amended Section 106 of the Energy Policy Act of 1992 by revising the maximum dollar amount that can be added to an FHA-insured mortgage for energy efficient improvements.

Respondents (*i.e.* affected public): Business or other for-profit (lenders).

Estimated Number of Respondents: 40.

Estimated Number of Responses: 270.

Frequency of Response: On occasion.

Average Hours per Response: 1.35.

Total Estimated Burdens: 364 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 2 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Dana T. Wade,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 2020–27297 Filed 12–10–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7027–N–40]

60-Day Notice of Proposed Information Collection: Section 811 Project Rental Assistance for Persons With Disabilities; OMB Control No.: 2502–0608

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 9, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Section 811 Project Rental Assistance for Persons with Disabilities.

OMB Approval Number: 2502–0608.

OMB Expiration Date: 04/30/2020.

Type of Request: Reinstatement of an expired collection.

Form Number: SF–424, SF–LLL, HUD–2880, HUD–92235, HUD–92236, HUD–92237, HUD–92238, HUD–92240, HUD–92239, HUD–92241, HUD–92243, HUD–93205.

Description of the need for the information and proposed use: The collection of this information is necessary to the Department to assist HUD in determining applicant eligibility and capacity to award and administer the HUD PRA funds within statutory and program criteria. A thorough evaluation of an applicant's submission is necessary to protect the Government's financial interest.

Respondents (i.e. affected public): State, Local or Tribal Government, Not-for-profit institutions, Business or other for-profit.

Estimated Number of Respondents: 2,285.

Estimated Number of Responses: 2,375.

Frequency of Response: Annually or quarterly.

Average Hours per Response: varies from 10 minutes to 20 hours.

Total Estimated Burden: 4,248.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Assistant Secretary for Housing—Federal Housing Commissioner, Dana T. Wade, having reviewed and approved this document, is delegating the authority to electronically sign this document to submitter, Nacheshia Foxx, who is the **Federal Register** Liaison for HUD, for purposes of publication in the **Federal Register**.

Nacheshia Foxx,

Federal Register Liaison for theDepartment of Housing and Urban Development.

[FR Doc. 2020–27286 Filed 12–10–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7025–N–08]

60-Day Notice of Proposed Information Collection: State Community Development Block Grant (CDBG) Program OMB Control No.: 2506–0085

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date: February 9, 2021.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Robert Peterson, Director, States and Small Cities Division, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Robert Peterson at *Robert.C.Peterson@hud.gov* or telephone 202–402–4211. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Mr. Peterson.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: 60-Day Notice of Proposed Information Collection: State Community Development Block Grant (CDBG) Program.

OMB Approval Number: 2506–0085.

Type of Request: Extension of currently approved collection.

Form Number: HUD–40108.

Description of the need for the information and proposed use: The Housing and Community Development Act of 1974, as amended (HCDA), requires grant recipients that receive CDBG funding to retain records necessary to document compliance with statutory and regulatory requirements on an on-going basis. The statute also requires [Section 104(e)(2)] that HUD conduct an annual review to determine whether states have distributed funds to units of general local government in a timely manner. Additionally, Section 916 of the Cranston-Gonzalez National Affordable Housing Act of 1990, prescribes a consultation with representatives of the interests of the residents of the colonias.

Respondents (i.e. affected public): This information collection applies to 50 State CDBG Grantees (49 states and Puerto Rico but not Hawaii).

Information collection	Number of respondents	Frequency of response	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Recordkeeping:						
States	50	1	126.00	6,300	$36.76	$231,588.00
Localities	3,500	1	26.13	91,455	36.76	3,361,885.80
Timely Distribution	50	1	2.60	130	36.76	4,778.80
Colonias Consultation	54	1	4.00	216	36.76	7,940.16
Total				98,101		3,606,192.76

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

John Gibbs,

Principal Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 2020–27273 Filed 12–10–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–50]

30-Day Notice of Proposed Information Collection: COVID19 HUD Contingency Plan for HUD Multifamily Rental Project Closing Documents; OMB Control No.: 2502–0618

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 11, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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/Start* Printed Page 15501PRAMain. 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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 4, 2020 at 85 FR 55312.

A. Overview of Information Collection

Title of Information Collection: COVID19 HUD Contingency Plan for HUD Multifamily Rental Project Closing Documents.

OMB Approval Number: 2502–0618.

OMB Expiration Date: 12/32/2020.

Type of Request: Revision of a currently approved collection.

Form Numbers: HUD–5985 & HUD–5960.

Respondents: Business or other for-profit, Not-for-profit institutions, State, Local or Tribal Government.

Estimated Number of Respondents: 612.

Estimated Number of Responses: 1,224.

Frequency of Response: Twice per annum.

Average Hours per Response: 1.00 hour [0.50 x 2 = 1 hour].

Total Estimated Burdens: 1,224.

Description of the need for the information and proposed use: This is a new collection based on situational conditions relating to the COVID–19 Coronavirus outbreak and the Presidential declaration that began a national emergency. This new PRA collection will serve as the authority for any new or future changes or revisions to multifamily programs impacted by COVID–19 or related pandemics.

The Lender's Certificate, HUD–92434, establishes the conditions, which the Lender agrees to abide by in consideration of HUD's commitment to FHA-insure mortgages, and by which the Lender certifies that the conditions have been fulfilled to date, including any work done prior to endorsement of the Note that has been approved by HUD in writing, and all HUD imposed conditions that have been met with respect to such work. The information collection requirements contained in the Lender's Certificate are to oversee the parties' compliance with all applicable legal requirements and therefore ensure protection of the FHA insurance fund. The HUD–92434M is required by the Closing Checklists via the Firm Commitment (Housing Notice 2018–03) and per the fact that the underlying forms contemplate hardcopy submission (since HUD historically has not accepted electronic submission of documents for closing purposes). The *Lender's Certification Regarding: Electronic Submission of Closing Documents* is a modification of the HUD–92434M that will set the Office of General Counsel's (''OGC'') temporary uniform electronic closing protocols until normal closing can resume after the COVID–19 Pandemic.

Relating to the current COVID–19 Coronavirus outbreak and the President declaring a national emergency the Department of Housing and Urban Development (''HUD'') and its offices remain open for business at this time, many are now engaged in full-time telework. It is therefore prudent and appropriate for the OGC, in collaboration with Multifamily to establish protocols, rules, and procedures that best ensure continuity of operations in the event of an extended closure of a specific division, regional or field office, or the determination that OGC in its entirety should work remotely. Pursuant to the March 16, 2020 HUD Memorandum issued for all Regional Counsel and Deputy Regional Counsel, all Associate Regional Counsel for Programs and all OGC Closing Attorneys, set forth protocols and best practices for the continued provision of legal services by HUD Closing Attorneys while working from home or from another remote location. Also included in the memorandum are suggestions that may be shared with outside counsel to facilitate the work being done remotely by OGC attorneys. Therefore, Regional Counsel will ensure that the temporary protocols set forth in the March 16, 2020 memorandum are adopted and applied consistently across the regional and field offices within their purview. When the pandemic subsides and OGC resumes normal closing operations consistently across the country, HUD will reconsider the temporary protocols in this memorandum. OGC attorney protocols for review and approval of draft closing documents must rely on electronic transmission of closing documents in lieu of hard copies in performing their initial reviews. This approach will ensure the continuation of reviews even if our external partners are unable to physically transmit the volume of paper documents needed at this stage. While providing increased flexibility to lenders in submitting closing documents, this protocol does

not authorize any additional substantive modifications to the closing process without approval of the appropriate Regional Counsel and the Office of Insured Housing in Headquarters. Draft closing submission will remain consistent with the approach of Multifamily Housing and OGC will accept draft closing packages in fully electronic form.

Respondents estimation for the Escrow Agreement for Deferred Repairs & Debt Service—223(f)—(one closing):

Estimated Number of Respondents: 330.

Estimated Number of Responses: 330.

Frequency of Response: Once per annum.

Average Hours per Response: .50 hours.

Total Estimated Burdens: 165.

Description of the need for the information and proposed use: The form *Escrow Agreement for Deferred Repairs & Debt Service—223(f)* (''*Debt Service Escrow Agreement*''), sets the terms and conditions between the Borrower and Lender and provides for the establishment of an escrow by the Borrower as security for completion of non-critical deferred repairs. Such escrow also serves as security for HUD's insurance of the loan. The agreement provides for prior approval of HUD for certain actions to be taken by the Borrower or Lender. The information collection requirements contained in Debt Service Escrow Agreement are to oversee the parties' compliance with all applicable legal requirements and therefore ensure protection of the FHA insurance fund.

The global pandemic relating to the COVID–19 Emergency has disrupted the U.S. economy with significantly increased unemployment and overall economic instability. This instability has carried over to real estate markets in general, including multifamily commercial markets. During these challenging times, HUD remains open for business and will continue as an active participant in sourcing new construction and refinance debt through its mortgage insurance programs. At the same time, HUD has reevaluated its underwriting requirements, particularly for market rate refinance transactions that may now experience increased vacancy, rent collection losses and income disruption both in the near and long term. Section 207 of the National Housing Act provides that no mortgage shall be acceptable for insurance unless the Secretary finds that the project is economically sound, and the MAP Guide permits specific mitigants to be employed to reduce risk for transactions currently in process but yet to receive a Firm Commitment to insure. These mitigants include but are not limited to the requirement of a Debt Service Reserve (DSR) for Section 223(f) transactions to offset anticipated operating losses post endorsement. To address risk and/or changed economic circumstances for transactions that have been issued a commitment to insure but have yet to endorse, HUD includes language in the Firm Commitment affirming that no material adverse change (MAC) has occurred between the issuance of the commitment and endorsement. Accordingly, HUD has taken the position that the impact of the COVID–19 Emergency has resulted in a material change in most, if not all, real estate markets and therefore, HUD will require mitigants to offset this additional risk. Accordingly, this form provides clarification and instructions to HUD staff describing additional mitigants that may be included in the Firm Commitment for Section 223(f) loans that are in processing, as well as for those projects for which a Firm Commitment has been issued.

Revisions to the OMB approved Form HUD–92476.1M is the temporary *Escrow Agreement for Deferred Repairs & Debt Service—223(f).* This form does not permanently replace the HUD–92476.1M. The revised escrow, while based on the HUD–92476.1M, is a separate document for temporary use during the COVID–19 emergency pursuant to Mortgagee Letter 2020–11 issued April 10, 2020. The temporary *Escrow Agreement for Deferred Repairs & Debt Service—223(f)* Form will remain in effect until such time as HUD determines that the real estate markets that have been negatively affected by the COVID–19 Emergency have stabilized and additional mitigants for Section 223(f) transactions are no longer required.

This new collection can be used to address future changes to multifamily programs or processes that may arise from impacts due to the COVID19 pandemic.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(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.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27272 Filed 12–10–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–51]

30-Day Notice of Proposed Information Collection: Public Housing Agency (PHA) 5-Year and Annual Plan; OMB Control No.: 2577–0226

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD has submitted the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, in accordance with the Paperwork Reduction Act. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date: January 11, 2021.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. 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/Start* Printed Page 15501PRAMain. 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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing

and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD has submitted to OMB a request for approval of the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on October 9, 2018 at 83 FR 50676.

A. Overview of Information Collection

Title of Information Collection: Public Housing Agency (PHA) 5-Year and Annual Plan.

OMB Approval Number: 2577–0226.

Type of Request: Revision of currently approved collection.

Form Number(s): HUD–50075–5Y, HUD–50075–ST, HUD–50075–SM, HUD–50075–HCV, HUD–50075–HP, HUD–50075–MTW, HUD–50077–CR, HUD–50077–SL, HUD–50077–CRT–SM, and HUD–50077–ST–HCV–HP.

Description of the need for the information and proposed use: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Department of Housing and Urban Development (HUD) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. The Public Housing Agency (PHA) Plan was created by section 5A of the United States Housing Act of 1937 (42 U.S.C. 1437c–1). There are two different PHA Plans: The Five-Year Plan and the Annual Plan. The Five-Year Plan describes the agency's mission, long-range goals and objectives for achieving its mission over a five-year period. The Annual PHA Plan is a comprehensive guide to PHA policies, programs, operations, and strategies for meeting local housing needs and goals. This revision integrates the MTW Supplement to the Annual PHA Plan process for PHAs that join MTW under the 2016 Appropriations Act (*i.e.,* MTW Expansion).

The PHA Plans informs HUD, residents, and the public of the PHA's mission for serving the needs of low, very low-income, and extremely low-income families and its strategy for addressing those needs. This information helps provide accountability to the local community for how PHAs spend their funding and implement their policies. Also, PHA Plans allow HUD to monitor the performance of programs and the performance of public housing agencies that administer them.

This proposed information collection was previously published in the **Federal Register** on October 9, 2018 (FR 83, 50676) and allowed 60-days for public comment. It should be noted that all forms except for the Moving to Work (MTW) Supplement were published in the **Federal Register** on October 30, 2019 (FR 84, 58167) for a 30-day public comment period. The four public comments received for the documents included in that notice were addressed at that time. The MTW Supplement was not included in this publication due to revisions that were needed as part of ongoing work on the MTW Operations Notice, which has now been published. The purpose of this 30-day notice is to respond to public comments received during the 60-day public comment period on the MTW Supplement and to allow for the 30-day public comment period for the MTW Supplement.

Respondents (i.e. affected public): Local, Regional and State Body Corporate Politic Public Housing Agencies (PHAs) Governments.

Estimated Number of Respondents: 3,780.

Estimated Number of Responses: 4,832 (Annual Plan: 1,152 and 5 Year Plan: 3,780).

Frequency of Response: Every five years for all PHAs, annually for all PHAs except HERA Qualified PHAs.

Average Hours per Response: 6.33 hrs.

Total Estimated Burdens: 14,613.74.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(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.

HUD encourages interested parties to submit comment in response to these questions.

Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

D. Overview of Significant Changes Made to the HUD–50075–MTW, MTW Supplement to the Annual PHA Plan

The MTW Supplement has been updated to reflect the final MTW Operations Notice, which was published in the **Federal Register** (FR 85, 53444) on August 28, 2020, and public comments received during the 60-day **Federal Register** public comment period. A copy of the draft HUD–50075 MTW can be obtained per the information provided earlier in this notice under ''For further information'', or on the HUD Moving to Work website at *https://www.hud.gov/mtw.*

The other forms in the PHA Plan data collection were published in the **Federal Register** on October 30, 2019 for the 30-day public comment period and, therefore, are not included in this 30-day **Federal Register** notice.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27276 Filed 12–10–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX21EG31DW50100; OMB Control Number 1028–New]

Agency Information Collection Activities; Hydrography Maintenance Portal

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before February 9, 2021.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to U.S. Geological Survey,

Information Collections Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–xxxx in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Michael Tinker by email at *mdtinker@usgs.gov,* or by telephone at 303–202–4476.

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Hydrography Maintenance Portal (HMP) is a website used by trained editors to access data from the USGS National Hydrography Dataset (NHD) or Watershed Boundary Dataset (WBD) national databases for the purpose of editing the data to update, correct, or otherwise improve it. HMP is used by federal employees of the USGS National Geospatial Program (NGP) and state partners with which USGS has a signed Stewardship Program Memorandums of Understanding (MOU). USGS employees use the HMP as their primary means of accessing NHD and WBD for data management. State partners use the HMP to check out areas of the NHD and/or WBD to perform edits and updates to the data using their specialized, local knowledge of the streams in their areas. These data contributions are very important to maintaining the datasets as A–16 National Geospatial Data Assets, as well as helping to prevent duplication of data by supporting editing of one primary dataset by many.

Using HMP, NHD or WBD data is ''checked out'' from a national database for a select area. No other editor can check out the data for an area when the data is already checked out. The HMP is *not* used to directly edit or submit (''check in'') data to the national database. Data checked out with HMP must be edited with USGS hydrography editing tools, such as the WBD Edit Tool or the NHD Update Tool. To check in data, editors must use the USGS hydrography editing tools.

An HMP user must take special training from USGS staff before they can register for an HMP user account. After training, users register an HMP user account with their business contact information including first/last name, business phone, state, and work organization. Registered users are then assigned check out permissions by the HMP administrators. HMP administrators are a limited group of the USGS NHD/WBD Partner Support Team. HMP user accounts are necessary because they allow HMP administrators to provide assistance if needed, to coordinate production needs, and enable tracking on the editing history for the datasets through reporting.

HMP has reporting functions to generate production statistics. These reports detail active and previous checkout histories within specified date ranges. The business contact information of the users who checked out the data are visible on these reports. Any registered user can generate reports with HMP.

HMP reports are frequently used to coordinate essential production needs between states, or between USGS staff and state partners. The reports allow USGS staff to contact partners if there is a problem with their data or allow partners to contact partners in others states to confirm if editing work is planned or occurring in an adjacent watershed.

Title of Collection: Hydrography Maintenance Portal.

OMB Control Number: New.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: General public. NHD stewards and editors.

affiliated with Federal, State, Local governments, and universities.

Total Estimated Number of Annual Respondents: 200.

Total Estimated Number of Annual Responses: 200.

Estimated Completion Time per Response: 1 hour.

Total Estimated Number of Annual Burden Hours: 200.

Respondent's Obligation: Voluntary.

Frequency of Collection:

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

David Brostuen,

Acting Director, National Geospatial Technical Operations Center.

[FR Doc. 2020–27293 Filed 12–10–20; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD AAK6006201 AOR3030.999900]

Final Supplemental Environmental Impact Statement for the Proposed Arrow Canyon Solar Project, Clark County, Nevada

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that the Bureau of Indian Affairs (BIA), as the lead Federal agency, with the Bureau of Land Management (BLM), the Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), and the Moapa Band of Paiute Indians (Moapa Band) as cooperating agencies, intends to file a final supplemental environmental impact statement (FSEIS) with the EPA for the proposed Arrow Canyon Solar Project (ACSP or Project). The FSEIS evaluates the expansion of the previously approved Moapa Solar Energy Center (MSEC) Project on the Moapa River Indian Reservation (Reservation) in Clark County, Nevada. This notice also announces that the FSEIS is now available for public review.

DATES: The FSEIS is available at the following website: *www.arrowcanyonsolarseis.com.* In order to be fully considered, written comments on the FSEIS must arrive no later than 30 days after EPA publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: You may mail, hand carry, fax, or email written comments to Mr. Chip Lewis, Regional Environmental Protection Officer, BIA Western Regional Office, Branch of Environmental Quality Services, 2600 North Central Avenue, 4th Floor Mail Room, Phoenix, Arizona 85004–3008; fax (602) 379–3833; email: *chip.lewis@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Chip Lewis, BIA Western Regional Office, Branch of Environmental Quality Services at (602) 379–6750 or Mr. Garry Cantley at (602) 379–6750.

SUPPLEMENTARY INFORMATION: The proposed Federal action, taken under 25 U.S.C. 415, is BIA's approval of a lease to accommodate the expansion of the solar field previously approved for the MSEC Project and the modification of the existing solar energy ground lease and related agreements entered into by the Moapa Band with the Applicant. The agreements provide for construction, operation and maintenance (O&M), and decommissioning of a 200-megawatt (MW) alternating current solar photovoltaic (PV) electricity generation facility located entirely on the Reservation and specifically on lands held in trust for the Moapa Band.

The MSEC Project was originally developed by Moapa Solar LLC and included an 850-acre solar site on the Reservation and associated rights-of-way (ROWs) on BLM-managed lands for an access road, gen-tie line, and water pipeline. Records of Decision (RODs) were issued by the BIA and BLM in May 2014 and BIA approved the lease one month later. The ROW was issued by BLM in August 2015 for the linear facilities. In March 2017, EDF Renewables Development, Inc. (EDFR) purchased the MSEC Project from the original owner and renamed the Project the Arrow Canyon Solar Project. EDFR subsequently transferred the Project to Arrow Canyon Solar, LLC. Currently, the approved MSEC Project and associated facilities have not yet been constructed.

The Applicant currently plans to expand the solar field on the Reservation from 850 acres to 2,200 acres. This expansion would occur on Tribal lands identified by the Moapa Band that are adjacent to the originally approved MSEC site. The linear facilities, (*i.e.* main access road, 230kV gen-tie line, and water pipeline) as previously approved by the BLM would remain a part of the Project description; therefore, these facilities are not reevaluated. The FSEIS focuses on the expansion of the solar field only.

Construction of the Project is expected to take approximately 18 to 20 months. The Applicant is expected to operate the energy facility up to 50 years. Major components of the solar site would include multiple blocks of solar PV panels mounted on tracking systems, inverters, transformers, collection lines, battery storage facilities, project substation, and O&M facilities. Water will be needed during construction primarily for dust control and a minimal amount will be needed during operations for administrative and sanitary water use and panel washing. The water supply required for the Project would be from wells owned by the Moapa Band and delivered to the site via the previously approved water pipeline or trucks. Access to the ACSP will be provided via North Las Vegas Boulevard from the I–15/US 93 interchange.

The purposes of the proposed Project are, among other things, to: (1) help provide a long-term, diverse, and viable economic revenue base and job opportunities for the Moapa Band; (2) meet the terms of the existing Power Purchase Agreement for the output of the Project; (3) help Nevada and neighboring states to meet their State renewable energy needs; and (4) allow the Moapa Band, in partnership with the Applicant, to optimize the use of the lease site while maximizing the potential economic benefit to the Moapa Band.

The BIA will use the FSEIS to make a decision on the land lease application under its jurisdiction; the EPA may use the document to make decisions under its authorities; the Band may use the FSEIS to make decisions under its Environmental Policy Ordinance; and the USFWS may use the FSEIS to support its decision under the Endangered Species Act.

Directions for Submitting Comments: Please include your name, return address and the caption: ''FSEIS Comments, Proposed Arrow Canyon Solar Project'' on the first page of your written comments and send to the address listed above in the **ADDRESSES** section.

Locations Where the FSEIS is Available for Review: The FSEIS will be available for review at: BIA Western Regional Office, 2600 North Central Avenue, 12th Floor, Suite 210, Phoenix, Arizona and the BIA Southern Paiute Agency, 180 North 200 East, Suite 111, St. George, Utah. The FSEIS is also available on line at: *www.arrowcanyonsolarseis.com.*

To obtain an electronic copy of the FSEIS, please provide your name and address in writing or by voicemail to Mr. Chip Lewis or Mr. Garry Cantley. Their contact information is listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. Individual paper copies of the FSEIS will be provided only upon request.

Public Comment Availability: Written comments, including names and addresses of respondents, will be available for public review at the BIA Western Regional Office, 2600 North Central Avenue, 12th Floor, Suite 210, Phoenix, Arizona during regular business hours, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Before including your address, telephone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This notice is published in accordance with section 1503.1 of the Council on Environmental Quality regulations (40 CFR 1500 *et seq.*) and the Department of the Interior Regulations (43 CFR part 46) implementing the procedural requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and in accordance with the exercise of authority delegated to the Assistant Secretary—Indian Affairs by part 209 of the Department Manual.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27220 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900253G]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Taking Effect in the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Skokomish Indian Tribe (Tribe) and the State of Washington (State) submitted the Fifth Amendment to the Tribal-State Compact for Class III Gaming between the Skokomish Indian Tribe and the State of Washington (Compact) governing certain forms of Class III gaming. This notice announces that the Fifth Amendment to the Tribal-State Compact for Class III Gaming between the Skokomish Indian Tribe and the State of Washington is taking effect.

DATES: The compact takes effect on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. On September 22, 2020, the Tribe and the State submitted the Fifth Amendment to the Tribal-State Compact for Class III Gaming between the Skokomish Indian Tribe and the State of Washington. The Secretary took no action on the Fifth Amendment to the Tribal-State Compact for Class III Gaming between the Skokomish Indian Tribe and the State of Washington within 45 days of its submission. Therefore, the Compact is considered to have been approved, but only to the extent it is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27219 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A501010.999900]

Land Acquisitions; Tule River Tribe, Airpark Site, Tulare County, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire in trust 40 acres, more or less, of land known as the Airpark Site in the City of Porterville, Tulare County, California (Site), for the Tule River Indian Tribe of the Tule River Reservation, California (Tribe), for gaming and other purposes.

DATES: This final determination was made on December 7, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Mailstop 3543, 1849 C Street NW, Washington, DC 20240, telephone (202) 219–4066, *paula.hart@bia.gov.*

SUPPLEMENTARY INFORMATION: On the date listed in the **DATES** section of this notice, the Assistant Secretary—Indian Affairs made a final agency determination to acquire the Site, consisting of 40 acres, more or less, in trust for the Tribe under the authority of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. 5108.

The Assistant Secretary—Indian Affairs, on behalf of the Secretary of the Interior, will immediately acquire title to Site in the name of the United States of America in trust for Tribe upon fulfillment of all Departmental requirements. The 40 acres, more or less, are described as follows:

The following described real property in the County of Tulare, State of California, more particularly described as:

Parcel No's 1 through 17 inclusive, of Parcel Map No. 4343, in the City of Porterville, County of Tulare, State of California, according to the map thereof recorded in Book 44, Page 47 of Parcel Map, in the office of the County Recorder of said County and by certificates of correction recorded, June 1, 1999 as Instrument No. 99–0041612 and August 12, 1999 as Instrument No. 99–0061851.

Excepting therefrom all oil, gas, minerals and other hydrocarbon substances, in, on, upon or under said land, as reserved by the City of Porterville, a Municipal Corporation, in a Deed recorded October 29, 1990 as file No. 71536 of Official Records.

Authority: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1, and is published to comply with the requirements of 25 CFR 151.12 (c)(2)(ii) that notice of the decision to acquire land in trust be promptly provided in the **Federal Register**.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27223 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A51010.999900]

Land Acquisitions; The Picayune Rancheria of Chukchansi Indians of California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs has made a final determination to acquire 217.88 acres, more or less, into trust for The Picayune Rancheria of Chukchansi Indians of California.

DATES: This determination was made on December 7, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Sharlene M. Round Face, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Albuquerque NM 87104, telephone (505) 563–3132.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual, and is published to comply with the requirement of 25 CFR 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly published in the **Federal Register**.

On the date listed in the **DATES** section of this notice, the Assistant Secretary—Indian Affairs issued a decision to accept land in trust for the Picayune Rancheria of Chukchansi Indians of California under the authority of Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984).

Picayune Rancheria of Chukchansi Indians of California

Parcel 1

All that portion of the North half of the Northeast quarter of Section 24, Township 9 South, Range 20 East, Mount Diablo Base and Meridian, according to the Official Plat thereof, lying Westerly of the Westerly line of State Highway No. 41.

Excepting Therefrom that portion thereof described in Grant Deed to the State of California, recorded April 8, 1987 in Book 1963, Page 411 of Official Records.

Parcel 2

All that portion of the South half of the Northeast quarter and of the North half of the North half of the Southeast

quarter of Section 24, Township 9 South, Range 20 East, Mount Diablo Base and Meridian, according to the Official Plat thereof, lying Westerly of the Westerly line of State Highway No. 41.

EXCEPTING THEREFROM that portion thereof described in Grant Deed to the State of California, recorded April 8, 1987 ln Book 1963, Page 411 of Official Records.

Parcel 3

All that portion of the South three-quarters of the Southeast quarter of Section 24. Township 9 South, Range 20 East. Mount Diablo Base and Meridian, according to the Official Plat thereof, lying Westerly of the Westerly line of State Highway No. 41.

Excepting Therefrom that portion thereof described in Grant Deed to the State of California, recorded April 8, 1987 in Book 1963. Page 411 of Official Records.

Parcel 4

The East 200.00 feet of the Southeast quarter of the Southwest quarter of Section 13 and the East 200 feet of the Northeast quarter of the Northwest quarter of Section 24, all in Township 9 South, Range 20 East, Mount Diablo Base and Meridian, in the unincorporated area, County of Madera, State of California, according to the Official Plat thereof.

Containing 217.88 acres, more or less.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27224 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/A0A51010.999900]

Land Acquisitions; Torres Martinez Desert Cahuilla Indians, California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary—Indian Affairs has made a final determination to acquire 195.54 acres, more or less, into trust for The Torres Martinez Desert Cahuilla Indians, California.

DATES: This final determination was made on December 7, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Sharlene M. Round Face, Bureau of Indian Affairs, Division of Real Estate Services, 1001 Indian School Road NW, Albuquerque, NM 87104, telephone (505) 563–3132.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual, and is published to comply with the requirement of 25 CFR 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly published in the **Federal Register**.

On the date listed in the **DATES** section of this notice, the Assistant Secretary—Indian Affairs issued a decision to accept land in trust for the Torres Martinez Desert Cahuilla Indians, California under the authority of Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984) pursuant to the mandatory provisions of the Torres-Martinez Desert Cahuilla Indians Claims Settlement Act contained in Title VI of the Omnibus Indian Advancement Act, Public Law 106–568, 114 Stat. 2868, enacted December 27, 2000.

Torres Martinez Desert Cahuilla Indians, California

Mecca Ranch Property

ALL THAT CERTAIN REAL PROPERTY IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA, DESCRIBED AS FOLLOWS:

PARCEL A: APN 729–040–003 & 729–040–004

THE WEST HALF OF THE NORTHEAST QUARTER AND THE EAST HALF OF THE EAST HALF OF THE NORTHWEST QUARTER OF SECTION 20, TOWNSHIP 7 SOUTH, RANGE 9 EAST, SAN BERNARDINO MERIDIAN, ACCORDING TO THE OFFICIAL PLAT THEREOF.

PARCEL B: APN 729–040–005–5

THAT PORTION OF THE EAST HALF OF THE NORTHEAST QUARTER OF SECTION 20, TOWNSHIP 7 SOUTH, RANGE 9 EAST, SAN BERNARDINO MERIDIAN, ACCORDING TO THE OFFICIAL PLAT THEREOF, DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF SECTION 20, TOWNSHIP 7 SOUTH, RANGE 9 EAST, SAN BERNARDINO BASE AND MERIDIAN; THENCE SOUTH 0°50′40″ EAST, ALONG THE EAST LINE OF SAID SECTION 20, A DISTANCE OF 59.33 FEET TO THE SOUTHWEST LINE OF THE RIGHT OF WAY OF THE SOUTHERN PACIFIC RAILROAD TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING ALONG THE EAST LINE OF SECTION 20, SOUTH 0°50′40″ EAST, A DISTANCE OF 114.72 FEET TO A POINT IN THE NORTH RIGHT OF WAY LINE OF STATE HIGHWAY NO. 111;

THENCE NORTH 61°30′15″ WEST, ALONG THE NORTH RIGHT OF WAY LINE OF SAID STATE HIGHWAY, A DISTANCE OF 365.10 FEET TO THE NORTH LINE OF SAID SECTION 20;

THENCE SOUTH 89° 58'' 19'' EAST, ALONG THE NORTH LINE OF SECTION 20, A DISTANCE OF 209.79 FEET TO THE SOUTHWEST LINE OF THE RIGHT OF WAY OF THE SOUTHERN PACIFIC RAILROAD;

THENCE SOUTH 61°30′15″ EAST ALONG SAID RIGHT OF WAY LINE, A DISTANCE OF 124.45 FEET TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THE NORTH 30 FEET AND THE EAST 30 FEET THEREOF.

ALSO EXCEPTING THEREFROM ALL MINERALS, OIL, GAS AND OTHER HYDROCARBONS, AND ALL OTHER SUBSTANCES PRODUCED THEREWITH, AND RIGHTS PERTAINING THERETO, IN, ON, UNDER, OR THAT MAY BE PRODUCED FROM SAID LAND, AS RESERVED BY DANTE A. GAIIANIGA AND ALICE M. GAIIANIGA, AS TRUSTEES UNDER THAT CERTAIN DECLARATION OF TRUST, DATED DECEMBER 6, 1971, IN THE DEED RECORDED MARCH 24, 1976 AS INSTRUMENT NO. 38365 OF OFFICIAL RECORDS OF RIVERSIDE COUNTY, CALIFORNIA.

PARCEL C: APN 729–040–006–6

THE EAST HALF OF THE NORTHEAST QUARTER OF SECTION 20, TOWNSHIP 7 SOUTH, RANGE 9 EAST, SAN BERNARDINO MERIDIAN, ACCORDING TO THE OFFICIAL PLAT THEREOF.

EXCEPTING THEREFROM THAT PORTION INCLUDED IN THE RIGHT–OF–WAY OF THE SOUTHERN PACIFIC RAILROAD COMPANY.

ALSO EXCEPTING THEREFROM THOSE PORTIONS CONVEYED TO THE STATE OF CALIFORNIA BY DEED RECORDED MARCH 9, 1948 IN BOOK 894, PAGE 456 OF OFFICIAL RECORDS OF RIVERSIDE COUNTY, CALIFORNIA.

ALSO EXCEPTING THEREFROM THAT PORTION CONVEYED TO COACHELLA VALLEY COUNTY WATER DISTRICT BY DEED RECORDED JULY 2, 1949 IN BOOK 1089, PAGE 363 OF OFFICIAL RECORDS.

ALSO EXCEPTING THEREFROM THE NORTH 30 FEET AND THE EAST 30 FEET THEREOF.

ALSO EXCEPTING THEREFROM THE WEST 90, FEET OF THE EAST 150

FEET OF THE SOUTH 1278.18 FEET AS CONVEYED TO THE COACHELLA VALLEY COUNTY WATER DISTRICT, A PUBLIC AGENCY OF THE STATE OF CALIFORNIA, AS SET FORTH AND DESCRIBED IN THAT CERTAIN DOCUMENT RECORDED JUNE 9, 1958 IN BOOK 2282, PAGE 595 OF OFFICIAL RECORDS.

ALSO EXCEPTING THEREFROM THAT PORTION THEREOF DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF SECTION NORTH 20, TOWNSHIP 7 SOUTH, RANGE 9 EAST, SAN BERNARDINO BASE AND MERIDIAN;

THENCE SOUTH 0°50′40″ EAST, ALONG THE EAST LINE OF SAID SECTION 20, A DISTANCE OF 59.33 FEET TO THE SOUTHWEST LINE OF THE RIGHT OF WAY OF THE SOUTHERN PACIFIC RAILROAD TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING ALONG THE EAST LINE OF SECTION 20, SOUTH 0°50′40″ EAST, A DISTANCE OF 114.72 FEET TO A POINT IN THE NORTH RIGHT OF WAY LINE OF STATE HIGHWAY NO. 111;

THENCE NORTH 61°30′15″ WEST, ALONG THE NORTH RIGHT OF WAY LINE OF SAID STATE HIGHWAY, A DISTANCE OF 365.10 FEET TO THE NORTH LINE OF SAID SECTION 20;

THENCE SOUTH 89°58′19″ EAST, ALONG THE NORTH LINE OF SECTION 20, A DISTANCE OF 209.79 FEET TO THE SOUTHWEST LINE OF THE RIGHT OF WAY OF THE SOUTHERN PACIFIC RAILROAD;

THENCE SOUTH 61°30′15″ EAST ALONG SAID RIGHT OF WAY LINE, A DISTANCE OF 124.45 FEET TO THE TRUE POINT OF BEGINNING.

ALSO EXCEPTING THEREFROM ALL MINERALS, OIL, GAS AND OTHER HYDROCARBONS, AND ALL OTHER SUBSTANCES PRODUCED THEREWITH, AND RIGHTS PERTAINING THERETO, IN, ON, UNDER, OR THAT MAY BE PRODUCED FROM SAID LAND, AS RESERVED BY DANTE A. GAIIANIGA AND ALICE M. GAIIANIGA, AS TRUSTEES UNDER THAT CERTAIN DECLARATION OF TRUST, DATED DECEMBER 6, 1971 IN DEED RECORDED MARCH 24, 1976 AS INSTRUMENT NO. 38365 OF OFFICIAL RECORDS OF RIVERSIDE COUNTY, CALIFORNIA.

APN: 729–040–003–3, 729–040–004–4, 729–040–005–5, 729–040–006–6

Containing 195.54 acres more or less.

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27222 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/ A0A501010.999900253G]

Indian Gaming; Tribal-State Class III Gaming Compacts Taking Effect in the State of California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The State of California submitted compacts governing certain forms of Class III gaming with six Tribes in California. This notice announces that the following compacts are taking effect: the Tribal-State Compact between the State of California and the Ione Band of Miwok Indians; the Tribal-State Compact between the State of California and the Mooretown Rancheria of Maidu Indians of California; the Tribal-State Compact between the State of California and Paskenta Band of Nomlaki Indians; the Tribal-State Compact between the State of California and the Shingle Springs Band of Miwok Indians; the Tribal-State Compact between the State of California and the Tolowa Dee-Ni' Nation; and the Tribal-State Compact between the State of California and the Tule River Indian Tribe of California.

DATES: The compacts take effect on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts are subject to review and approval by the Secretary. On October 14, 2020, the State of California submitted compacts governing certain forms of Class III gaming with six Tribes in California. The Secretary took no action on the following compacts within 45 days of their submission: The Tribal-State Compact between the State of California and the Ione Band of Miwok Indians; the Tribal-State Compact between the State of California and the Mooretown Rancheria of Maidu Indians of California; the Tribal-State Compact between the State of California and Paskenta Band of Nomlaki Indians; the Tribal-State Compact between the State of California and the Shingle Springs Band of Miwok Indians; the Tribal-State Compact between the State of California and the Tolowa Dee-Ni' Nation; and the Tribal-State Compact between the State of California and the Tule River Indian Tribe of California. Therefore, the Compacts are considered to have been approved, but only to the extent they are consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Tara Sweeney,

Assistant Secretary—Indian Affairs.

[FR Doc. 2020–27221 Filed 12–10–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[212D0102DM/DS64600000/ DLSN00000.000000/DX.64601]

Notice of Senior Executive Service Performance Review Board Appointments

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of Appointments.

SUMMARY: This notice provides the names of individuals appointed to serve on the Department of the Interior Senior Executive Service (SES) Performance Review Board.

DATES: These appointments take effect upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: To request additional information about this notice, contact Raymond Limon, Deputy Assistant Secretary—Human Capital and Diversity/Chief Human Capital Officer, by email at *Raymond_Limon@ios.doi.gov,* or by telephone at (202) 208–3100.

SUPPLEMENTARY INFORMATION: The individuals appointed to serve on the Department of the Interior SES Performance Review Board are as follows:

BARRETT, ANNE MICHELE
BEARQUIVER, KEVIN T.
BOCKMIER, JOHN M.
BUCKNER, SHAWN M.
GRAY, LORRI J.
HAMBLETON, RYAN M.
JORGENSON, SARAH T.
KEABLE, EDWARD T.
ROMANIK, PEG A.

SHOPE, THOMAS D.
SUAZO, RAYMOND
WEBER, WENDI

Authority: Title 5, U.S. Code, 4314

Raymond Limon,

Deputy Assistant Secretary—Human Capital and Diversity Chief Human Capital Officer.

[FR Doc. 2020–27285 Filed 12–10–20; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[20X.LLAKF03000 L16100000.PN0000]

Notice of Availability for the Central Yukon Draft Resource Management Plan/Environmental Impact Statement, Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) releases the Central Yukon Draft Resource Management Plan/Environmental Impact Statement (RMP/EIS) for public review and comment. The BLM will hold virtual public meetings and Alaska National Interest Lands Conservation Act (ANILCA) Section 810 subsistence-related hearings regarding the Central Yukon Draft RMP/EIS. Copies or notification of the electronic availability for the Central Yukon Draft RMP/EIS are being sent to affected federal, state, tribal, and local government agencies and to other stakeholders.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Draft EIS within 90 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will announce virtual public meetings, subsistence-related hearings, and any other public participation activities at least 15 days in advance on the NEPA Register program page, *https://eplanning.blm.gov/eplanning-ui/project/35315/510,* as well as through public notices, press releases, social media posts, and/or mailings.

ADDRESSES: You can review and download the Central Yukon Draft RMP/EIS online from the BLM's NEPA Register at *https://eplanning.blm.gov/eplanning-ui/project/35315/510.* Select the ''Documents'' tab to find the electronic version of this material. Hard copies of the Draft RMP/EIS are also available for public inspection at the offices listed in this section in compliance with current COVID–19 protocols.

You may provide comments by mail, fax, email, or in person. Mail comments to: BLM Central Yukon Field Office, Attention: Central Yukon Draft RMP/EIS, 222 University Avenue, Fairbanks, AK 99709. Fax comments to (907) 474–2282 or email comments to *CentralYukon@blm.gov.* Hand-deliver comments to any of the locations listed in this section in compliance with current COVID–19 protocols.

Please contact each of the following facilities before visiting to determine their specific COVID–19 protocols, which might include needing an appointment and face mask to enter:

BLM Fairbanks District Office, 222 University Avenue, Fairbanks, AK 99709, (907) 474–2200.

BLM Alaska Public Information Center, James M. Fitzgerald Federal Building, 222 West 7th Avenue, Anchorage, AK 99513, (907) 271–5960.

Alaska Resources Library & Information Services, 3211 Providence Drive, Suite 111, Anchorage, AK 99508, (907) 272–7547.

Alaska Public Lands Information Center, 101 Dunkel Street Suite 110, Fairbanks, AK 99701, (907) 459–3730.

FOR FURTHER INFORMATION CONTACT: Michelle Ethun, BLM Central Yukon Field Office, at (907) 474–2253 or *methun@blm.gov.* People who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Central Yukon Draft RMP/EIS is a comprehensive framework for future public land management actions in the Central Yukon region of Alaska. The planning area consists of about 55.7 million acres of land, including approximately 13.3 million acres of public lands managed by the BLM Central Yukon Field Office.

The Record of Decision for the Central Yukon RMP/EIS will guide management of these public lands for the next 15 to 20 years for the benefit of current and future generations as part of BLM's multiple-use mission. This planning effort is updating management decisions for public land uses and resources, including subsistence resources, mineral exploration and development, and recreation. When complete, the updated Central Yukon RMP will replace the Utility Corridor RMP (1991), the original Central Yukon RMP (1986), and portions of the Southwest Management Framework Plan (1981), as well as provide RMP-level decisions for unplanned lands west of Fairbanks. Although still draft, it provides:

- Consolidated direction under one resource management plan to address land and resource use and development on BLM-managed public lands within the planning area.
- An analysis of the environmental effects that could result from implementing the alternatives proposed in the Central Yukon Draft RMP/EIS. This Central Yukon Draft RMP/EIS evaluates five alternatives for managing the planning area. Alternative A, the no action alternative, represents existing management described by current land use plans and provides the benchmark against which to compare the other alternatives. Alternative B emphasizes reducing the potential for competition between development uses and subsistence resources by identifying key areas for additional management actions. Alternative C1 emphasizes a blend of resource protection and development at the planning level to maintain the long-term sustainability of resources while providing for multiple resource uses. Alternative C2, which is the agency preferred alternative, emphasizes management to facilitate resource development while applying habitat management and administrative designations to accommodate multiple uses. Alternative D focuses on maximizing BLM-managed public lands for development potential with fewer management restrictions at the planning level. Alternatives B, C1, C2, and D were developed using input from the public, tribes, stakeholders, and cooperating agencies. Major planning issues addressed include subsistence resources, water resources, fisheries, and wildlife; forestry; minerals and mining; recreation; travel management and access; and areas of critical environmental concern. Section 810 of ANILCA requires the BLM to evaluate the effects of all alternatives presented in the Draft EIS on subsistence resources and activities, as well as hold public hearings if it finds that any alternative may significantly restrict subsistence uses. The preliminary evaluation of impacts analyzed in the Central Yukon Draft RMP/EIS found that associated impacts may significantly restrict subsistence uses. Therefore, the BLM will hold virtual public hearings on subsistence resources and activities in conjunction with the Central Yukon

Draft RMP/EIS virtual public meetings for potentially affected communities. Before including your address, phone number, email address, or other personally identifying information in your comment, be aware that your entire comment—including your personally identifying information—may be made publicly available at any time. While you can ask the BLM in your comment to withhold your personally identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 16 U.S.C. 3120(a); 40 CFR 1506.6(b)

Chad B. Padgett,

State Director, Alaska.

[FR Doc. 2020–27253 Filed 12–10–20; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVC02000 L71220000.EU0000 LVTFF2007240 20X MO# 4500144974]

Notice of Intent To Prepare an Environmental Assessment and Resource Management Plan Amendment, for the Yerington Anaconda Mine Site Disposal, Lyon County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the United States Department of the Interior, Bureau of Land Management (BLM) Sierra Front Field Office, Carson City, Nevada, intends to prepare an Environmental Assessment (EA) and Land Use Plan Amendment (LUPA) to the current 2001 Carson City Resource Management Plan (CRMP) to analyze the potential impacts of approving the direct sale of surface and mineral estates of 2,062 acres of public lands to Atlantic Richfield Corporation (ARC) in Lyon County, Nevada. This notice announces the beginning of the scoping process to solicit public comments and identify issues to be considered in the EA.

DATES: This notice initiates the public scoping process for the EA. Comments on issues to be considered in the EA may be submitted in writing until January 11, 2021. Comments must be received prior to the close of the scoping period for the BLM to include them in the EA. The BLM will provide additional opportunities for public participation upon publication of the EA.

ADDRESSES: You may submit comments related to the ARC project by any of the following methods:

- *Email: gbuma@blm.gov;* include ''Anaconda Disposal Project EA Comments'' in the subject line.
- *Mail:* BLM, Sierra Front Field Office, attn. Gerrit Buma, 5665 Morgan Mill Road, Carson City, Nevada 89701.

FOR FURTHER INFORMATION CONTACT: For questions about the proposed ARC project, contact Mr. Gerrit Buma, Planning and Environmental Coordinator at: 775–885–6004, 5665 Morgan Mill Road, Carson City, Nevada 89701, or by email to: *gbuma@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM intends to prepare an EA and LUPA to the CRMP to analyze the potential impacts of approving the direct sale of 2,062 acres of public lands to ARC in Lyon County, Nevada. The BLM anticipates publishing an EA for the Yerington Anaconda Mine Site Disposal in early 2021. This document would be available for a 30-day public comment period.

The EA will evaluate a request from ARC for a direct sale of public lands associated with the Anaconda Mine site near the town of Yerington in Lyon County, Nevada, as provided for in Section 203(f) of FLPMA. ARC's purpose for this request is to consolidate land ownership, both the surface and mineral estate, to facilitate better management of the Anaconda Mine site remediation. The BLM must amend the 2001 CRMP to ensure all lands within the designated 2,062 acres are suitable for disposal to the private sector. By this notice, the BLM is complying with the requirements in 43 CFR 1610.2(c) to notify the public of potential amendments to the 2001 CRMP. The BLM will integrate the land use planning process with the NEPA analysis process for this project. A Notice of Realty Action will be prepared for publication upon the publication of this notice. The project website can be found at *https://go.usa.gov/xdVfj.*

The lands to be identified as suitable for disposal under this Notice are legally described as follows:

Mount Diablo Meridian, Nevada

T. 13 N., R. 25 E.,
Sec. 4, SW1/4SW1/4 and SE1/4SE1/4;
Sec. 5, lots 1 thru 3, lots 5 thru 7, and SW1/4NE1/4;
Sec. 7, E1/2NE1/4NE1/4, E1/2SE1/4NE1/4, and E1/2NE1/4SE1/4;
Sec. 8, lots 1, 3, and 4, NE1/4SW1/4SW1/4, N1/2NW1/4SW1/4SW1/4, SE1/4NW1/4SW1/4SW1/4, NE1/4SW1/4SW1/4SW1/4, and SE1/4SW1/4SW1/4;
Sec. 9, W1/2NE1/4NE1/4, W1/2NE1/4, SE1/4NE1/4, N1/2NW1/4, SE1/4NW1/4, NE1/4SW1/4, S1/2SW1/4, and SE1/4;
Sec. 16, lots 3 thru 10, NW1/4NE1/4, and N1/2NW1/4;
Sec. 17, lot 7, lots 13 thru 15, N1/2SW1/4NE1/4, NE1/4NW1/4, NE1/4NW1/4NW1/4, NE1/4SE1/4NW1/4NW1/4, N1/2SE1/4NW1/4, and W1/2SW1/4SE1/4NW1/4;
Sec. 20, lots 2 thru 5, E1/2NE1/4NW1/4NE1/4, SE1/4NW1/4NE1/4, E1/2SW1/4NE1/4, N1/2NE1/4NW1/4SE1/4, SE1/4NE1/4NW1/4SE1/4, and NE1/4SE1/4NW1/4SE1/4;
Sec. 21, lots 1 thru 6, SW1/4NW1/4, SW1/4, N1/2SW1/4SE1/4, SW1/4SW1/4SE1/4, and W1/2SE1/4SW1/4SE1/4;
Sec. 28, W1/2NE1/4NW1/4NE1/4, W1/2NW1/4NE1/4, W1/2NE1/4SE1/4NW1/4NE1/4, W1/2SE1/4NW1/4NE1/4, W1/2SE1/4SE1/4NW1/4NE1/4, NE1/4NW1/4, NE1/4NW1/4NW1/4, N1/2NW1/4NW1/4, N1/2SE1/4NW1/4NW1/4, N1/2NE1/4SE1/4NW1/4, and N1/2NW1/4SE1/4NW1/4.

Before including your address, phone number, email address, or other personal identifying information (PII) in your comment, you should be aware that your entire comment, including your PII, may be made publicly available at any time. While you may request in your comment that your PII be withheld from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1501.7.

Kimberly D. Dow,

Acting Field Manager, Sierra Front Field Office.

[FR Doc. 2020–27349 Filed 12–10–20; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[20X LLUTC02000 L14400000.FR0000 241A; UTU–90172]

Notice of Realty Action: Recreation and Public Purposes Act Classification and Conveyance of Public Land in Sevier County, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Notice of Realty Action (NORA) announces the Bureau of Land Management (BLM) proposes to patent 154.694 acres of public land in Sevier County, Utah, to Sevier County for the expansion of the Sevier County landfill.

DATES: Interested parties may submit comments regarding this classification and conveyance of public land on or before January 25, 2021.

ADDRESSES: Comments may be submitted by mail to the Richfield Field Office, 150 East 900 North, Richfield, Utah, 84701 or by email to *BLM_UT_RF_Comments@blm.gov,* with a subject line of ''Sevier County NORA comment.'' See ''Classification Comments'' and ''Application Comments'' portions of this notice for specifics regarding subjects open to comments. Project information is available for review at *https://go.usa.gov/xvjmr* or by contacting the Richfield Field Office at the above address or at (435) 896–1500.

FOR FURTHER INFORMATION CONTACT: Michael Utley, Realty Specialist, at *mutley@blm.gov* or (435) 896–1515. Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to leave a message or question for the above individual. The FRS is available 24 hours a day, 7 days a week. Replies are provided during normal business hours.

SUPPLEMENTARY INFORMATION: In accordance with Section 7 of the Taylor Grazing Act and Executive Order No. 6910, as amended, the BLM examined certain public lands in Sevier County, Utah, and found them suitable for classification for conveyance to Sevier County under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended., 43 U.S.C. 869 *et seq.;* Sec. 7 of the Taylor Grazing Act, 43 U.S.C. 315(f).

Sevier County submitted a statement in compliance with the regulations at 43 CFR 2741.4(b), and proposes to use the lands for expansion of the existing Sevier County landfill. The lands consist of 154.694 acres, must conform to the official plat of survey, and are legally described below. Sevier County has not applied for more than the 6,400-acre limitation for recreation uses in a year (or 640 acres if a nonprofit corporation or association), nor more than 640 acres for each of the programs involving public resources other than recreation. The lands examined and identified as suitable for lease or conveyance under the R&PP Act are legally described as:

Salt Lake Meridian, Utah

T. 22 S., R. 1 W.,
Sec. 34, SW¼NW¼SE¼ and W½SW¼SE¼.
T. 23 S., R. 1 W.,
Sec. 4, S½SW¼SE¼;
Sec. 9, lots 16 and 19, NW¼NE¼, N½SW¼NE¼, and SW¼SW¼NE¼.

The areas described aggregate 154.694 acres.

The lands are not needed for any Federal purposes.

Lease or conveyance of the lands for recreational or public purposes use is in conformance with the BLM Richfield Field Office Resource Management Plan, approved in October 2008, and would be in the public's interest. The BLM analyzed the parcel in a site-specific environmental assessment (EA) numbered DOI–BLM–UT–C020–2018–0039–EA. The EA has been published on the project's ePlanning site at *https://go.usa.gov/xvjmr.*

The conveyance of these parcels will not result in the loss of recreational access to adjacent lands in accordance with Secretary's Order 3373, Evaluating Public Access in Bureau of Land Management Public Land Disposals and Exchanges. There are no anticipated impacts to recreational access to adjacent lands from the conveyance because the existing roads will either be retained in place or rerouted by Sevier County. Because of this, access will continue to be provided to the public lands both north and south of the two conveyance parcels.

All interested parties will receive a copy of this notice once it is published in the **Federal Register**. A copy of the **Federal Register** notice with information about this proposed realty action will publish in a newspaper of local circulation once a week for three consecutive weeks. The regulations at 43 CFR subpart 2741 addressing requirements and procedures for conveyances under the R&PP Act do not require a public meeting. Upon publication of this notice in the **Federal Register**, the lands will be segregated from all other forms of appropriation under the public land laws, including locations under the mining laws, except for lease or conveyance under the R&PP Act and leasing under the mineral leasing laws.

The lease or conveyance of the land, when issued, will be subject to the following terms, conditions, and reservations:

1. A right-of-way thereon for ditches and canals constructed by the authority of the United States Act of August 30, 1890 (26 Stat. 391; 43 U.S.C. 945).

2. Provisions of the R&PP Act and to all applicable regulations of the Secretary of the Interior.

3. All mineral deposits in the land so patented, and the right to prospect for, mine, and remove such deposits from the same under applicable law and regulations as established by the Secretary of the Interior are reserved to the United States, together with all necessary access and exit rights.

4. Lease or conveyance of the parcel is subject to valid existing rights of record.

5. An appropriate indemnification clause protecting the United States from claims arising out of the lessee's/patentee's use, occupancy, or occupations on the leased/patented lands.

6. A limited reversionary provision stating the title shall revert to the United States upon a finding, after notice and opportunity for a hearing, that the patentee has not substantially developed the lands in accordance with the approved plan of development on or before the date five years after the date of conveyance. No portion of the land shall under any circumstance revert to the United States if any such portion has been used for solid waste disposal, or for any other purpose, which may result in the disposal, placement, or release of any hazardous substance.

7. The lessee/patentee shall comply with all Federal and State laws applicable to the disposal, placement, or release of hazardous substances.

8. Any other reservations the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein.

Classification Comments: Interested persons may submit comments involving the classification and suitability of the land for expansion and development of the existing landfill. Additionally, interested persons may submit comments regarding the specific use proposed in the application and plan of development and management, and whether the BLM followed proper administrative procedures in considering the decision to lease and convey under the R&PP Act.

Application Comments: Interested persons may submit comments regarding the specific use proposed in the application and plan of development and management, and whether the BLM followed proper administrative procedures in considering the decision to lease and convey under the R&PP Act.

Any adverse comments will be reviewed by the BLM Utah State Director or other authorized official of

the Department of the Interior, who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification will become effective on February 9, 2021. The lands will not be offered for lease or conveyance until after the classification becomes effective.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

Authority: 43 CFR 2741.5.

Gregory Sheehan,

State Director.

[FR Doc. 2020–27271 Filed 12–10–20; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L1220000.EA0000 LLAZC03000 21X]

Notice of Temporary Closure and Temporary Restrictions of Selected Public Lands in La Paz County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of temporary closure and restrictions.

SUMMARY: As authorized under the provisions of the Federal Land Policy and Management Act of 1976, as amended, notice is hereby given that temporary closures and temporary restrictions of activities will be in effect on public lands administered by the Lake Havasu Field Office, Bureau of Land Management (BLM), to minimize the risk of potential collisions with spectators and racers during the annual Best In The Desert (BITD) off-highway vehicle (OHV) race events, Parker 250 and Parker 425, authorized under a Special Recreation Permit (SRP).

DATES: This notice is effective upon publication. The temporary restrictions for the Parker 425 take effect at noon, January 13, 2021, through 11:59 p.m., January 16, 2021. The temporary closure for the Parker 425 takes effect at 7 a.m., January 15, 2021, through 11:59 p.m., January 16, 2021.

The temporary restrictions for the Parker 250 take effect at noon, February 17, 2021, through 11:59 p.m., February 20, 2021. The temporary closure for the Parker 250 takes effect at 8 a.m., February 19, 2021, through 11:59 p.m., February 20, 2021. All times are listed in local time.

FOR FURTHER INFORMATION CONTACT: Jason West, Field Manager, BLM Lake Havasu Field Office, 1785 Kiowa Avenue, Lake Havasu City, Arizona 86403, 928–505–1200. Also see the Lake Havasu Field Office website: *https://www.blm.gov/office/lake-havasu-field-office.* Persons who use a telecommunications device for hearing impaired (TDD) may call the Federal Relay Service (FRS) at 800–877–8339 to contact the above individual during normal business hours. FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: On January 6, 2015, the Decision Record authorizing the BITD Parker Races SRP was signed. This permit authorizes the BITD to utilize the Parker 400 course for the Parker 425 race event on January 13 through 16, 2021, and for the Parker 250 race event on February 18 through 20, 2021. The permit is authorized from 2015 through 2024. The Environmental Assessment analyzing these routes (EA #DOI–BLM–AZ–C030–2014–0040) concluded that allowing permitted motorized racers exclusive use of the *Lake Havasu Field Office Record of Decision/Approved Resource Management Plan* (2007) designated Parker 400 course would mitigate safety concerns. These routes receive the most intense and concentrated high-speed use during the two annual permitted events.

These temporary closures and restrictions affect public lands in and around the Parker 400 course near the communities of Parker and Bouse in La Paz County, Arizona. The temporary restriction areas are shown on the maps entitled ''Parker 425 Map'' and ''Parker 250 Map'' found at *http://go.usa.gov/xfF8u.*

The temporary closures and restrictions are necessary because of the high-speed nature of the race event and the added safety concerns due to limited visibility when there is no daylight. Roads leading into the public lands under the temporary closure and restrictions will be posted with copies of the temporary closure, temporary restrictions, and associated maps to notify the public. The temporary closure and restriction orders will be posted in the Lake Havasu Field Office and online at *https://www.blm.gov/office/lake-havasu-field-office.* Maps of the affected area and other documents associated with this temporary closure are available at the Lake Havasu Field Office, 1785 Kiowa Avenue, Lake Havasu City, Arizona.

The closures and restrictions are issued under the authority of 43 CFR 8364.1, which allows the BLM to establish closures for the protection of persons, property, and public lands and resources. The closure and restrictions listed below are exactly the same as those published last year found at 84 FR 71458. Violation of any of the terms, conditions, or restrictions contained within this closure order may subject the violator to citation or arrest with a penalty or fine or imprisonment or both as specified by law.

Temporary Closure and Restrictions and Existing Regulations

1. Environmental Resource Management and Protection

a. No person may deface, disturb, remove, or destroy any natural object.

b. Fireworks: The use, sale, or possession of personal fireworks is prohibited.

c. Cutting or collecting firewood of any kind, including dead and downed wood or other vegetative material is prohibited.

d. Grey Water Discharge: The discharge and dumping of grey water onto the ground surface is prohibited. Grey water is defined as water that has been used for cooking, washing, dishwashing, or bathing and/or contains soap, detergent, food scraps, or food residue, regardless of whether such products are biodegradable or have been filtered or disinfected.

e. Black Water Discharge: The discharge and dumping of black water onto the ground surface is prohibited. Black water is defined as wastewater containing feces, urine, and/or flush water.

f. Human Waste: The depositing of human waste (liquid and/or solid) on the ground surface is prohibited.

g. Trash: The discharge of any and all trash/litter onto the ground surface is prohibited. All event participants must pack out or properly dispose of all trash at an appropriate disposal facility.

h. Hazardous Materials: The dumping or discharge of vehicle oil, petroleum products, or other hazardous household, commercial, or industrial refuse or waste onto the ground surface is prohibited. This applies to all recreational vehicles, trailers, motorhomes, port-a-potties, generators, and other camp infrastructure.

2. Alcohol/Prohibited Substance

a. Possession of an open container of an alcoholic beverage by the driver or

operator of any motorized vehicle, whether or not the vehicle is in motion, is prohibited.

b. Possession of alcohol by minors. The following are prohibited:

i. Consumption or possession of any alcoholic beverage by a person under 21 years of age on public lands.

ii. Selling, offering to sell, or otherwise furnishing or supplying any alcoholic beverage to a person under 21 years of age on public lands.

c. Operation of a motor vehicle while under the influence of alcohol, marijuana, narcotics, or dangerous drugs is prohibited.

3. Drug Paraphernalia

a. The possession of drug paraphernalia is prohibited.

4. Disorderly Conduct

a. Disorderly conduct is prohibited. Disorderly conduct means that an individual, with the intent of recklessly causing public alarm, nuisance, jeopardy, or violence, or recklessly creating a risk thereof:

i. Engages in fighting or violent behavior;

ii. Uses language, an utterance or gesture, or engages in a display or act that is physically threatening or menacing, or is done in a manner that is likely to inflict injury or incite an immediate breach of the peace.

iii. Obstructs, resists, or attempts to elude a law enforcement officer, or fails to follow their orders or directions.

5. Eviction of Persons

a. The temporary closure and restriction area is closed to any person who:

i. Has been evicted from the event by the permit holder, whether or not the eviction was requested by the BLM;

ii. Has been evicted from the event by the BLM; or

iii. Has been ordered by a law enforcement officer to leave the area of the permitted event.

b. Any person evicted from the event forfeits all privileges to be present within the temporary closure and restriction area.

6. Motor Vehicles

a. Motor vehicles must comply with the following requirements:

i. The operator of a motor vehicle must possess a valid driver's license.

ii. Motor vehicles and trailers must possess evidence of valid registration.

iii. Motor vehicle operators must possess evidence of valid insurance.

iv. Motor vehicles and trailers must not block a street used for vehicular travel or a pedestrian pathway. Parking any off-highway vehicle in violation of posted restrictions; or in such a manner as to obstruct or impede normal or emergency traffic movement or the parking of other vehicles; creating a safety hazard; or endangering any person, property, or feature is prohibited. Vehicles parked in violation are subject to citation, removal, and/or impoundment at the owner's expense.

v. Motor vehicles must not exceed the posted speed limit.

vi. Operating a vehicle through, around, or beyond a restrictive sign, barricade, fence, or traffic control barrier or device is prohibited.

vii. Failure to obey any person authorized to direct traffic or control access to event area including law enforcement officers, BLM officials, and designated race officials is prohibited.

b. The temporary closure area is closed to motor vehicle use, except as provided below. Motor vehicles may be operated within the temporary closure area under the circumstances listed below:

i. Race participants and support vehicles on designated routes;

ii. BLM, medical, law enforcement, and firefighting vehicles are authorized at all times;

iii. Vehicles operated by the permit holder's staff or contractors and volunteers are authorized at all times. These vehicles must display evidence of event registration at all times in such manner that it is visible to the front of the vehicle while the vehicle is in motion.

7. Public Camping

a. The temporary closure and restriction area is closed to public camping with the following exceptions:

i. The permitted event's spectators, who are camped in designated spectator areas, as marked by protective fencing, barriers, and informational signage provided by the permit holder;

ii. The permit holder's authorized staff, contractors, and BLM-authorized event managers.

b. Spectator area site reservations, denying other visitors or parties from utilizing unoccupied portions of the spectator area by marking with flags, tape, posts, cones, etc., is prohibited. Vehicles and trailers may not be left unattended for over 72 hours.

c. Allowing any pet or other animal to be unrestrained is prohibited. All pets must be restrained by a leash of not more than six feet in length.

d. Failure to observe restricted area quiet hours of midnight to 6 a.m. is prohibited.

8. Weapons

a. Discharging or use of firearms or other weapons is prohibited.

b. The prohibition above shall not apply to county, state, tribal and Federal law enforcement personnel who are working in their official capacity at the event.

9. Race Course Closure

a. The designated race course as shown in the Lake Havasu Field Office approved RMP and Decision Record is closed to public entry during the temporary closure.

b. The temporary closure area is closed to use by members of the public with the following exceptions:

i. The person is an employee or authorized volunteer with the BLM, a law enforcement officer, emergency medical service provider, fire protection provider, or another public agency employee working at and assigned to the event;

ii. The person is working at or attending the event directly on behalf of the permit holder.

c. Failure to obey any official sign posted by the BLM, law enforcement, La Paz County, or the permit holder is prohibited.

Enforcement: Any person who violates these closures or restrictions may be tried before a United States magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, state or local officials may also impose penalties for violations of Arizona law. A complete list of laws and regulations applicable to public lands in Arizona may be viewed at: *http://www.azd.uscourts.gov/sites/default/files/general-orders/19-14.pdf.*

(Authority: 43 CFR 8364.1)

Jason West,

Field Manager.

[FR Doc. 2020–27254 Filed 12–10–20; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0002; DS63644000 DRT000000.CH7000 201D1113RT]

States' Decisions on Participating in Accounting and Auditing Relief for Federal Oil and Gas Marginal Properties

AGENCY: Office of the Secretary, Office of Natural Resources Revenue, Interior.

ACTION: Notice.

SUMMARY: Office of Natural Resources Revenue (ONRR) regulations provide two types of accounting and auditing relief for Federal onshore or Outer Continental Shelf lease production from marginal properties. Each year, ONRR provides a list of qualifying marginal Federal oil and gas properties to States that receive a portion of Federal royalties from those properties. Each State then decides whether to participate in relief, and if so, whether to allow one or both relief options. For calendar year 2020, ONRR provides this notice of the affected States' decision regarding whether relief should be allowed and, if so, which type of relief will be allowed.

DATES: Effective January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Sudar, Market and Spatial Analytics, Coordination, Enforcement, Valuations, and Appeals Division, ONRR, at (303) 231–3511; or email to *Robert.Sudar@onrr.gov.*

SUPPLEMENTARY INFORMATION: The regulations, codified under 30 CFR part 1204, subpart C, implement certain provisions of section 7 of the Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (30 U.S.C. 1726), which allows States to relieve the lessees of marginal properties from certain reporting, accounting, and auditing requirements. Each State makes an annual determination as to whether to allow relief, and if so, what types. Two relief options are authorized: (1) Notification-based royalty report and payment relief which, if selected, allows lessees or designees to forgo filing monthly reports and making monthly royalty payments and, instead, to file one annual royalty report and make one annual royalty payment, and (2) other requested appropriate accounting and auditing relief, as proposed by lessees or designees and approved by ONRR, after consultation with the affected State(s). The regulations require ONRR to publish, no later than 30 days before the beginning of the calendar year, a list of the States and their decisions regarding marginal property relief.

To qualify for the first relief option (notification-based relief) for calendar year 2021, properties must produce less than 1,000 barrels-of-oil-equivalent (BOE) per year for the base period (July 1, 2019 through June 30, 2020). Annual reporting relief will begin January 1, 2021, with the annual report and royalty payment due February 28, 2022, or March 31, 2022, if you have an estimated payment on file. To qualify for the second relief option (other requested relief), the combined equivalent production of the marginal properties during the base period must equal an average daily well production of less than 15 BOE per well per day, as calculated under 30 CFR 1204.4(c).

The following table lists the States with qualifying marginal properties and each State's decision as to the relief options it will allow in calendar year 2021. An ''N/A'' means that the State did not provide ONRR its decision and, accordingly, no relief will be allowed to lessees in that State.

State	Notification-based relief (less than 1,000 BOE per year)	Request-based relief (less than 15 BOE per well per day)
Alabama	No	No.
Arkansas	N/A	Yes.
California	No	No.
Colorado	No	No.
Kansas	No	No.
Louisiana	Yes	Yes.
Michigan	Yes	Yes.
Mississippi	No	No.
Montana	No	No.
Nebraska	N/A	No.
Nevada	N/A	Yes.
New Mexico	No	Yes.
North Dakota	N/A	Yes.
Oklahoma	No	No.
South Dakota	Yes	Yes.
Utah	No	No.
Wyoming	Yes	No

A Federal oil and gas property located in a State where ONRR does not share a portion of Federal royalties with the State is eligible for relief if the property qualifies as marginal under 30 U.S.C. 1726(c). For information on how to obtain relief, please refer to 30 CFR 1204.205, viewable at *https://www.ecfr.gov/.*

Unless the information ONRR receives is proprietary data, all correspondence, records, or information that ONRR receives in response to this notice may be subject to disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. 552 *et seq.*). If applicable, please highlight any proprietary portions, including any supporting documentation, or mark the page(s) containing proprietary data. We protect proprietary information under the Trade Secrets Act (18 U.S.C. 1905), FOIA Exemption 4 (5 U.S.C. 552(b)(4)), and the Department of the Interior's FOIA regulations (43 CFR part 2).

Authority: Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.,* as amended by Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (RSFA, Pub. L. 104–185—Aug. 13, 1996, as corrected by Pub. L. 104–200—Sept. 22, 1996).

Kimbra G. Davis,

Director for the Office of Natural Resources Revenue.

[States' Decisions on Participating in Accounting and Auditing Relief for Federal Oil and Gas Marginal Properties]

[FR Doc. 2020–27267 Filed 12–10–20; 8:45 am]

BILLING CODE 4335–30–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR83550000, 212R5065C6, RX.59389832.1009676]

Change in Discount Rate for Water Resources Planning

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of change in discount rate.

SUMMARY: The Bureau of Reclamation is announcing the interest rate to be used by Federal agencies in the formulation and evaluation of plans for water and related land resources is 2.50 percent for fiscal year 2021. The prior year's rate, as announced in the **Federal Register** on December 17, 2019, was 2.75 percent for fiscal year 2020.

DATES: This discount rate is to be used for the period October 1, 2020, through and including September 30, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. Fernando Castro-Alvarez, Bureau of Reclamation, Reclamation Law Administration Division, P.O. Box 25007, Denver, Colorado 80225; telephone 303–445–2821.

SUPPLEMENTARY INFORMATION: The Water Resources Planning Act of 1965 and the Water Resources Development Act of 1974 require an annual determination of a discount rate for Federal water resources planning. The discount rate for Federal water resources planning for fiscal year 2021 is 2.50 percent. Discounting is to be used to convert future monetary values to present values.

This rate has been computed in accordance with Section 80(a), Public Law 93–251 (88 Stat. 34), and 18 CFR 704.39, which: (1) Specify that the rate will be based upon the average yield during The preceding fiscal year on interest-bearing marketable securities of the United States which, at the time the computation is made, have terms of 15 years or more remaining to maturity (average yield is rounded to nearest one-eighth percent); and (2) provide that the rate will not be raised or lowered more than one-quarter of 1 percent for any year. The U.S. Department of the Treasury calculated the specified average to be 1.5730 percent. In accordance with the Water Resource Council Rules and Regulations, the maximum adjustment allowed for the current fiscal year rate is one-quarter of one percentage point from the previous fiscal year rate, which was 2.75 percent. Therefore, the fiscal year 2021 rate is 2.50 percent.

The rate of 2.50 percent will be used by all Federal agencies in the formulation and evaluation of water and related land resources plans for the purpose of discounting future benefits and computing costs or otherwise converting benefits and costs to a common-time basis.

Signed:

Christopher J. Beardsley,

Director, Policy and Programs.

[FR Doc. 2020–27294 Filed 12–10–20; 8:45 am]

BILLING CODE 4332–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[EEEE500000 21XE1700DX EX1SF0000.EAQ000]

Leaders in Advancing Safety and Environmental Stewardship

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Safety and Environmental Enforcement (BSEE) developed objective, qualitative and quantifiable criteria to create a ''Leaders in Advancing Safety and Environmental Stewardship'' Recognition Program to recognize operators who demonstrate exemplary operating performance or sustained safety and environmental stewardship improvements on their Outer Continental Shelf (OCS) oil and gas facilities, including support vessels, and leadership within the industry regarding operational safety and environmental performance. BSEE's process for identifying ''Leaders in Advancing Safety and Environmental Stewardship'' is consistent with BSEE's inspection programs, regulations, and Notice to Operators and Lessees (NTL) No. 2008–N02, *Outer Continental Shelf (OCS) Inspection Program.* The ''Leaders in Advancing Safety and Environmental Stewardship'' Recognition Program will recognize OCS operators demonstrating high levels of operational safety, sustained safety improvement, or industry leadership on operational safety issues. The primary objective of the Recognition Program is to drive OCS operators to significantly improve safety and environmental prioritization, culture, and performance on OCS facilities and to encourage them to become leaders in industry regarding operational safety and environmental issues. Another objective is to create a platform through which BSEE can educate the public regarding the fact that OCS operators can conduct complex and high-risk operations on OCS oil and gas facilities in a way that is safe for personnel, the public, and the environment.

DATES: This notice will become effective on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Jason Mathews, Bureau of Safety and Environmental Enforcement, Chief, Safety Improvement Branch, (504) 731–1496, or by email: *jason.mathews@bsee.gov.*

SUPPLEMENTARY INFORMATION:

Each year, BSEE Gulf of Mexico and Pacific Regions conduct Annual Performance Reviews (APRs) of OCS operators. The APRs consist of a review of the following:

- The operator's compliance history, as reflected in findings from the BSEE Inspection Program;
- The operator's safety record as it relates to incidents;
- Any action that BSEE has forwarded to the BSEE Safety Enforcement Division (SED) for review for potential assessment of a civil penalty; and,
- The results of the most recent internal and regulatory audits of the operator's Safety and Environmental Management System (SEMS) program.

BSEE will use the information gathered during the APRs to provide factual bases for determining eligibility for operator recognition.

For an OCS operator to qualify for consideration as a Leader in Advancing Safety and Environmental Stewardship, the operator must have either:

1. An Injury/Illness Combined Rate (total recordables) less than the OCS average for the prior reporting year, or

2. Demonstrate two or more consecutive years of improvement of its Injury/Illness Combined Rate.

In addition, the OCS operator's operations for the reporting must not have included any of the following:

- Fatality;
- Incident with ≥ 3 injuries;
- Major pollution incidents;
- Major Fire/Explosion;
- ≥ 3 Incidents of Noncompliance (INCs) forwarded for civil penalty cases or $1 million in cumulative proposed fines;
- Loss of Well Control; (not to include shallow water flow)
- ≥ 3 Facilities on Increased Oversight List;
- Order to perform an additional Directed SEMS Audit; or,
- A sustained environmental compliance record <90 percent with assigned environmental mitigation measures and similar regulatory requirements; or,
- Placement on a Performance Improvement Plan.

If an OCS operator is disqualified by any of the factors above, BSEE may reconsider the operator for potential recognition if the issue(s) is satisfied prior to March 31st of the following year.

For OCS operators that meet the requirements above, BSEE will also look at how those operators are providing leadership within the industry regarding operational safety. BSEE will consider whether the OCS operator is offering

industry advice and details on steps it has taken that have resulted in significant improvement to its safety performance, and leadership positions it has taken within industry organizations, such as the American Petroleum Institute (API), the Offshore Operators Committee (OOC), or The Center for Offshore Safety (COS), with a focus on advancing safety. Similarly, BSEE will also assess how operators are providing guidance and supporting environmental research, mitigation assessments, and project validation of pollution prevention, spill preparedness/response, and environmental compliance efforts, which not only benefit their operations and stewardship culture, but every partner in the OCS energy program.

Environmental stewardship components that BSEE will consider include:

- A sustained compliance record (≤ 90-percent) with assigned environmental mitigation measures and similar regulatory requirements, as confirmed by office and field verification;
- Participation and leadership with critical Joint Industry Project (JIP) efforts and within environmental and/or pollution prevention-focused workgroups and teams;
- Response preparedness and planning assessments;
- Non-compulsory enhancements and innovation above and beyond standard pollution prevention requirements; and
- Repeated (100-percent) appropriate and constructive response on corrective/remedial actions associated with all noncompliance issues.

For information on the ''Leaders in Advancing Safety and Environmental Stewardship'' Recognition Program or the submission of comments, the public should contact Mr. Jason Mathews, Chief, Safety Improvement Branch, Regional Field Operations (GE 1073E), BSEE, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, (504) 731–1496.

BSEE will implement this program in 2021, with qualifying OCS operators recognized in 2022 for their 2020 and 2021 calendar year performance. BSEE will initiate performance reviews beginning in January 2021 and January 2022, and all OCS operators who meet the minimum requirements and are selected by BSEE for recognition, will be identified by April-May 2022.

Casey Hammond,

Principal Deputy Assistant Secretary, Land and Minerals Management.

[FR Doc. 2020–27237 Filed 12–10–20; 8:45 am]

BILLING CODE 4310–VH–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1088 (Rescission)]

Certain Road Construction Machines and Components Thereof; Commission Decision to Institute a Rescission Proceeding; Permanent Rescission of a Seizure and Forfeiture Order; Termination of the Rescission Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to institute a proceeding to determine whether to permanently rescind the Commission's seizure and forfeiture order (''SFO'') of January 14, 2020 (corrected January 23, 2020) issued against Wirtgen America, Inc. (''Wirtgen America''). The SFO is permanently rescinded. The rescission proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–4716. 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.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 29, 2017, based on a complaint, as supplemented, filed by Caterpillar Inc. of Peoria, Illinois and Caterpillar Paving Products, Inc. of Minneapolis, Minnesota (collectively, ''Caterpillar''). *See* 82FR 56625–26 (Nov. 29, 2017). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) (''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 road construction machines and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 7,140,693 (''the '693 patent''); 9,045,871; and 7,641,419. *See id.* The notice of investigation identifies the following respondents: Wirtgen GmbH of Windhagen, Germany; Joseph Vögele AG of Ludwigshafen, Germany; Wirtgen Group Holding GmbH of Windhagen, Germany; and Wirtgen America of Antioch, Tennessee (collectively, ''Wirtgen''). *See id.* The Office of Unfair Import Investigations is not a party to this investigation. *See id.*

On June 27, 2019, the Commission found a violation of section 337 in the above-identified investigation based on the infringement of claim 19 of the '693 patent and issued a limited exclusion order against the infringing articles and a cease and desist order (collectively, ''the remedial orders'') against Wirtgen America. The United States Customs and Border Protection (''Customs'') subsequently excluded six Wirtgen redesigned series 1810 machines in December 2019. Based on such exclusion, the Commission issued the subject SFO on January 14, 2020 (corrected January 23, 2020). On March 13, 2020, Wirtgen filed an appeal from the SFO (''the SFO appeal'') to the U.S. Court of Appeals for the Federal Circuit (''Federal Circuit'').

On January 30, 2020, Wirtgen filed a civil action against Customs and related U.S. government parties (collectively, ''the U.S. government'') in the U.S. Court of International Trade (''CIT'') under 28 U.S.C. 1581(a) and (i). The Commission moved to intervene to contest the CIT's exercise of jurisdiction, and the CIT denied the Commission's motion. The CIT exercised jurisdiction under section 1581(a) over the U.S. government's objections and granted summary judgment for Wirtgen as to the excluded entries of the redesigned machines at issue. The CIT also ordered Customs to release the machines for entry into the United States no later than Thursday, May 21, 2020. On July 14, 2020, the U.S. government appealed the CIT's decision to the Federal Circuit (''the CIT appeal'').

On May 21, 2020, arguing that the predicate for the SFO had been invalidated by the CIT, Wirtgen filed an emergency motion to stay or temporarily rescind the SFO pending resolution of any CIT appeal. On June 10, 2020, the Commission determined to deny Wirtgen's motion to stay, but granted Wirtgen's motion for temporary rescission of the SFO, thus temporarily suspending the SFO until such time as the CIT's decision is modified, stayed, or overturned. On June 15, 2020, the

Commission filed a motion to stay the SFO appeal pending reinstatement of the SFO by the Commission or resolution of any CIT appeal by the Federal Circuit. On July 29, 2020, the Federal Circuit granted the Commission's motion to stay the SFO appeal until the suspension of the SFO is lifted or until final disposition of the CIT appeal.

Concurrently, on January 16, 2020, the Commission instituted a modification proceeding to determine whether Wirtgen's redesigned series 1810 machines infringe claim 19 of the '693 patent. On August 31, 2020, the Commission determined that Wirtgen's redesigned machines do not infringe and issued modified remedial orders exempting the redesigned machines from the scope of the orders. Caterpillar did not appeal the Commission's non-infringement determination to the Federal Circuit, and therefore, the Commission's non-infringement determination is now final. Consequently, on November 5, 2020, the U.S. government moved to dismiss the CIT appeal. On December 4, 2020, the Federal Circuit dismissed the CIT appeal.

In view of the Federal Circuit's dismissal of the CIT appeal, the Commission has determined to institute a rescission proceeding and to permanently rescind the SFO. The rescission proceeding is hereby terminated.

The Commission's vote for this determination took place on December 7, 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: December 7, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–27195 Filed 12–10–20; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Bankruptcy Rules; Hearing of the Judicial Conference

AGENCY: Advisory Committee on the Federal Rules of Bankruptcy Procedure, Judicial Conference of the United States.

ACTION: Notice of Cancellation of Open Hearing.

SUMMARY: The following remote public hearing on proposed amendments to the Federal Rules of Bankruptcy Procedure has been canceled: Bankruptcy Rules Hearing on January 7, 2021.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

SUPPLEMENTARY INFORMATION: Announcements for this hearing were previously published in 85 FR 48562.

Authority: 28 U.S.C. 2073.

Dated: December 8, 2020.

Rebecca A. Womeldorf,

Chief Counsel, Rules Committee Staff.

[FR Doc. 2020–27279 Filed 12–10–20; 8:45 am]

BILLING CODE 2210–55–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Appellate Rules; Hearing of the Judicial Conference

AGENCY: Advisory Committee on the Federal Rules of Appellate Procedure, Judicial Conference of the United States.

ACTION: Notice of Cancellation of Open Hearing.

SUMMARY: The following remote public hearing on proposed amendments to the Federal Rules of Appellate Procedure has been canceled: Appellate Rules Hearing on January 4, 2021.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

SUPPLEMENTARY INFORMATION: Announcements for this hearing were previously published in 85 FR 48562.

Authority: 28 U.S.C. 2073.

Dated: December 8, 2020.

Rebecca A. Womeldorf,

Chief Counsel, Rules Committee Staff.

[FR Doc. 2020–27278 Filed 12–10–20; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

King Wong, M.D.; Decision and Order

On November 12, 2019, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government), issued an Order to Show Cause (hereinafter, OSC) to King Wong, M.D. (hereinafter, Registrant). OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. AL1804409. *Id.* It alleged that Registrant is without ''authority to handle controlled substances in California, the state in which [Registrant is] registered with the DEA.'' *Id.* (citing 21 U.S.C. 823(f) and 824(a)(3)).

Specifically, the OSC alleged that Registrant surrendered his medical license pursuant to an agreement with the Medical Board of California on March 18, 2019, and that his license remains surrendered. *Id.* at 1–2. The OSC further alleged that because Registrant surrendered his medical license, Registrant lacks the authority to handle controlled substances in the State of California. *Id.* at 2.

The OSC notified Registrant of the right to either request a hearing on the allegations or submit a written statement in lieu of exercising the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

A DEA Diversion Investigator personally served Registrant with the OSC on December 13, 2019, and Registrant signed a DEA Form 12, Receipt for Cash or Other Items, to acknowledge his receipt of the OSC. Request for Final Agency Action Exhibit (hereinafter, RFAAX) 8, at 2–3 (Declaration of Diversion Investigator); RFAAX 5 (DEA Form 12 signed by Registrant). I find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. RFAAX 8, at 3; RFAAX 6 (Emails regarding no communication from Registrant). Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and

corrective action plan. 21 CFR 1301.43(d) and 21 U.S.C. 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.46.

Findings of Fact

REGISTRANT'S DEA REGISTRATION

Registrant is the holder of DEA Certificate of Registration No. AL1804409 at the registered address of 2392 N. Euclid Ave, Upland, CA 91784. RFAAX 1 (Registrant's DEA Certificate of Registration). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration will expire on its own terms on March 31, 2022. *Id.*

THE STATUS OF REGISTRANT'S STATE LICENSE

On March 5, 2019, Registrant and the Medical Board of California entered into a Stipulated Surrender of License and Order, whereby Registrant surrendered his California medical license. RFAAX 3. The Medical Board of California's online records, of which I take official notice, document that Registrant's license is still surrendered. [1] Medical Board of California License Verification, *https://www.mbc.ca.gov/Breeze/License_Verification.aspx* (last visited date of signature of this Order).

Accordingly, I find that Registrant currently is not licensed to engage in the practice of medicine in California, the state in which Registrant is registered with the DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 Fed. Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

According to California statute, ''[n]o person other than a physician . . . shall write or issue a prescription.'' Cal. Health & Safety Code § 11150 (West 2020). Further, ''physician,'' as defined by California statute, is a person who is ''licensed to practice'' in California. *Id.* at § 11024.

Here, the undisputed evidence in the record is that Registrant currently lacks authority to practice medicine in California. As already discussed, a physician must be a licensed practitioner to dispense a controlled substance in California. Thus, because Registrant lacks authority to practice medicine in California and, therefore, is not authorized to handle controlled substances in California, Registrant is not eligible to maintain a DEA registration. Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. AL1804409 issued to King Wong, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of King Wong, M.D. to renew or modify this registration. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27232 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–09–P

[1] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by email (*dea.addo.attorneys@dea.usdoj.gov*).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Zeljko Stjepanovic, M.D.; Decision and Order

On May 1, 2018, a former Acting Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government) issued an Order to Show Cause and Immediate Suspension of Registration to Zeljko Stjepanovic, M.D. (hereinafter, Registrant). Government's Request for Final Agency Action Exhibit (hereinafter, RFAAX) 3, at 1 (Order to Show Cause and Immediate Suspension Order (hereinafter, collectively OSC)). The OSC informed Registrant of the immediate suspension of his DEA Certificate of Registration FS3042885 pursuant to 21 U.S.C. 824(d), ''because [his] continued registration constitutes an imminent danger to public health and safety.'' *Id.*

The substantive ground for the proceeding, as alleged in the OSC, is that Registrant's ''continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f).'' *Id.* Specifically, the OSC alleges that on August 31, 2017, January 19, 2018, February 16, 2018, and March 15, 2018, Registrant unlawfully prescribed controlled substances in violation of 21 U.S.C. 841(a) and 842(a). The OSC further alleges that on those dates, Registrant prescribed controlled substances to individuals that he ''knew were not for a legitimate medical purpose and were not in the usual course of [his] professional practice,'' because he issued them ''without establishing bona fide practitioner-

patient relationships'' and ''issued prescriptions in the name of one patient for use by another patient, despite acknowledging the illegality of this behavior, in violation of federal and state law.'' *Id.* at 2 (citing 21 CFR 1306.04(a); Va. Code Ann. §§ 54.1–3303.A, 54.1–2915.A(3), (8), (13), (16), (17), and 18.2.248).

In issuing the OSC, which immediately suspended the registration, the former Acting Administrator concluded that Registrant's ''continued registration is inconsistent with the public interest'' based on a preliminary finding that Registrant ''issued prescriptions for controlled substances that [Registrant] knew were illegal, without a legitimate medical purpose and outside the usual course of professional practice'' and that were ''indicative of [Registrant's] general illegitimate practice of prescribing controlled substances in violation of State and Federal laws.'' *Id.* at 7. Citing 21 U.S.C. 824(d), he also made the preliminary finding that Registrant's ''continued registration during the pendency of the proceedings would constitute an imminent danger to the public health or safety because of the substantial likelihood that [Registrant] will continue to unlawfully prescribe controlled substances, thereby allowing the diversion of controlled substances unless [Registrant's] DEA COR is suspended.'' *Id.* The former Acting Administrator authorized the DEA Special Agents and Diversion Investigators serving the OSC on Registrant to place under seal or remove for safekeeping all controlled substances Registrant possessed pursuant to the immediately suspended registration. *Id.* (citing 21 U.S.C. 824(f) and 21 CFR 1301.36(f)). The former Acting Administrator also directed those DEA employees to take possession of Registrant's Certificate of Registration FS3042886 and any unused prescription forms. *Id.* at 8.

According to the Declaration of a DEA Diversion Investigator (hereinafter, DI) from the Richmond District Office, the DI personally served the OSC on Registrant on May 4, 2018, at his registered address. RFAAX 5, at 2. Based on the DI's Declaration, and my review of the record, I find that the Government accomplished service of the OSC on Registrant on May 4, 2018. The OSC notified Registrant of his right to request a hearing on the allegations or to submit a written statement while waiving his right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. OSC at 7–8 (citing 21 CFR 1301.43(c)).

On July 25, 2018, the Government forwarded a Request for Final Agency Action (hereinafter, RFAA), along with the evidentiary record for this matter, to my office, and asserted that the Government had not received a request for a hearing. RFAA, at 2. I find that more than thirty days have now passed since the Government accomplished service of the OSC. I further find, based on the Government's written representations, that neither Registrant, nor anyone purporting to represent the Registrant, requested a hearing, or submitted a written statement while waiving Registrant's right to a hearing. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement. 21 CFR 1301.43(d). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 CFR 1301.43(e).

Having considered the record in its entirety, I find that the record establishes, by substantial evidence, that Registrant committed acts rendering his continued registration inconsistent with the public interest. I also find that Registrant has submitted no evidence that he accepts responsibility for his failures to meet the responsibilities of a registrant nor presented any evidence of mitigation or remedial measures. Accordingly, I conclude that the appropriate sanctions are (1) for Registrant's DEA registration to be revoked; and (2) for any pending application by Registrant to be denied.

Based on the representations of the Government in its RFAA, I make the following findings of fact.

I. Findings of Fact

A. Registrant's DEA Registration

Registrant is registered with DEA as a practitioner in schedules II through V under DEA Certificate of Registration No. FS3042885, at the registered address of 2004 Bremo Rd, Suite 200, Richmond, VA 23226. RFAAX 1. This registration expires on February 28, 2021. *Id.* The registration was suspended pursuant to the Immediate Suspension Order dated May 1, 2018. OSC, at 7.

B. The Investigation of Registrant

In 2017, the Richmond District Office (hereinafter, RDO) of the DEA Washington Field Office began an investigation of Registrant that included the use of undercover investigators. RFAAX 5, at 1–2. Two RDO Task Force Officers (hereinafter, TFO One and TFO Two) were assigned to investigate Registrant. *Id.* at 2. According to the Government, TFO One first visited Registrant posing as a patient on August 31, 2017, while Registrant was working for a practice located in Fredericksburg, VA. RFAAX 6 (Declaration of TFO One), at 1. TFO Two next went undercover to visit Registrant with TFO One on January 19, 2018 and February 16, 2018 in Registrant's Richmond Office. *Id.* at 2. Finally, TFO Two went undercover to visit Registrant by herself on March 15, 2018. RFAAX 7 (Declaration of TFO 2), at 2.

The Government submitted declarations from TFO One and TFO Two, which summarize the events of the undercover visits to Registrant. *See* RFAAX 6 and 7. The Government also submitted copies of controlled substance prescriptions written by Registrant to the aliases used by TFO One and TFO Two that support their accounting of their visits with Registrant, RFAAX 4 (Copies of prescriptions), and a partial transcript of a recording of the February 16 undercover visit.[1] RFAAX 2 (Transcript of February 16, 2018 undercover visit with Registrant).

1. August 31, 2017 Undercover Visit

TFO One first visited Registrant posing as a patient on August 31, 2017. RFAAX 6, at 1. At the time, Registrant was working for a practice located in Fredericksburg, VA. *Id.* During the August 31 visit, Registrant provided TFO One with a prescription for Tramadol (50 mg, QTY 84).[2] RFAAX 4 (copy of prescription); RFAAX 6, at 2.

TFO One said that she ''specifically asked for Tramadol by name because it made [her] feel good.'' RFAAX 6, at 2. When Registrant checked the Virginia Prescription Monitoring Program and discovered that TFO One did not have a previous prescription for Tramadol, TFO One told Registrant that she ''had previously been using [her] ex-boyfriend's Tramadol prescription.'' *Id.* According to TFO One, Registrant did

[1] The DI assigned to Registrant's case declared that TFO One and TFO Two recorded all of their visits with Registrant. RFAAX 5, at 2. The Government, however, has only provided a partial transcript from the recording of one of those visits. *See* RFAAX 2 (Transcript of February 16, 2018 undercover visit with Registrant). Exhibit Two to the Government's RFAA is three pages of a twenty-four page transcript of the recording of the February 16, 2018 visit. *Id.* The Government has provided no explanation for only including certain pages from the February 16, 2018 visit transcript and for not including any of the recordings or transcripts of the recordings from the other three visits. Although I do not have the recordings for the majority of the undercover visits in the evidence before me, there is no evidence in the record that contradicts the Government's presentation of the facts in this matter.

[2] Tramadol is a schedule IV controlled substance. 21 CFR 1308.14(b).

not conduct a physical exam, use diagnostic tools, or complete a urinalysis during the August 31 visit. *Id.* TFO One also declared that she did not provide any medical records from a previous medical provider. *Id.*

2. January 19, 2018 Undercover Visit

On January 19, 2018, TFO One visited Registrant again in an undercover capacity at Registrant's office in Richmond, Virginia. RFAAX 6, at 2. TFO One was accompanied on this visit by TFO Two, acting in an undercover capacity.[3] *Id.* Registrant saw TFO One and Two together, in the same room, during the visit. *Id.*

During the January 19 visit, TFO One asked Registrant for another prescription for Tramadol. *Id.* According to the declaration of TFO One, Registrant replied that he ''could not write [TFO One] [her] own prescription due to [her] status as a former Fredericksburg patient.'' *Id.* Instead, according to TFOs One and Two, Registrant issued TFO Two a double dose of oxycodone so TFO One and TFO Two ''could share a prescription until [their] next office visit to [Registrant].'' RFAAX 6, at 2; RFAAX 7, at 2. A copy of the prescription from the January 19 visit shows that Registrant wrote TFO Two (in the name of her alias) a prescription for oxycodone (10mg, QTY 90).[4] RFAAX 4.

3. February 16, 2018 Undercover Visit

TFO One and TFO Two visited Registrant in an undercover capacity together for a second time on February 16, 2018.[5] RFAAX 6, at 2. Registrant saw TFO One first, by herself, in Registrant's office. *Id.* TFO One stated that the office was not an examination room—that it contained a desk, computer, and chairs but no examination bed or medical equipment. *Id.* Registrant again stated that he could not write TFO One a prescription due to her status as a former Fredericksburg patient and offered to write TFO One a Tramadol prescription in TFO Two's name. *Id.; see also* RFAAX 2 (Excerpts from transcript of February 16 visit), at 2. The transcript of the recording made of the visit demonstrates that Registrant said, ''What I was thinking in the beginning according [sic], that you are so nice, and I know that it is illegal, but I technically can write down those medications on her name.'' RFAAX 2, at 2.

TFO Two was then summoned into Registrant's office with Registrant and TFO One. RFAAX 6, at 2. Registrant told TFO Two that he had been discussing with TFO One writing a Tramadol prescription for TFO One in TFO Two's name. RFAAX 7, at 2. Registrant sought to confirm that TFO Two was comfortable with having the Tramadol prescription for TFO One written in TFO Two's name. *Id.;* RFAAX 2, at 3. After TFO Two said that it was fine, Registrant told TFO Two what to say if a pharmacist questioned her on why a doctor was prescribing two short acting drugs. RFAAX 2, at 3. According to the transcript, Registrant then asked, ''Is that Okay? I'm sorry is illegal, but you know.'' *Id.*

Registrant issued two prescriptions to TFO Two, one for oxycodone (10mg, QTY 90) and one for Tramadol (50mg, QTY 90). RFAAX 6, at 2; RFAAX 7, at 2; RFAAX 4. Registrant then advised TFO Two that she should fill the prescriptions at the same pharmacy as the January 19, 2018 prescription to avoid any scrutiny. RFAAX 6, at 2; RFAAX 7, at 2; RFAAX 4. He said ''just don't change, because they're looking if you're changing doctors or changing pharmacies . . . .'' RFAAX 2, at 4. According to TFO Two, Registrant did not perform any type of physical exam on her during the February 16 visit. RFAAX 7, at 2.

4. March 15, 2018 Undercover Visit

TFO Two visited Registrant by herself on March 15, 2018, and met with Registrant in his office. RFAAX 7, at 2. According to TFO Two, Registrant asked ''if I wanted him to 'do the same stuff'' and ''if I wanted him to issue another Tramadol prescription for TFO [One] in [TFO Two's] name.'' *Id.* Registrant then asked if she had any problems with the pharmacy filling the previous prescriptions for oxycodone and Tramadol. *Id.* When TFO Two told him there were no problems, Registrant ''again advised [her] that to avoid scrutiny of the illegal prescriptions he was writing, [she] should not change providers or pharmacies.'' *Id.*

Registrant wrote TFO Two a prescription for oxycodone (10mg, QTY 90) and a prescription for Tramadol (50mg, QTY 90). *Id.;* RFAAX 4. TFO Two declared that during the visit Registrant ''asked generally, how [she] was feeling but did not perform any physical examination.'' RFAAX 7, at 2.

In summary, based on the substantial evidence in the record, I find that Registrant issued a total of six prescriptions for controlled substances to TFO One and TFO Two without performing a physical examination of either undercover officer. I also find that Registrant wrote two controlled substance prescriptions for TFO One in TFO Two's name even though he verbally stated that doing so was illegal.

II. Discussion

Under the Controlled Substances Act (CSA), ''[a] registration . . . to . . . distribute[ ] or dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' which is defined in 21 U.S.C. 802(21) to include a ''physician,'' Congress directed the Attorney General to consider the following factors in making the public interest determination:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant]'s experience in dispensing . . . controlled substances.

(3) The [registrant]'s conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. 21 U.S.C. 823(f). These factors are considered separately. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003).

According to Agency decisions, I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharm., LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir.

[3] TFO One declared that this visit occurred on January 19, 2018, while TFO Two declared that this visit occurred on January 18, 2018. RFAAX 7, at 2. I find that the one-day discrepancy between the two accounts of the date of this visit does not detract from TFO Two's credibility, given the other supporting evidence for this visit, and is ultimately irrelevant in this matter. The Government presents the visit as having occurred on January 19, 2018, and a prescription Registrant issued during the visit supports a finding of that date; therefore, I am concluding that the visit occurred on that January 19, 2018.

[4] Oxycodone is a schedule II controlled substance. 21 CFR 1308.12(1).

[5] In their declarations, TFO One and TFO Two state that this visit occurred on February 26, 2018. RFAA 6, at 2; RFAAX 7, at 2. The Government stated in the RFAA that the date in the declarations was a typo and should read February 16, 2018. RFAA, at 4. The transcript of the recording of the interview states that the recording was made on February 16, 2018. RFAAX 2. I find that the date in the declarations was a typo and that the visit occurred on February 16, 2018. I find that this date discrepancy was a scrivener's error and does not detract from the overall credibility of the Government's evidence.

2016)); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (quoting *Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

The Government has the burden of proving that the requirements for revocation of a DEA registration in 21 U.S.C. 824(a) are satisfied. 21 CFR 1301.44(e). When the Government has met its *prima facie* case, the burden then shifts to the registrant to show that revoking the registration would not be appropriate, given the totality of the facts and circumstances on the record. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008).

In this matter, while I have considered all of the Factors, the Government's evidence in support of its *prima facie* case is confined to Factors Two and Four.[6] I find the Government has satisfied its *prima facie* burden of showing that Registrant's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

A. Factors Two and/or Four—The Registrant's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

The Government alleges that on August 31, 2017, January 19, 2018, February 16, 2018, and March 15, 2018, Registrant prescribed controlled substances to undercover officers posing as patients without establishing a bona fide practitioner-patient relationship, without a legitimate medical purpose, and outside the usual course of his professional practice in violation of 21 CFR 1306.04(a) and Va. Code Ann. § 54.1–3303.A. RFAA, at 8; OSC, at 2. The Government further alleges that Registrant's actions violated 21 U.S.C. 841(a), which states, in relevant part, that it is unlawful for any person to knowingly or intentionally dispense a controlled substance except as authorized by the CSA. OSC, at 2.

According to the CSA's implementing regulations, a lawful prescription for controlled substances is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. 829] and . . . the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' *Id.* The Supreme Court has stated that ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006).

DEA has consistently stated that a practitioner must establish and maintain a bona fide doctor-patient relationship in order to act ''in the usual course of . . . professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Ralph J. Chambers,* 79 FR 4962, 4970 (2014) (citing *Paul H. Volkman,* 73 FR 30,629, 30,642 (2008), *pet. for rev. denied Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 223–24 (6th Cir. 2009)); *see also U.S.* v. *Moore,* 423 U.S. 122, 142–43 (1975) (noting that evidence established that the physician exceeded the bounds of professional practice, when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against . . . misuse and diversion''). In recognition of the State's primary role in regulating the practice of medicine, the CSA generally looks to state law to determine whether a doctor and patient have established a legitimate doctor-patient relationship. *Mackay,* 75 FR at 49,973; *Volkman,* 73 FR at 30,642.

The law of the Commonwealth of Virginia, the state in which Registrant is registered with DEA, to which the Government cited in the OSC, echoes the CSA requirement that a practitioner may only issue a prescription to a person with whom the practitioner has ''a bona fide practitioner-patient relationship.'' Va. Code Ann. § 54.1–3303A (West 2018).[7] At the time of the events at issue here, Virginia law defined a bona fide practitioner-patient relationship as ''one in which a practitioner prescribes, and a pharmacist dispenses, controlled substances in good faith to his patient for a medicinal or therapeutic purpose within the course of his professional practice.'' *Id.* The Virginia law further states that

> A bona fide practitioner-patient relationship means that the practitioner shall (i) ensure that a medical or drug history is obtained; (ii) provide information to the patient about the benefits and risks of the drug being prescribed; (iii) perform or have performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically; except for medical emergencies, the examination of the patient shall have been performed by the practitioner himself, within the group in which he practices, or by a consulting practitioner prior to issuing a prescription; and (iv) initiate additional interventions and follow-up care, if necessary, especially if a prescribed drug may have serious side effects.

Id.

The Government typically establishes that a practitioner issued prescriptions without a legitimate medical purpose or outside the usual course of professional practice in violation of 21 CFR 1306.04(a) through, or with the support of, expert testimony. However, DEA decisions have found that the nature of the allegations and the evidence on the record can establish violations of Section 1306.04(a) without necessitating

[6] As to Factor One, the Government alleged that Registrant holds a valid state medical license, and there is no evidence in the record of any recommendation from Registrant's ''State licensing board or professional disciplinary authority.'' *See* OSC, at 2. State authority to practice medicine is ''a necessary, but not a sufficient condition for registration . . . .'' *Robert A. Leslie, M.D.,* 68 FR at 15,230. Therefore, ''[t]he fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether continuation of Respondent's DEA certification is consistent with the public interest.'' *Roni Dreszer, M.D.,* 76 FR 19,434, 19,444 (2011).

As to Factor Three, there is no evidence in the record that Registrant has a ''conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, as Agency cases have noted, there are a number of reasons why a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49,956, 49,973 (2010), *pet. for rev. denied, MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808 (10th Cir. 2011). Agency cases have therefore held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

[7] Virginia amended this portion of the code in 2018 and 2020. This Decision cites to the law that was in effect during the time when Registrant issued the subject prescriptions to the undercover officers and when the OSC was issued.

the support of expert opinion.[8] *Lawrence E. Stewart, M.D.,* 81 FR 54,822, 54,839 (2016). DEA has not required expert testimony to establish a violation of 21 CFR 1306.04(a) in past matters under factual circumstances that include: Where a prescriber engaged in drug deals; where a prescriber did not conduct a physical exam of the patient as required by law; where a controlled substance prescription was based on a patient's request rather than the result of the application of the physician's medical judgment; and where a prescriber falsified patients' charts. *See e.g., Stewart,* 81 FR at 54,839–41 (finding, without expert testimony, that prescriptions were issued outside the usual course of professional practice, where the physician failed to perform and document a physical exam, and lacked a legitimate medical purpose, where a physician prescribed controlled substances based on a patient's request); *Morris W. Cochran, M.D.,* 77 FR 17,505, 17,519–20 (2011) (finding, without expert testimony, that prescriptions lacked a legitimate medical purpose, where a physician noted in patient medical records that patients had no pain, did not document any findings to support a diagnosis, and yet diagnosed patients as having chronic pain); *Robert F. Hunt, D.O.,* 75 FR 49,995, 50,003 (2010) (finding, without expert testimony, that a physician lacked a legitimate medical purpose based on statements made during undercover visits and falsification of patient chart). *See also T.J. McNichol, M.D.,* 77 FR 57,133, 57,147–48 (2012), *pet. for rev. denied,* 537 Fed. Appx. 905 (11th Cir. 2013).

I find that, with respect to the prescriptions Registrant issued to the undercover officers, expert testimony is not necessary to prove that Registrant lacked a legitimate medical purpose and acted outside of the usual course of professional practice in issuing them. Virginia law clearly states that to establish a practitioner-patient relationship, the practitioner must ''perform or have performed an appropriate examination of the patient, either physically or by the use of instrumentation and diagnostic equipment through which images and medical records may be transmitted electronically.'' Va. Code Ann. § 54.1–3303A(iii). The uncontested evidence in this matter shows that Registrant issued prescriptions for controlled substances to TFOs One and Two without performing any physical examination or using any diagnostic tools. By issuing prescriptions to TFOs One and Two without first establishing a bona fide practitioner-patient relationship, Registrant violated Va. Code Ann. § 54.1–3303A and thus acted outside the usual course of his professional practice.

I also find that Registrant did not issue the prescriptions to the undercover officers for legitimate medical purposes. First, there is substantial evidence that Registrant knew that TFO One was not seeking treatment for a legitimate medical condition but was either engaged in self-abuse or diversion. During her first visit with Registrant on August 31, 2017, TFO One asked Registrant for a prescription for Tramadol ''because it made [her] feel good'' and told Respondent that she had been taking Tramadol that was not prescribed to her. Previous DEA decisions have found, without the support of expert testimony, that controlled substance prescriptions did not have a legitimate medical purpose when practitioners prescribed them based on a patient request rather than for the treatment of a legitimate medical condition. *See Stewart,* 81 FR at 54,841; *Henri Wetselaar M.D.,* 77 FR 57,126, 57,132 (2012).

Second, Registrant's statements to TFOs One and Two during the course of their visits make clear that Registrant was prescribing controlled substances to TFO Two to intentionally divert drugs to TFO One. On their first visit together to Registrant on January 19, 2018, Registrant told the undercover officers that he was prescribing TFO Two a double dose of oxycodone, so that they ''could share a prescription until [their] next office visit to [Registrant].'' RFAAX 6, at 2; RFAAX 7, at 2. Then, during the undercover officers' second visit together to Registrant on February 16, 2018, Registrant told the undercover officers that he would write a prescription for Tramadol in TFO Two's name for TFO Two to give to TFO One. RFAAX 2 at 2; see also RFAAX 4 (prescription for Tramadol in TFO Two's name). When TFO Two visited Registrant by herself on March 15, 2018, Registrant again issued TFO Two a prescription for Tramadol so that she could give the drugs to TFO One. RFAAX 7, at 2. Registrant's actions ''completely betrayed any semblance of legitimate medical treatment.'' *Jack A. Danton, D.O,* 76 FR 60,900, 60,904 (quoting *United States* v. *Feingold,* 454 F.3d 1001, 1010 (9th Cir. 2006)). Therefore, the evidence clearly supports a finding that Registrant issued the prescriptions without a legitimate medical purpose and outside the usual course of his professional practice in violation of 21 CFR 1306.04(a).

Finally, despite Registrant's failure to take his responsibilities as a registrant seriously, he did understand the potential legal consequences for his action and undoubtedly knew his actions were wrong. Registrant repeatedly stated that the prescriptions he wrote for TFO Two to give to TFO One were ''illegal.'' [9] RFAAX 2, at 2–3. He also gave the undercover officers instructions on how to evade scrutiny when filling the prescriptions. RFAAX 2, at 3; RFAAX 7, at 2. This evidence supports the conclusion that Registrant knowingly engaged in an outright drug deal in violation of 21 U.S.C. 841(a).

In summary, I find that Registrant committed flagrant violations of 21 CFR 1306.04(a); violated state law, Va. Code Ann. § 54.1–3303.A; [10] and displayed an appalling disregard of a registrant's duty under the CSA to prescribe controlled substances based on a legitimate doctor-patient relationship.

B. Registrant's Registration Is Inconsistent With the Public Interest and Presented an Imminent Danger

Violations of the prescription requirement strike at the core of the CSA's purpose of preventing the diversion of controlled substances. *See United States* v. *Moore,* 423 U.S. 122, 135 (1975) (''Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels. It was aware that registrants,

[8] Numerous federal courts have found in criminal cases, which require a higher standard of proof than is required in these proceedings, that expert testimony is not required to establish a violation of 21 U.S.C. 841 or 21 CFR 1306.04(a) based on the particular facts of the case. *See, e.g., United States* v. *Pellman,* 668 F.3d 918, 924 (7th Cir. 2012) (holding that even without expert testimony there was ''ample evidence'' for a reasonable jury to determine the physician-defendant acted outside the usual course of his professional practice and not for a legitimate purpose); *U.S.* v. *Armstrong,* 550 F.3d 382, 389 (5th Cir. 2008), *overruled on other grounds by United States* v. *Balleza,* 613 F.3d 382 (5th Cir. 2010) (''While expert testimony may be both permissible and useful, a jury can reasonably find that a doctor prescribed controlled substances not in the usual course of professional practice or for other than a legitimate medical purpose from adequate lay witness evidence surrounding the facts and circumstances of the prescriptions.''); *U.S.* v. *Word,* 806 F.2d 658 663–64 (6th Cir. 1986).

[9] In the transcript of recording from the February 16, 2018 visit, regarding prescribing in TFO Two's name for TFO One, Registrant stated, ''I know that is illegal, but I technically can write down those medications on her name,'' and ''Is that Okay? I'm sorry is illegal, but you know.'' RFAAX 2, at 2–3.

[10] The Government also alleged that Registrant's actions violated Va. Code Ann. § 54.1–2915.A(3), (8), (13), (16), and (17), which provide grounds for which the Virginia Medical Board may refuse to issue, suspend, or revoke a medical license. While I find that these provisions buttress the Government's argument that Registrant was acting outside the usual course of his professional practice, I do not find that they establish independent violations of state law and, as such, I am not including them in my findings herein.

who have the greatest access to controlled substances and therefore the greatest opportunity for diversion, were responsible for a large part of the illegal drug traffic.''). The Agency has previously found that proof of a single act of intentional or knowing diversion is sufficient to satisfy the Government's *prima facie* burden of showing that a practitioner's continued registration is inconsistent with the public interest. *McNichol,* 77 FR at 57,145–46 (2012); *see also, Alan H. Olefsky,* 57 FR 928, 928–29 (1992) (revoking registration based on physician's presentation of two fraudulent prescriptions to pharmacist in single act where physician failed to acknowledge his misconduct). Accordingly, I find that the evidence in this matter establishes Registrant ''has committed such acts as would render his registration . . . inconsistent with the public interest.'' *See* 21 U.S.C. 824(a)(4).

For purposes of the imminent danger inquiry, my findings also lead to the conclusion that Registrant ''fail[ed] . . . to maintain effective controls against diversion or otherwise comply with the obligations of a registrant'' under the CSA. 21 U.S.C. 824(d)(2). The substantial evidence that Registrant was issuing prescriptions for controlled substances without a legitimate medical purpose and outside the usual course of professional practice also establishes that there was ''a substantial likelihood [that an] . . . abuse of a controlled substance . . . [would] occur in the absence of the immediate suspension'' of Registrant's registration. *Id.* As I found above, the recording of the February 16, 2018 visit between Registrant and the undercover officers and the undercover officers' accountings of their other visits establish that Registrant unlawfully prescribed controlled substances to the officers without conducting physical examinations and wrote controlled substance prescriptions in TFO Two's name for her to give to TFO One. Thus, at the time the Government issued the OSC, the Government had clear evidence of Registrant's violations of law.

III. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that a Registrant's continued registration is inconsistent with the public interest, the burden shifts to the Registrant to show why he can be entrusted with a registration. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases). Registrant did not present any evidence of remorse for his past misconduct or evidence of rehabilitative actions taken to correct his past unlawful behavior. Further, he provided no assurances that he would not engage in such conduct in the future. Absent such evidence and such assurances in this matter, I find that continued registration of Registrant is inconsistent with the public interest. Registrant's silence weighs against his continued registration. *Zvi H. Perper, M.D.,* 77 FR 64,131, 64,142 (2012 (citing *Med. Shoppe-Jonesborough,* 73 FR at 387); *see also Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007). Accordingly, I find that the factors weigh in favor of sanction, and I shall order the sanctions the Government requested, as contained in the Order below.

IV. Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration FS3042885 issued to Zelijko Stjepanovic, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny any pending application of Zelijko Stjepanovic, M.D. to renew or modify this registration. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27231 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Anindita Nandi, M.D.; Decision and Order

On January 31, 2020, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Anindita Nandi, M.D. (hereinafter, Registrant) of Jersey City, New Jersey. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. FN5040136. *Id.* It alleged that Registrant has ''no state authority to handle controlled substances.'' *Id.* (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that, ''[o]n September 25, 2018, the New Jersey State Board of Medical Examiners (hereinafter, BME) issued an Order of Temporary Suspension of License, suspending . . . [Registrant's] license to practice medicine and surgery in the State of New Jersey, effective September 12, 2018.'' OSC, at 2. The OSC further alleged that Registrant's ''State of New Jersey C[ontrolled] D[angerous] S[ubstance] (hereinafter, CDS) license is in an 'Inactive' status, having expired on October 31, 2018.'' *Id.* The OSC concluded that ''[c]onsequently, the DEA must revoke . . . [her] DEA registration based on . . . [her] lack of authority to handle controlled substances in the State of New Jersey.'' *Id.*

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. OSC, at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a sworn Declaration, dated May 21, 2020, a DEA Diversion Investigator assigned to the Newark Division Office (hereinafter, DI) stated that he attempted personal service of the OSC on Registrant at the Hudson County Correctional Facility. Request for Final Agency Action (hereinafter, RFAA), EX 5 (DI Declaration), at 1. Registrant, however, refused to meet with DI. *Id.*

DI, therefore, sent the OSC to Registrant certified mail, return receipt requested. *Id.* He attached the executed return receipt card, dated February 26, to his Declaration. *Id.* at Attachment C. Further evidence of the adequacy of the Government's service is Registrant's proposed Corrective Action Plan (hereinafter, CAP) and waiver of hearing dated March 4, 2020. RFAA EX 6 (CAP), at 1. Accordingly, I find that the Government's service of the OSC was adequate.

Registrant's Proposed CAP

As already discussed, Registrant timely submitted a proposed CAP and waiver of hearing. *Id.* In her CAP, Registrant asked that this proceeding be discontinued or postponed. *Id.* She alleged that she received notification of the reactivation of her medical license in July 2019. *Id.* at 2. Further, she alleged that she timely renewed her ''second State of NJ CDS Account.'' *Id.*

I find that Registrant waived her right to a hearing and proposed a CAP. I find that the Assistant Administrator, Diversion Control Division, denied Registrant's CAP request that the administrative proceeding be discontinued or deferred. RFAA EX 7 (Letter Denying Proposed CAP), at 1. I also find that the Assistant Administrator concluded that ''there is no potential modification of . . . [her proposedCAP] that could or would alter

. . . [his] decision in this regard.'' *Id.* I agree.

The Government forwarded its RFAA, along with the evidentiary record, to my office on May 26, 2020. In its RFAA, the Government represented that ''Registrant has no valid medical license or CDS registration in New Jersey.'' RFAA, at 3. The Government requested that Registrant's registration be revoked. *Id.* at 4.

I issue this Decision and Order based on the record submitted by the Government in its RFAA, which constitutes the entire record before me.[1] 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FN5040136 at the registered address of 610 Washington Boulevard, Jersey City, NJ 07310. RFAA, EX 1 (Certification of Registration History), at 1. Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. *Id.* Registrant's registration expired on October 31, 2020.[2] *Id.*

The Status of Registrant's State License and Registration

The Government submitted a certified copy of the ''Order of Temporary Suspension of License'' concerning Registrant that the BME issued on September 25, 2018. RFAA, EX 3 (hereinafter, Temporary Suspension Order). The Temporary Suspension Order ''temporarily suspended (Registrant's New Jersey medical license) pending final adjudication of the allegations of the Verified Complaint.'' *Id.* at 12. It ordered Registrant immediately to cease and desist practicing medicine in New Jersey and it set out the steps required for Registrant's reinstatement. *Id.* at 12–13.

The Government also submitted a Certification from the New Jersey Drug Control Unit stating that Registrant's ''CDS registration became inactive on September 25, 2018, when a suspension was imposed on her medical license. Her CDS registration remains inactive.'' RFAA, EX 4 (New Jersey Attorney General, Division of Consumer Affairs, Drug Control Unit, Certification that Registrant's CDS registration is ''Inactive''), at 1. The Certification is dated January 17, 2020. *Id.*

As already discussed, Registrant's proposed CAP alleged that her New Jersey medical license was ''reactivated'' in July 2019 and that her controlled dangerous substance registration was ''timely . . . renewed.'' RFAA, EX 6, at 2. Her proposed CAP, however, did not include evidence documenting or supporting her allegations.

According to New Jersey's online records, Registrant's medical license is still suspended today.[3] New Jersey Division of Consumer Affairs License Information, *https://www.njconsumeraffairs.gov* (last visited date of signature of this Order). The evidence that the Government submitted with its RFAA, EX 3 and EX 8, and the evidence from today's New Jersey online records outweigh Registrant's unsupported allegation about her ''reactivated'' medical license. Accordingly, I find that Registrant's New Jersey medical license is currently suspended.

The Government's RFAA includes evidence that Registrant's New Jersey controlled dangerous substance registration is inactive. RFAA, EX 4, at 1. Registrant's CAP did not include evidence supporting her allegation that she ''timely . . . renewed'' her New Jersey controlled dangerous substance registration. RFAA, EX 6, at 2. The Government's evidence outweighs Registrant's unsupported allegation. Accordingly, I find that Registrant is not authorized in New Jersey to dispense controlled substances. *See also infra* Discussion section.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the Agency has long stated that the possession of authority to dispense controlled substances under the laws of the state in which the practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); Frederick Marsh Blanton, M.D., 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the Agency has repeatedly stated that revocation of a practitioner's registration is the appropriate sanction whenever she is no longer authorized to dispense controlled substances under the laws of the state in which she practices. *See, e.g., James L. Hooper, M.D.,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton, M.D.,* 43 FR at 27,617.

According to New Jersey statute, ''Practitioners shall be registered to dispense substances in Schedules II through IV if they are authorized to dispense or conduct research under the law of this State.'' N.J. Stat. Ann. § 24:21–11(c) (West, current with laws through L. 2020, c. 109 and J.R. No. 2); *see also* N.J. Stat. Ann. § 24:21–10(a) (West, current with laws through L. 2020, c. 109 and J.R. No. 2) (''Every person who manufactures, distributes, or dispenses any controlled dangerous

[1] The RFAA includes Registrant's proposed CAP/hearing waiver.

[2] The fact that a Registrant's registration expires during the pendency of an OSC does not impact my jurisdiction or prerogative under the Controlled Substances Act (hereinafter, CSA) to adjudicate the OSC to finality. *Jeffrey D. Olsen, M.D.,* 84 FR 68,474 (2019).

[3] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Applicant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Applicant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response shall be filed and served by email on the other party at the email address the party submitted for receipt of communications related to this administrative proceeding, and on the Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

substance within this State . . . shall obtain a registration issued by the division in accordance with rules and regulations promulgated by it.'').

New Jersey statute defines ''practitioner'' as a ''physician.'' N.J. Stat. Ann. § 24:21–2 (West, current with laws through L. 2020, c. 109 and J.R. No. 2). It defines ''physician'' as ''a physician authorized by law to practice medicine in this or any other state.'' *Id.*

Here, the weight of the evidence in the record is that Registrant's license to practice medicine is currently suspended and that her CDS registration is inactive. In New Jersey, as already discussed, a ''practitioner'' must be a physician authorized by law to practice medicine. *Id.* As such, she is not a ''physician'' or a ''practitioner'' as New Jersey statute defines those terms. *Id.* Thus, since Registrant lacks authority to practice medicine in New Jersey and does not have an active New Jersey CDS registration, she is not eligible to dispense controlled substances in that state. N.J. Stat. Ann. § 24:21–11(c). As such, based on the overwhelming record evidence and the law in New Jersey, I find that Registrant is not authorized to dispense controlled substances in New Jersey. 21 U.S.C. 824(a)(3). Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FN5040136 issued to Anindita Nandi, M.D. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27235 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–748]

Bulk Manufacturer of Controlled Substances Application: Sterling Pharma USA, LLC

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Sterling Pharma USA, LLC has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before February 9, 2021. Such persons may also file a written request for a hearing on the application on or before February 9, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on August 24, 2020, Sterling Pharma USA, LLC, 1001 Sheldon Drive, Suite 101, Cary, North Carolina 27513–2079, applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Tetrahydrocannabinols ..	7370	I

The company plans to manufacture in bulk drug code 7370 (Tetrahydrocannabinols) exclusively from hemp extract, for distribution and sale to its customers. No other activities for this drug code is authorized for this registration.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2020–27240 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–752]

Bulk Manufacturer of Controlled Substances Application: Johnson Matthey, Inc.

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Notice of application.

SUMMARY: Johnson Matthey, Inc., has applied to be registered as a bulk manufacturer of basic class(es) of controlled substance(s). Refer to Supplemental Information listed below for further drug information.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before February 9, 2021. Such persons may also file a written request for a hearing on the application on or before February 9, 2021.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on November 2, 2020, Johnson Matthey, Inc., 2003 Nolte Drive West Deptford, New Jersey 08066–1742, applied to be registered as an bulk manufacturer of the following basic class(es) of controlled substance(s):

Controlled substance	Drug code	Schedule
Gamma Hydroxybutyric Acid.	2010	I
Marihuana	7360	I
Tetrahydrocannabinols ..	7370	I
Dihyromorphine	9145	I
Difenoxin	9168	I
Amphetamine	1100	II
Methamphetamine	1105	II
Lisdexamfetamine	1205	II
Methylphenidate	1724	II
Nabilone	7379	II
Norfentanyl	8366	II
Cocaine	9041	II
Codeine	9050	II
Dihydrocodeine	9120	II
Oxycodone	9143	II
Hydromorphone	9150	II
Diphenoxylate	9170	II
Ecgonine	9180	II
Hydrocodone	9193	II
Levorphanol	9220	II
Meperidine	9230	II
Methadone	9250	II
Methadone intermediate	9254	II
Morphine	9300	II
Thebaine	9333	II
Opium tincture	9630	II
Oxymorphone	9652	II
Noroxymorphone	9668	II
Alfentanil	9737	II
Remifentanil	9739	II
Sufentanil	9740	II
Tapentadol	9780	II
Fentanyl	9801	II

The company plans to bulk manufacture the listed controlled substances for the internal use intermediates or for sale to its customers. In reference to drug codes 7360 (Marihuana), and 7370 (Tetrahydrocannabinols), the company plans to bulk manufacture these drugs as synthetic. No other activities for these drug codes are authorized for this registration.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2020–27241 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 19–29]

Lisa Hofschulz, N.P.; Decision and Order

On June 21, 2019, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Lisa Hofschulz, N.P. (hereinafter, Respondent) of Wauwatosa, Wisconsin. OSC, at 1. The OSC proposed the revocation of Respondent's Certificate of Registration No. MH1088182. *Id.* It alleged that Respondent is without ''authority to handle controlled substances in Wisconsin, the state in which [Respondent is] registered with DEA.'' *Id.*

Specifically, the OSC alleged that Respondent's Wisconsin ''Advance Practice Nursing Prescriber [hereinafter, APNP] license expired on September 30, 2018, and has not been renewed. As a result of the expiration of [her] APNP license, [Respondent] currently lack[s] the authority to handle controlled substances in Wisconsin.'' *Id.* at 1–2 (citing 21 U.S.C 802(21), 823(f), and 824(a)(3)).

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2–3 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated July 17, 2019, Respondent timely requested a hearing.[1] Hearing Request, at 1. In the Hearing Request, Respondent stated that ''[o]n May 17, 2019, Respondent applied to transfer her DEA registration from the State of Wisconsin to the State of Florida'' and that ''Respondent has a current and active Nurse Practitioner license . . . in the State of Florida.'' *Id.*

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge Mark M. Dowd (hereinafter, ALJ). The ALJ issued an Order for Prehearing Statements, dated July 18, 2019. The Government timely complied with the Briefing Schedule by filing a Motion for Summary Disposition on July 25, 2019 (hereinafter, Government Motion or Govt Motion). In its Motion, the Government submitted evidence that the Wisconsin Board of Nursing (hereinafter, Board) entered a Final Decision and Order with an attached Stipulation on April 12, 2018, which suspended Respondent's APNP following an investigation into unlawful prescribing practices, and Respondent therefore lacked authority to handle controlled substances in Wisconsin, the state in which she is registered with DEA. Govt Motion, at 1. The Government acknowledged that Respondent had requested a modification of her registration to Florida, but stated that the ''Government's allegations in support of revocation of Respondent's [registration] pertain solely to Respondent's current authorization to handle controlled substances in Wisconsin [] and . . . do not address any denial of Respondent's pending application for modification of that [registration.]'' *Id.* at 4. In light of these facts, the Government argued that DEA must revoke her registration. Govt Motion, at 6.

On July 31, 2019, Respondent requested an extension of time to file her Prehearing Statement and Response to Government's Motion for Summary Disposition, which the ALJ granted that same day. *See* Respondent's Unopposed Motion for Extension and ALJ's Order Granting Respondent's Unopposed Motion for Extension. On August 5, 2019,[2] Respondent filed a Response in Opposition to Government's Motion for Summary Disposition (hereinafter, Resp Opposition). Respondent argued that ''Under the Administrative Procedure[ ] Act (''APA''), '[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.' '' Resp Opposition, at 1 (quoting 5 U.S.C. 558). Respondent, therefore, argued that the Agency is obligated to act on Respondent's application for a registration in Florida. In the alternative, Respondent argued that even if the Agency decided that it must revoke Respondent's application, then it ''should determine that the application for modification is not affected.'' *Id.* at 4.

On August 8, 2019, the ALJ issued an Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Recommended Decision of the Administrative Law Judge (hereinafter, Summary Disposition or SD). The ALJ granted the Government Motion for Summary Disposition—finding that the only subject of the underlying action was Respondent's Wisconsin registration, Respondent had conceded that she had no authority in Wisconsin, and therefore, ''summary disposition of an administrative case is warranted where, as here, 'there is no factual dispute of substance.' '' SD, at 7 (citing *Veg-Mix, Inc.* v. *U.S. Dep't of Agric.,* 832 F.2d 601, 607 (D.C. Cir. 1987) (''[A]n agency may ordinarily dispense with a hearing when no genuine dispute exists.'' (citations omitted))). By letter dated September 4, 2019, the ALJ certified and transmitted the record to me for final Agency action. In that letter, the ALJ advised that neither party filed exceptions. I find that the time period to file exceptions has expired. *See* 21 CFR 1316.66.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

Findings of Fact

Respondent's DEA Registration

Respondent is the holder of DEA Certificate of Registration No. MH1088182 at the registered address of 6163 Washington Circle, Wauwatosa, Wisconsin 53213. Govt Motion Exhibit (hereinafter, GX) 2, at 1. Pursuant to this registration, Respondent is authorized to dispense controlled substances in schedules II through V as a ''practitioner.'' *Id.* Respondent's registration expires on October 31, 2021, and is currently in ''active pending status.'' *Id.*

The Status of Respondent's State License

On April 12, 2018, the Wisconsin Board of Nursing issued a Final Decision and Order (hereinafter, Board Order), in which Respondent stipulated to facts and conclusions of law related to her prescribing practices. Respondent Exhibit (hereinafter, RX) C (Board Order). The Board Order was ''effective on the date of its signing.'' *Id.* at 29. According to the Board Order, Respondent ''engaged in unprofessional conduct . . . by departing from or failing to conform to the minimal standards of acceptable nursing practice that may create unnecessary risk or danger to a patient's life, health, or safety.'' *Id.* at 27. The Board suspended Respondent's professional nursing

[1] The Hearing Request was deemed filed on July 17, 2019. Order for Prehearing Statements, at 1. I find that the Government's service of the OSC was adequate and that the Hearing Request was timely filed on July 17, 2019.

[2] Respondent filed a Prehearing Statement on the same day.

license and advanced practice nurse prescriber certificate in Wisconsin for twenty-one (21) days, and further limited her license requiring that she ''not practice pain management'' and ''not return to practice in the State of Wisconsin unless she provides written notification to the Board, or its designee, of intent to return to Wisconsin at least fifteen (15) days prior to return'' at which time the Board ''may impose additional limitations upon Respondent's license.'' *Id.* at 27–28.

According to Wisconsin's online records, of which I take official notice, Respondent's Advance Practice Nurse Prescriber license status is listed as ''license is not current (Expired)'' and further states ''Not Eligible to Practice (See board order).'' [3] Wisconsin Department of Safety and Professional Services Credential/Licensing Search, *https://licensesearch.wi.gov* (last visited on date of this Order).

Based on the entire record before me, I find that Respondent currently is not licensed as an Advance Practice Nurse Prescriber in Wisconsin, the state in which Respondent is registered with DEA.

I further find, as recommended by the ALJ, that Respondent's application for modification is not the subject of this proceeding, and agree that the Government did not challenge that application modification in its OSC. *See* OSC, at 1; *see also* SD, at 7–8.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (CSA) ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing[4] of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration in that state. *See, e.g., James L. Hooper, M.D.,* 76 FR 71371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27616, 27617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton,* 43 FR at 27,617.

In Wisconsin, an ''advanced practice nurse'' is a registered nurse who ''has a current license to practice professional nursing'' in Wisconsin. Wis. Admin. Code N § 8.02(1) (West, Current through Wisconsin Register 776B, published August 31, 2020). An ''advanced practice nurse prescriber'' is ''an advanced practice nurse who has been granted a certificate to issue prescription orders'' under Wis. Stat. § 441.16(2). *Id.* § 8.02(2).[5]

Under the Wisconsin Uniform Controlled Substances Act (hereinafter, Act), a person must have a federal controlled substances registration in order to lawfully dispense controlled substances in Wisconsin.[6] Wis. Stat. § 961.32(1m)(a) (West, Current through 2019 Act 186, published April 18, 2020). The Act further provides that a ''practitioner'' includes an ''advanced practice nurse . . . licensed, registered, certified or otherwise permitted to . . . dispense . . . a controlled substance in the course of professional practice.'' *Id.* § 961.01(19)(a).

Here, the undisputed evidence in the record is that Respondent is not currently licensed as an APNP in Wisconsin. As such, she is not authorized to dispense controlled substances in Wisconsin, the state in which she is registered with the DEA. Because Respondent lacks authority to dispense controlled substances in Wisconsin, she is not eligible to hold a DEA registration in Wisconsin. 21 U.S.C. 823(f).

I agree with the ALJ's finding that ''[t]he subject of the instant litigation is not whether the Respondent has requested to modify her [registration] to reflect an address in Florida, but whether she has state authority to dispense controlled substances in the state in which her [registration] is currently registered, Wisconsin, which she concedes, she does not.'' SD, at 7. The current issue before me is whether Respondent has state authority in Wisconsin, and I find that she does not. *See Parth S. Bharill,* 84 FR 39014 (2019).

Although she admitted that her Wisconsin APRN license expired about forty days before she asked DEA to change the address of her registration from Wisconsin to Florida, Respondent opposed the Government's Motion for Summary Disposition and argued for my focus first to be on her request for a change of address. Resp Opposition, at 1. In doing so, as already discussed, Respondent suggested that I ignore the fact that the Show Cause Order I am adjudicating is based on Respondent's lack of authority to dispense controlled substances in Wisconsin. 21 U.S.C. 823(f) (stating that a prerequisite to receiving a registration is having authorization to dispense controlled substances in the state of requested

[3] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Respondent may dispute my finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Respondent files a motion, the Government shall have fifteen calendar days to file a response. Any motion and response shall be filed and served by email to the other party and to the Office of the Administrator at *dea.addo.attorneys@dea.usdoj.gov.*

[4] ''[D]ispense[ ] means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance . . . .'' 21 CFR 802(10).

[5] An advanced practice nurse (hereinafter, APN) who meets the requisite education, training and examination requirements, and who pays the required fee, ''shall [be] grant[ed] a certificate to issue prescription orders.'' Wis. Stat. § 441.16(2) (West, Current through 2019 Act 186, published April 18, 2020).

[6] Under Wisconsin law, ''dispensing'' a controlled substance includes ''prescribing'' a controlled substance. Wis. Stat. § 961.01(7) (West, Current through 2019 Act 186, published April 18, 2020).

registration). Respondent made no argument that convinces me to ignore the statutorily mandated show cause order process or to limit the Agency's enforcement discretion and prerogatives by addressing her modification request based merely on a chronological sequence of events. 21 U.S.C. 823(c). The *Wedgewood Village Pharmacy* case Respondent cited explicitly articulates this process and DEA's enforcement discretion and prerogatives when it states that, ''[w]hen an application for modification of an existing practitioner's registration is received by DEA, and before an approval may be given, DEA must determine whether there is any need to conduct a further investigative inquiry.'' *Wedgewood Village Pharmacy, Inc.* v. *Ashcroft,* 293 F. Supp. 2d, 462, 467 (D.N.J. 2003). Here, Respondent's loss of APRN authority in Wisconsin was reason ''to conduct a further investigative inquiry.'' *Id.* Similarly, I reject Respondent's alternative argument that, even if I revoke her registration, ''then the application for modification should continue and be granted.'' Resp Opposition, at 4.

Respondent suggested that, even if I revoke her registration, her requested modification should continue and either be granted or be the subject of an order to show cause and a demonstration that ''granting the application is not in the public interest.'' *Id.* She did not, however, address how to implement the regulatory requirement of maintaining the modification with the ''old certificate'' until its expiration when the old certificate already expired due to revocation. 21 CFR 1301.51(c).

Respondent argued that the statement in 21 CFR 1301.51(c), that a ''request for modification shall be handled in the same manner as an application for registration,'' means that the Agency is ''required to register an applicant, unless it determines that the applicant's registration would be inconsistent with the public interest.'' Resp Opposition, at 2 (citing 21 U.S.C. 823). The further support Respondent provided for her argument is the *Wedgewood Village Pharmacy* federal district court decision. *Id.* (citing *Wedgewood Village Pharmacy, Inc.* v. *Ashcroft,* 293 F. Supp. 2d at 469).

Respondent's arguments ignore the entirety of 21 U.S.C. 823. That statutory provision premises a public interest analysis, in the first instance, on an applicant's existing authorization ''to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Respondent admitted that she lacks authority to dispense controlled substances in Wisconsin. Accordingly, if she were to apply for a registration in Wisconsin, the public interest portion of section 823 would not be reached due to her failure to meet the threshold eligibility requirements for a registration. Thus, Respondent's reliance on the district court's decision in *Wedgewood Village Pharmacy* is unavailing. Although Wedgewood Village Pharmacy retained its state authorization to dispense controlled substances during its litigation and, as such, its eligibility for a registration, Respondent has not.

Respondent did not address past Agency decisions concerning the precise portion of 21 CFR 1301.51(c) that she cited. Those decisions starkly show the weakness of Respondent's position. Most recently, my predecessor noted that this portion of the regulation ''does not mean that a modification request is the same as an application for a new registration in every respect.'' *Parth S. Bharill, M.D.,* 84 FR 39014 n.2 (2019) (citing *Craig S. Morris, D.D.S.,* 83 FR 36966, 36967 (2018)). In *Craig S. Morris, D.D.S.,* my predecessor had noted that ''[u]nlike a timely renewal application, a request to modify the registration address of an existing registration . . . does not remain pending after the registration expires, nor does it operate to extend when that registration expires.'' 83 FR at 36967.

Respondent also cited the Administrative Procedure Act (hereinafter, APA) as ''clearly indicat[ing] a governmental policy, by which agencies must consider a timely application before terminating a current registration,'' and 21 CFR 1301.36(i) for the proposition that ''as long as a current DEA registrant submits his renewal application in a timely manner, an Order to Show Cause in administrative revocation proceedings will not void the registration.'' Resp Opposition, at 2 (citing 5 U.S.C. 558 and *Wedgewood Village Pharmacy,* 293 F. Supp. 2d at 467). Both of these arguments fail because both section 558 of the APA and section 1301.36(i) of DEA's regulations concern applications for reregistration (renewal) or for a new registration. 5 U.S.C. 558 (''When the licensee has made timely and sufficient application for a renewal or a new license . . .''); 21 CFR 1301.36(i) (''In the event that an applicant for reregistration (who is doing business under a registration previously granted and not revoked or suspended) has applied for reregistration . . .'').

Respondent's request under 21 CFR 1301.51(c) was not to renew or obtain a new registration. Her request was ''for modification of her DEA registration, to change the address of her registration'' from Wisconsin to Florida. Resp Opposition, at 1. As discussed above, the regulations are clear that the request to modify is not an extension of an existing registration, but shall be handled in the same manner as an application. *See Cleveland J. Enmon, Jr. M.D.,* 77 FR 57,116, 57,125 (2012) (''[W]hile the address change request is pending with the DEA, the registrant is not authorized to handle controlled substances at the new location until the DEA approves the modification.'').

Accordingly, I will order that Respondent's DEA registration in Wisconsin be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MH1088182 issued to Lisa Hofschulz, N.P. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27239 Filed 12–10–20; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 18–13]

George Pursley, M.D.; Denial of Application

I. Introduction

On December 1, 2017, a former Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to George Pursley, M.D. (hereinafter, Applicant), of Augusta, Georgia. Administrative Law Judge Exhibit (hereinafter, ALJX) 1 (Order to Show Cause (hereinafter, OSC)), at 1. The OSC proposed the denial of Applicant's application for a DEA certificate of registration on the ground that his registration ''would be inconsistent with the public interest,'' citing 21 U.S.C. 823(f). *Id.*

The substantive grounds for the proceeding, as more specifically alleged in the OSC, are that Applicant unlawfully pre-signed and pre-printed prescriptions, committed violations of applicable federal and state recordkeeping requirements, unlawfully prescribed controlled substances, and, citing 21 U.S.C. 823(f)(5), did not exhibit candor during DEA's investigation. *Id.* at 2–8.

The OSC notified Applicant of his right to request a hearing on the

allegations or to submit a written statement while waiving his right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 9 (citing 21 CFR 1301.43). Applicant timely requested a hearing by letter dated January 3, 2018. ALJX 3 (Order for Prehearing Statements dated January 10, 2018), at 1 (interpreting ALJX 2 (Request for Hearing)).

The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Administrative Law Judge (hereinafter, ALJ) Mark M. Dowd. The parties agreed to nine stipulations.[1] ALJX 8 (Prehearing Ruling dated February 12, 2018), at 1.

The hearing in this matter spanned four days and took place in Augusta, Georgia. The Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (hereinafter, RD) is dated August 20, 2018. Both parties filed exceptions to the RD. Transmittal Letter, at 1. With his exceptions, Applicant filed a Motion for Leave to Supplement Evidence Post-Hearing. The Government filed an opposition to Applicant's Motion on September 12, 2018. *Id.* The ALJ denied Applicant's Motion on September 14, 2018.

Having considered the record in its entirety, I find that it establishes, by substantial evidence, that Applicant violated controlled substance recordkeeping requirements and unlawfully prescribed controlled substances. I disagree with the RD that it is in the public interest for Applicant to be granted a DEA registration. I find that Applicant's acceptance of responsibility was insufficient and that, even if it were sufficient, Applicant did not offer adequate remedial measures. Further, for the reasons stated in his Order, I agree with the ALJ's denial of Applicant's Motions for Leave to Supplement Evidence Post-Hearing.

Accordingly, I conclude that Applicant's application for a DEA registration should be denied. I make the following findings.

II. Georgia Physicians' Standard of Care

According to the Controlled Substances Act (hereinafter, CSA), ''Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to . . . distribute, . . . dispense, or possess with intent to . . . distribute[ ] or dispense, a controlled substance.'' 21 U.S.C. 841(a)(1). The CSA's implementing regulations state, among other things, that a lawful controlled substance order or prescription is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a).

Applicant's registration application is for his medical practice in Georgia. As such, I also evaluate the record evidence according to the applicable laws and standard of care in Georgia.[2] The Government offered two exhibits about the standard of care in Georgia. Applicant did not object to the admission of either exhibit.[3]

The Government offered Georgia Composite Medical Board Rule 360–3–.06, entitled ''Pain Management.'' GX 4 (hereinafter, GA Pain Management Rule). The GA Pain Management Rule initially notes that section 43–34–8 of Georgia's statutes authorizes the Georgia Composite Medical Board (hereinafter, GCMB) to discipline licensees for unprofessional conduct, ''which includes conduct below the minimum standards of practice.''[4] GX 4, at 1 (360–3–.06(2)); *see also* transcript page (hereinafter, Tr.) 185 (the Government's expert, Dr. Kaufman, testifying that these standards apply to all individuals holding a medical license). With respect to prescribing controlled substances to treat pain and chronic pain, the GA Pain Management Rule states, ''Physicians cannot delegate the dispensing of controlled substances to an unlicensed person.'' GX 4, at 1 (360–3–.06(2)(a)). When ''initially prescribing'' a controlled substance to treat pain or chronic pain, ''a physician shall have a medical history of the patient, a physical examination of the patient shall have been conducted, and informed consent shall have been obtained.'' *Id.* (360–3–.06(2)(c)); *see also* Tr. 195–201 (testimony of Dr. Kaufman discussing the applicable standard of care in Georgia). The GA Pain Management Rule addresses such a non-terminal patient's prior diagnostic records in significant detail: ''[T]he physician shall obtain or make a diligent effort to obtain any prior diagnostic records relative to the condition for which the controlled substances are being prescribed and shall obtain or make a diligent effort to obtain any prior pain treatment records.'' GX 4, at 1 (360–3–.06(2)(d)). The physician ''shall'' maintain the prior treating physician's records ''for a period of at least ten . . . years.'' *Id.* If the physician, after trying diligently, is not able to obtain prior diagnostic records, the physician ''must document the efforts made to obtain the records'' and ''must order appropriate tests to document the condition requiring treatment for pain or chronic pain.'' *Id.* at 1–2.

According to the GA Pain Management Rule, when a ''physician determines that a patient for whom he is prescribing controlled scheduled substances is abusing the medication, then the physician shall make an appropriate referral for treatment for substance abuse.'' *Id.* at 2 (360–3–.06(2)(e)). For patients being treated for chronic pain with a schedule II or III controlled substance for ninety or more days, the physician ''must have a written treatment agreement with the patient and shall require the patient to have a clinical visit at least once every three . . . months to evaluate the patient's response to treatment, compliance with the therapeutic regimen through monitoring appropriate for that patient, and any new condition.'' *Id.* (360–3–.06(f)). Physicians are explicitly charged with ''respond[ing] to any abnormal result of any monitoring'' and told to ''record

[1] ''1) Prior to and on August 11, 2015, [Applicant] maintained Schedule II–V controlled substances at his office of 1219 West Wheeler Parkway, Augusta, GA 30909.

''(2) Three hundred sixteen pre-signed prescriptions were seized from [Applicant's] office on August 11, 2015.

''(3) On August 11, 2015, DEA investigators seized [Applicant's] patient sign-in list for August 6–7, 2015.

''(4) On August 11, 2015, DEA seized pre-printed, unsigned prescriptions dated August 11, 2015 from [Applicant's] office.

''(5) [Applicant] no longer works at the location listed on his application for a DEA [registration], 1219 West Wheeler Parkway, Augusta, GA 30909.

''(6) [Applicant] has not filed any materially falsified applications.

''(7) [Applicant] has not been convicted of a felony relating to a controlled substance or a List I chemical.

''(8) [Applicant] has not had his state license or registration suspended, revoked, or denied despite full disclosure to all entities and boards of the DEA investigation including, but not limited to [the Centers for Medicare and Medicaid Services (Department of Health and Human Services)], the Georgia Medical Composite Board, and the South Carolina Board of Medical Examiners.

''(9) [Applicant] has not been excluded from participation in a Medicaid or Medicare program.''

[2] *See Gonzales* v. *Oregon,* 546 U.S. 243, 269–71 (2006).

[3] Applicant did not offer any exhibit purporting to address or memorialize the Georgia standard of care.

[4] According to section 43–34–8, unprofessional conduct ''need not have resulted in actual injury to any person'' and includes ''any departure from, or failure to conform to, the minimum standards of acceptable and prevailing medical practice and shall also include . . . the prescribing or use of drugs, treatment, or diagnostic procedures which are detrimental to the patient as determined by . . . rule of the board.'' Ga. Code Ann. § 43–34–8(a)(7) (West, Westlaw: Effective January 1, 2013, to May 8, 2017). This provision of the Georgia Code also defines unprofessional conduct as failure ''to maintain appropriate medical or other records as required by board rule.'' *Id.* at § 43–34–8(a)(19).

. . . [such response] in the patient's record.'' [5] *Id.*

While the GCMB does not have a ''magic formula for determining the dosage and duration of administration for any drug,'' it ''does have the expectation that physicians will create a record that shows evaluation of every patient receiving a controlled substance prescription.'' *Id.* The need for record documentation appears throughout the Ten Steps. The evaluation record that the GCMB expects is to show (1) ''[p]roper indication for the use of drug or other therapy;'' (2) ''[m]onitoring of the patient where necessary;'' (3) ''[t]he patient's response to therapy on follow-up visits;'' (4) [a]ll rationale for continuing or modifying the therapy;'' (5) ''[d]iscussion of risks/benefits;'' (6) ''[p]eriodic medical record review;'' and (7) ''[p]rescription records.'' *Id.* at 2.

According to the Ten Steps, a ''medical history and physical examination must be obtained, evaluated, and documented in the medical records.'' The medical record documentation ''should'' address the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function, and history of substance abuse.'' *Id.* It also ''should document the presence of one or more recognized medical indications for the use of a controlled substance.'' *Id.* The ''workup'' is to be ''sufficient to support a diagnosis including all necessary tests, history and physical examination.'' *Id.* In sum, the ''medical record will need to document sufficient and appropriate H&P and diagnostic testing to support the diagnosis necessitating the use of controlled substances.'' *Id.*

Second, the Ten Steps calls for creation of a treatment plan, including the use of appropriate non-controlled drugs, and consideration of referrals to appropriate specialists. *Id.* The treatment plan is to ''state objectives that will be used to determine treatment success . . . and should indicate if any further diagnostic evaluations or other treatments are planned.'' *Id.* at 3.

Third, the Ten Steps calls for a determination, through trial or a documented history and physical, that non-controlled drugs are not appropriate or effective for the patient's condition. *Id.* Further, when controlled substances are used as a ''first-line therapy,'' ''it is important to document the rationale when used as such.'' *Id.*

According to the fourth step, the physician is to ''[r]eview the patient's prescription records and discuss the patient's chemical history before prescribing a controlled drug.'' *Id.*

Fifth, the physician is to ''discuss the risks and benefits of the use of controlled substances with the patient,'' taking the ''time to explain the relative risks and benefits of the drug,'' and ''record[ing] in the chart the fact that this was done.'' *Id.*

The sixth step addresses monitoring and states that regular monitoring, including ''frequent physical monitoring,'' of the patient is to be ''maintained.'' *Id.* at 4. Further, according to this step, ''it is very important to monitor the patient for the underlying condition which necessitates the drug and for the side effects of the drug itself'' when the regimen calls for prolonged need for use of the drug. *Id.*

Seventh, the ''physician must keep detailed records of the type, dosage and amount of the drug prescribed.'' *Id.* In addition, the prescribing physician ''should also monitor and personally control all refills.'' *Id.* According to this step, ''[o]ne good way to accomplish this is to require the patient to return to obtain refill authorization, at least part of the time.'' *Id.* Further, this step states that a ''patient should receive prescriptions from one physician and one pharmacy whenever possible'' while advising that it is a ''felony in Georgia for a patient to fail to disclose to his physician that he has received controlled substances of a similar therapeutic use from another practitioner at the same time.'' *Id.* This step advises physicians to contact the local police or the Georgia Drug and Narcotics Agency if they ''are aware of these situations occurring.'' *Id.*

The eighth step suggests that the ''patient's family may be a valuable source of information on the patient's response to the therapy regimen and the patient's functional status.'' *Id.* This information is important because changes ''may be symptoms of dependency or addiction.'' *Id.*

Ninth, ''[m]aintaining adequate records is extremely important.'' *Id.* According to the Ten Steps, the ''physician who carefully manages pain treatment and maintains detailed records which reflect all the steps involved in the process will be able to assess and review the treatment course and progress.'' *Id.*

The tenth of the Ten Steps states, ''Document. Document. Document. Keep accurate and complete records'' to include medical history and physical exam; diagnostic, therapeutic, and laboratory results; evaluations and consultations; treatment objectives; medications; and instructions and agreements, including any pain contracts.

The second exhibit the Government offered about the standard of care in Georgia is GCMB Rule 360–3–.02, entitled ''Unprofessional Conduct Defined,'' GX 5. The rule starts by citing two Georgia statutes for the proposition that the GCMB is authorized to take disciplinary action against licensees for unprofessional conduct. Ga. Code Ann. § 43–34–8(a)(7) (West, Westlaw effective January 1, 2013, to May 8, 2017) (authorizing the GCMB to discipline a regulated person who engages in ''any unprofessional, unethical, deceptive, or deleterious conduct or practice harmful to the public,'' explaining that the conduct or practice ''need not have resulted in actual injury to any person,'' and explicitly including ''any departure from, or failure to conform to, the minimum standards of acceptable and prevailing medical practice'' and ''the prescribing or use of drugs, treatment, or diagnostic procedures which are detrimental to the patient as determined by the minimum standards of acceptable and prevailing medical practice or rule of the board'') and **G**a. Code Ann. § 43–1–19(a)(6) (West, Westlaw effective to May 2, 2016) (containing ''general provisions'' authorizing professional licensing boards to refuse to grant a license to an applicant, to revoke a license, and to discipline a licensed person when the applicant or licensee engaged in any unprofessional conduct or practice harmful to the public that materially affects the fitness of the licensee or applicant to practice the profession or is of a nature likely to jeopardize the interest of the public, and the conduct need not result in actual injury to any person or be related to the practice of the licensed profession). The Georgia Code also authorizes the GCMB to refuse to grant a license and to

[5] The GCMB adopted ''Guidelines for the Use of Controlled Substances for the Treatment of Pain: Ten Steps'' (hereinafter, Ten Steps) on January 11, 2008. The Ten Steps are ''primarily intended to provide orientation for physicians intending to prescribe schedule II and III analgesics . . . [to treat] chronic pain conditions and do not necessarily apply to clinical conditions . . . such as acute pain management following surgery, emergency care pain management and end-of-life care.'' Ten Steps, at 1. The Ten Steps ''clarify the . . . [GCMB's] position on pain management, particularly as it relates to the use of controlled substances, to alleviate physician uncertainty and to encourage better pain management practices.'' *Id.* They are also intended to curtail drug diversion, ''a serious public safety concern for the . . . [GCMB] and law enforcement agencies.'' *Id.* The Ten Steps state that physicians ''should not fear disciplinary action from the . . . [GCMB] for ordering, prescribing, dispensing or administering controlled substances, including opioid analgesics, for a legitimate medical purpose and in the course of professional practice.'' *Id.* According to the GCMB, ''[a]dherence . . . [to the Ten Steps] will not only improve quality medical practice but will also improve the . . . [GCMB's] efficiency in its investigations by distinguishing legitimate practice from foul play.'' *Id.*

discipline a regulated person who has ''[f]ailed to maintain appropriate medical or other records as required by . . . [GCMB] rule.'' [6] Ga. Code Ann. § 43–34–8(a)(19) (West, Westlaw effective January 1, 2013, to May 8, 2017); *see also* Ga. Comp. R. & Regs. § 480–28–.02 (West, Westlaw effective 2002) (''All practitioners who dispense drugs shall comply with all record-keeping, labeling, packaging, and storage requirements imposed upon pharmacists and pharmacies with regard to such drugs and those regulations contained in this Chapter.'') and Ga. Comp. R. & Regs. § 480–28–.04(5) (West, Westlaw effective 2002) (establishing controlled substance invoice, inventory, and filing requirements).

Having read and analyzed all of the record evidence, I agree with the ALJ's determination to recognize Dr. Kaufman as an expert in the area of pain management.[7] Tr. 183. Dr. Kaufman testified that the GA Pain Management Rule establishes the minimum standard of care in Georgia for prescribing controlled substances, regardless of the prescriber's medical specialty. *Id.* at 180, 182, 192–93. He noted that a prescriber's failure to conform to the requirements of the GA Pain Management Rule is unprofessional conduct subject to disciplinary action. *Id.* at 185; GX 5, at 4 (Rule 360–3–.02(22)). Dr. Kaufman testified that prescribing controlled substances for a known or suspected habitual drug abuser or other substance abuser in the absence of substantial justification is also unprofessional conduct under Georgia law. Tr. 185, 208–10; GX 5, at 1 (Rule 360–3–.02(1)). Further, he stated that writing a controlled substance prescription for immediate family members, except in a documented emergency, constitutes unprofessional conduct. Tr. 185–86, 215–16 (''everybody knows this''); *id.* at 489–90; GX 5, at 1 (Rule 360–3.02(2)).

Dr. Kaufman's testimony provided additional detail about the standard of care for prescribing controlled substances in Georgia. Regarding the requirement that a physician review the medical history of a patient when initially prescribing a controlled substance to treat pain or chronic pain, Dr. Kaufman testified that a history ''doesn't just say, the patient has back pain. You have to say how long, how did it get hurt, what things have they tried to get better before they came to see you, what types has another physician tried, what types of evaluations have they done.'' Tr. 195. Concerning the physical examination called for by the Georgia standard of care, Dr. Kaufman testified that it has to be ''appropriate to the problem.'' *Id.* at 196.

> So, if you're saying that someone has a back problem, you have to do an examination of the back. Obviously, my examination of the back might be different than a family practitioner's. But there are some sort of basic things that are involved with a physical examination that have to be done.''

Id.

The standard of care in Georgia states that physicians ''should always start with the easiest treatment plan,'' non-addicting options, such as physical therapy, chiropractic, tens unit, and anti-inflammatories. *Id.* at 203. Through physician-patient conversations, the physician evaluates whether the treatment is working and documents ''what's going on.'' *Id.* at 204. This process may lead to the prescribing of controlled substances. *Id.*

Regarding the requirement that a physician obtain the patient's informed consent when initially prescribing a controlled substance, Dr. Kaufman explained that ''[t]here's no reason a patient should know anything about opioids and you have an obligation to explain that things like they can be habit forming, that you cannot take extra ones, because these could really cause issues, you shouldn't have alcohol.'' *Id.* at 196–97. According to Dr. Kaufman, ''It's just a general discussion and explanation of what they are getting into . . . because they might not know that it's habit forming, they may not know that they are going to develop physical dependence, and you have to explain these things.'' *Id.* at 197. In addition, the physician has an obligation to inform the patient that he ''should go to one pharmacy so that we can really keep track'' and ''should really only go to one physician to write these prescriptions.'' *Id.* The physician should tell the patient ''about the interactions with other medications or other medical problems that they might have as it relates to these medications.'' *Id.* at 196–97.

Dr. Kaufman elaborated on the requirements for a physician prescribing a Schedule II or III controlled substance for ninety or more days to treat a patient with a non-terminal condition in chronic pain. *Id.* at 189–90. He testified that the physician must have a written treatment agreement with the patient and require the patient to have a clinical visit at least once every three months. *Id.* at 190. The physician must monitor the patient's compliance with the therapy and identify any new condition. *Id.* Although the standard of care does not specify a physician's exact response to the monitoring's results, it ''insist[s] that you document that something was abnormal and encourage[s] you to write down what you are thinking and why it is you do whatever it is you do.'' *Id.* The standard of care calls for the physician to make a referral to an appropriate practitioner when the physician determines that the patient has a new condition ''beyond his scope of training.'' *Id.*

Dr. Kaufman explained that the written treatment agreement is a component of the physician's discussion with the patient being treated for more than ninety days. *Id.* at 197. The doctor explores what physical and emotional impacts the patient is experiencing. *Id.* This discussion leads to written goals for the therapy. *Id.* ''You ask . . . [the patient], can you climb the stairs, can you go to the mailbox, can you stand and make your lunch.'' *Id.* at 204.

> You want to have a plan. . . . . You want to have some things that are laid down as goals, and you tell patients, or at least . . . you're supposed to tell patients. And if were [sic] not effective, we give it a period of time and if it's not working, if we don't see some objective improvement, we're going to stop these medicines. We don't want to just turn you into a person who got a dependency on medications unless were [sic] getting somewhere, unless were [sic] doing something.

Id. at 197–98. Dr. Kaufman further explained the standard of care with an analogy to blood pressure medication—after prescribing blood pressure medication, the physician records the changes in the patient's blood pressure. *Id.* at 201–02. For patients in pain, there is a ''visual analog scale'' and, as

[6] Although not charged in this administrative proceeding, provisions of the Georgia criminal code address related matters. For example, only an authorized, registered practitioner acting in the usual course of his professional practice for a legitimate medical purpose may prescribe or order the dispensing of a controlled substance. Ga. Code Ann. § 16–13–41(f) (West, Westlaw effective since 2011).

Regarding prescriptions for Schedule II controlled substances, the Georgia criminal code states, among other things, that they ''shall be signed and dated by the practitioner on the date when issued.'' Ga. Code Ann. § 16–13–41(b) (West, Westlaw effective since 2011); *see* OSC, at 2 (unlawful pre-signed and pre-printed prescriptions allegation). The same issuance-related requirement applies to Schedule III, IV, and V controlled substances. Ga. Code Ann. § 16–13–41(d)(2) (West, Westlaw effective since 2011). Further, regarding recordkeeping, the Georgia criminal code states that persons registered to dispense controlled substances ''shall keep a complete and accurate record of all controlled substance on hand, received, . . . sold, dispensed, or otherwise disposed of and shall maintain such records and inventories in conformance with the record-keeping and inventory requirements of federal law and with any rules issued by the State Board of Pharmacy.'' Ga. Code Ann. § 16–13–39 (West, Westlaw effective since 1982); *see* OSC, at 2 (recordkeeping violations allegation).

[7] Applicant's counsel did not object to this determination. Tr. 183.

already discussed, objective improvements in the patient's physical ability. *Id.* at 202. ''[A]t the very least,'' he testified, ''you need to find out how they're doing and document whether they got better, or worse or what's going on.'' *Id.* at 204. If the current therapy does not work, the physician is to try something else. *Id.* at 205. Since there are ''severe issues, complications'' for a patient on the equivalent of more than 90 milligrams of morphine, ''it's recommended that non-specialists don't really go above that level . . . [and that] they then send those patients to specialists.'' *Id.* at 206.

Dr. Kaufman explained that a narcotics agreement advises the patient that controlled substances are ''very serious medications, they're not to be sneezed at.'' *Id.* at 198. The patient is told that a controlled substance may be taken only as prescribed, that drinking ''a whole bunch of alcohol'' while taking a controlled substance will result in ''horrible side effects,'' and that it is important to be ''very careful the first few times if they're going to be driving a vehicle or climbing a ladder, because there's all kinds of side effects from this.'' *Id.* at 199. Further, the prescribing physician is to explain the screening procedures to the patient, including urine drug screens whose results are recorded in the patient record, the possibility of pill counts, and the unavailability of early refills. *Id.* at 199, 201.

Dr. Kaufman also testified about the standard of care for the maintenance of medical records. He explained that complete medical records help prevent a physician from making a mistake due to the difficulty of recalling everything that transpired with the passage of time. *Id.* at 210. He noted that the GCMB reviews medical records to determine if the physician ''followed everything and if you did, everything is okay and there's no problem.'' *Id.* Dr. Kaufman emphatically testified that errors or sloppiness are not an ''adequate explanation of a failure to document properly'' and, ''at the end of the day, I'm responsible for anything that's in that chart'' and ''I take ownership'' of anything in the chart ''once I sign off on it,'' ''just as everybody else does.'' *Id.* at 211. He affirmed that this is the standard of care in Georgia. *Id.* at 212.

In sum, having read and analyzed the relevant legal authorities and the record evidence, I find that Dr. Kaufman's testimony about the Georgia standard of care applicable to this adjudication is credible. I give it controlling weight in this proceeding.[8] The testimony of Applicant's expert witnesses is not cited in this section because, to the extent that they addressed the applicable standard of care in Georgia, they did not detail a perspective that is contrary to the much more comprehensive and credible testimony of Dr. Kaufman.[9] Further, to the extent that the testimony of Applicant or his experts about the applicable standard of care in Georgia conflicts with Dr. Kaufman's testimony, I will credit Dr. Kaufman's testimony. *See, e.g., infra* section IV.

III. Findings of Fact

A. Applicant's Current Medical Licensure

The Georgia Composite Medical Board (hereinafter, GCMB) issued medical license number 31308 to Applicant. According to Applicant, his Georgia medical license was renewed on April 3, 2019. Applicant's Second Motion for Leave to Supplement Evidence Post-Hearing dated February 7, 2020, at 2.[10]

B. The Investigation of Applicant and His Recent Registration History

During the course of the DEA Diversion Investigator's (hereinafter, DI) duties conducting an administrative inspection at an area pharmacy, he received information from a pharmacist who claimed to have work experience at Applicant's office. Tr. 29, 82, 85; *see also id.* at 136 (testimony of Group Supervisor (hereinafter, GS)). According to that information, Applicant ''would pre-sign prescriptions and then would be filling prescriptions without evaluation or without seeing them, sometimes for long periods of time.'' *Id.* at 30; *see also id.* at 44. DI asked the pharmacist to repeat this information to DI's supervisor. *Id.* at 31. He then recommended that DEA conduct an inspection of Applicant's office. *Id.* DI's supervisor agreed. *Id.*

C. The Allegations of Dispensing and Non-Dispensing Violations

The OSC alleges four bases for the denial of Applicant's registration application: The pre-signing and pre-printing of prescriptions (citing 21 CFR 1306.04 and 1306.05; Ga. Code Ann. § 16–13–41(b)); recordkeeping violations (citing 21 U.S.C. 842(a)(5); 21 CFR 1304.04(a), (f)(1), (f)(2), and (g), 1304.11(b) and (c), 1304.21(a); Ga. Code Ann. §§ 16–13–39, 16–13–42(a)(3)); the unlawful prescribing of controlled substances (citing 21 CFR 1306.04; Ga. Code Ann. § 16–13–41(f); GCMB Rules 360–03–.02(2) and 360–03–.06; the Georgia Guidelines for the Use of Controlled Substances for the Treatment of Pain (hereinafter, GA Guidelines)); and lack of candor (citing 21 U.S.C. 823(f)(5)).[11]

There is factual agreement among the witnesses on a number of matters. When there is factual disagreement, I apply my credibility determinations and, to the extent that I agree with them, any credibility recommendations of the ALJ.[12] *See, e.g., supra,* section II; *infra* sections III.D., III.E., and IV.B.3.

[8] I agree with the RD that Dr. Kaufman ''generally offered detailed assessments of individual prescriptions and actions by the . . . [Applicant], and tied these directly to the relevant regulation or statute.'' RD, at 76. I do not, however, adopt all of the statements in the RD about Dr. Kaufman's credibility. *Id. Infra* n.28.

[9] The RD states that ''[a]s to patients DC and M.B., by all accounts, these are exceptional patients, legacy pain patients, by their history and according to Dr. Downey, warranting a different evaluation and treatment standard than that afforded non-legacy pain patients.'' RD, at 113. I find that this portion of the RD is not complete; it does not include Dr. Downey's testimony explicitly acknowledging that the provisions of the Georgia Pain Management Rule apply to all controlled substance prescriptions written since 2012, including for so-called ''legacy pain patients,'' such as patients whom an applicant treated since 1994. Tr. 601–03.

[10] My citation to this document is solely for the purpose of noting the status of Applicant's Georgia medical license and does not change my finding that the ALJ was correct to deny Applicant's motions. *Supra* section I.

[11] The Government abandoned two of the patient files (H.B. and K.K.) cited in the unlawful prescribing of controlled substances charges. Tr. 244. The Government subsequently withdrew the lack of candor charge entirely. *Id.* at 9–10.

[12] I appreciate the ALJ's work and the work of Applicant's and Government's counsel on this matter. I considered the entire record certified to me and, as the ultimate Agency decision maker, found facts, assessed credibility, and determined how the findings of fact measure against the applicable law. In doing so, I carefully considered the ALJ's RD and the parties' submissions. *See Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 487–97 (1951) (holding that the standard of proof specifically required by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act, finding that the Courts of Appeals determine whether there is substantial evidence to support agency findings on the record as a whole, stating that the reviewing court is directed to determine the substantiality of evidence on the record including the examiner's report, and concluding, ''We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree.''); *Reckitt & Colman, Ltd.* v. *Administrator, Drug Enf't Admin.,* 788 F.2d 22, 26–27 (1986) (''The agency, and not the ALJ, is the ultimate factfinder. . . . While it is true that reviewing courts must take the ALJ's findings into account as part of the record, . . . the significance to be ascribed to them 'depends largely on the importance of credibility in the particular case.' . . . The dispute in this case centered not on the occurrence or nonoccurrence of historical facts, or other issues for which demeanor evidence would be highly probative, but rather on matters of scientific judgment and expertise. The ALJ conceded that Dr.

D. The Government's Case

The Government's documentary evidence consists primarily of medical records. The Government called three witnesses: A DEA Diversion Investigator, DI, GS, and Dr. Gary Kaufman, the Government's expert witness.

DI testified about his investigation-related actions, including execution of the Notice of Inspection (hereinafter, NOI), Applicant's voluntary consent to the inspection, Applicant's polite and cooperative demeanor, Applicant's subsequent voluntary surrender of his DEA registration, and the handwritten statement Applicant voluntarily provided. Tr. 31–44; GX 3 (DEA–82 (Notice of Inspection of Controlled Premises) that Applicant signed consenting to the inspection on August 11, 2015); GX 2 (DEA–104 (Voluntary Surrender of Controlled Substances Privileges) that Applicant signed concerning BP1660338 and XP1660338 on August 11, 2015); GX 96 (Applicant's undated handwritten statement).[13] After Applicant voluntarily surrendered his registration, DI ascertained that there were controlled substances in Applicant's office. Tr. 39, 43.

DI testified that he seized a ''clear plastic tub full of pre-signed prescriptions'' and ''[u]nsigned, pre-printed prescriptions . . . sitting right there in plain view.'' *Id.* at 43–44; GX 87 (''pre-signed prescriptions,'' including prescriptions for controlled substances); GX 88 (''pre-printed, unsigned controlled substance prescriptions''); *see also* Tr. 45–49. DI also testified that, according to Applicant and Applicant's staff, Applicant was not in the office on August 7, 2015, and he was only in the office for half of August 6, 2015. Tr. 49–53. While conducting the inspection, DI also seized patient sign-in sheets that Applicant's staff provided as evidence of the patients who were in the office on August 6 and 7, 2015. *Id.* at 56–58; GX 86. DI testified that GX 86 was ''the only thing that . . . [Applicant's] Office provided . . . [him] as evidence of who was in the office those two days,'' and that Applicant's staff did not indicate that ''there was any other evidence or sign-in logs that would indicate who was in the office on August 6th and August 7th.'' Tr. 58.

DI testified about the seizure of Applicant's patient files, DEA's analysis of those files, and the identification of ''red flags'' in those files.[14] *Id.* at 58–68; GX 51 (D.C. patient files); GX 59 (M.B. patient files); GX 77 (patient files for Applicant's daughter (hereinafter, Applicant's (or his) daughter)); GX 52–58 (prescriptions that Applicant issued to D.C.); GX 60–76 (prescriptions that Applicant issued to M.B.); GX 78–84 (prescriptions that Applicant issued to his daughter). The analysis of Applicant's patient files, according to DI's testimony, led to the retention of a medical expert to analyze the legitimacy of Applicant's controlled substance prescribing and to the issuance of subpoenas to pharmacies for prescriptions that Applicant issued to these patients and that the patients filled.[15] Tr. 68–79.

In addition to his testimony about the origin of DEA's investigation of Applicant and execution of the NOI, *id.* at 136–37, GS testified about the controlled substance records that registrants are legally required to maintain, his request for Applicant's controlled substance records, his NOI-related interactions with Applicant and Applicant's staff, and the seizure of controlled substances from Applicant's office.[16] *Id.* at 137–73.

GS explained that the mandatory controlled substance records include an initial inventory, a biennial inventory, dispensing records, purchasing records, return records, and destruction records, and that these records must be maintained in a manner that allows them to be readily retrievable upon the registrant's receipt of an authorized request for them. *Id.* at 138–40. According to GS, both federal law and Georgia law require controlled substance recordkeeping. *Id.* at 141. When he learned that Applicant had controlled substances in his office, GS asked to see ''the records for any controlled substances that you might have on hand.'' *Id.* at 138. More specifically, he testified that he asked for ''any initial inventory, the bi-annual inventory, the purchasing records, the dispensing records, any type of destruction records, any other type of record dealing with controlled substances that they would be required to maintain for a period of two years in a readily retrievable format on site.'' *Id.* at 141–42.

GS testified that Applicant's office was not able to produce any of the records that he requested. *Id.* at 142, 155, 156–57, 160, 168, 172–73.

> There was no bi-annual inventory, when a schedule of a drug changes, say . . . [as] hydrocodone did on October 6, 2014. There would have been a required new inventory for that, so there wasn't an initial inventory for that. There were no purchasing records on site. No 222s. No invoices. No destruction of controlled substance records. No controlled substance records whatsoever.

Id. at 155. GS also testified that no one in Applicant's office stated that the required controlled substance records were maintained electronically. *Id.* at 144; *see also id.* at 170. Also, GS specifically testified that (1) anyone's testimony that Applicant's ''pharmacist'' showed him ''the computer'' and that he was not ''interested in it'' is not accurate, (2) a statement that Applicant's staff ''pointed . . . [him] to two notebooks where the invoices were kept'' is not accurate, (3) he did not ask ''if all the data was on the computer,'' (4) he does not recall ''a discussion with . . . [Applicant's staff] that they should scan the filled prescriptions back into the EMR records,'' (5) he does not recall telling Applicant and Applicant's staff that ''there were some minor problems, but in general they were in compliance;'' he recalls ''telling . . . [the staff] there were recordkeeping violations, and . . . that's when . . . [he] said it could be a letter of admonition, a memorandum of agreement, civil fine, up the gamut,'' and (6) he does not recall stating that ''they would likely get a letter within the next 30 days with a corrective plan.'' *Id.* at 169–71.

GS specifically testified about the documents in RX 11F. On cross-examination, GS looked through RX 11F and concluded that he saw in there ''clear[ ] violations of the recordkeeping requirements.'' *Id.* at 166. On re-direct, GS testified that, if RX 11F had been presented to him on August 11, 2015, he ''absolutely'' would still have cited Applicant for recordkeeping violations ''[b]ecause they are not in compliance with the federal regulations of the United States [C]ode.'' *Id.* at 173.

Zelesko was 'a highly qualified and experienced chemist' but simply found the petitioner's experts more persuasive. On such matters the Administrator remains free to disagree. We conclude that the Administrator's conclusion is supported by substantial evidence.''); 5 U.S.C. 557(b) (''On appeal from or review of the initial decision [by the ALJ], the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.'').

[13] Tr. 97 (Applicant's counsel purported to read Applicant's handwritten statement into the record during his cross-examination of DI: ''I've been practicing medicine in the State of Georgia for 25 years. I have never willfully tried to be unlawful in my practice with my patients. Evidently, today I found out that I have been in violation of federal drug code with my practice. I will surrender my DEA license and hope that a hearing would be obtained to hopefully reconcile this matter.'').

[14] DI explained that ''red flags'' is a ''term of art, that we use for signs indicative of opioid or other prescription medical abuse or diversion.'' Tr. 65.

[15] The DEA subpoena did not result in the seizure of every prescription that Applicant issued.

[16] GS also testified that Applicant was ''very cordial'' during execution of the NOI. Tr. 137.

When Applicant's staff asked him what could happen when a registrant does not produce the required records, GS testified that he outlined the possible ramifications ranging from a verbal, on-site warning to a criminal prosecution. *Id.* 148–49; *see also id.* at 171. In response to questioning by Applicant's counsel, GS stated that he had never before seen the paperwork counsel was showing him during the cross-examination. *Id.* at 163. GS testified that, had Applicant or Applicant's staff given him RX 11 during the inspection, he would not have accepted it. *Id.* GS pointed out pages in the paperwork that did not concern controlled substances, were not relevant to the required time period, or exhibited clear violations of the recordkeeping requirements. *Id.* at 163–68 (regarding RX 11F, RX 11G, RX 11I, RX 11J); *see also* Tr. 160–61 (regarding RX 11B). GS testified that, if Applicant had offered the DEA team the required records that he had requested, ''even the next day,'' the team would have taken them. Tr. 156. ''We probably would have been like, yes, that's what we're looking for. We probably would have taken them and explained that you need to make sure in the future that you have that. . . . [W]e have done that in the past,'' he testified. *Id.*

When GS learned that Applicant had voluntarily surrendered his registration, his request for required records ''became a moot point,'' and he seized the controlled substances in Applicant's office.[17] *Id.* at 156, 150–51. The DEA Form 7 memorializing the seizure of Applicant's controlled substances was admitted as GX 94. *Id.* at 153–55.

I find that GS and DI presented as objective, rational, careful law enforcement officers, whose testimonies deserves full credibility.[18] *Id.* at 28–173.

The Government's expert, Dr. Gary Kaufman, is a physician licensed in Georgia and Board certified in both pain medicine and neurosurgery. *Id.* at 175–77; GX 93 (Curriculum Vitae of Dr. Gary Kaufman, M.D.).[19] He explained that he read all of Applicant's medical files that he was given and, taking into account his training and experience, assessed Applicant's compliance with the standard of care in Georgia for the treatment and management of pain patients.[20] *Id.* at 191–93. He explicitly stated that he was not providing an opinion of the ''medical care'' Applicant provided as a family practitioner. *Id.* at 192, 399 (''I'm not in a position to say if . . . [Applicant's medical care] was good, bad or indifferent.''); *contra id.* at 1082–84 (Counsel for Applicant's statement, after admitting his client ''made mistakes,'' that ''ultimately, going back to the quality of care, even Dr. Kaufman said, look I can't criticize his quality [of] care''). The ALJ recognized Dr. Kaufman as an expert and authorized him to give expert testimony in the area of pain management. *Id.* at 183.

From his review of Applicant's medical records, Dr. Kaufman concluded that Applicant failed to comply fully with the applicable standard of care with respect to obtaining the patient's history, conducting a physical exam, and obtaining informed consent before prescribing controlled substances.[21] *See, e.g., id.* at 285–87 (concluding that Applicant's documentation of M.B.'s history is ''terrible. There's essentially no reasonable history of back pain or neck pain documented. . . . [T]here was never an examination of the back documented. There was never an examination of the neck documented, and there was . . . an x-ray in 2008, plain x-ray which didn't show anything, and the next time she had any radiographic exam and the first time she probably had a legitimate medical problem that could be treated with scheduled medications, was in 2014 when she fell and landed on her back, had a compression fracture.''). Dr. Kaufman explained that the lack of a history, a physical, and any supporting document means ''there's no diagnosis of any illness that should be treated with schedule[d] medications.'' *Id.* at 286. ''None,'' he emphasized,

[17] GS testified that DEA's inspection put him at Applicant's office ''for probably at least three hours.'' Tr. 156.

[18] The RD does not address the credibility of DI and GS in one spot. It concludes, for example, that there was ''no indication from . . . [the testimony of DI or GS] that any partiality interfered with their telling the truth'' and that DI and GS did not target Applicant for ''unequal treatment.'' RD, at 72. *See also id.* at 71–72, 94.

[19] GX 93 is incomplete; it does not reference that Dr. Kaufman has a DEA ''X'' number authorizing him to prescribe Suboxone. Tr. 181.

[20] According to the RD, the ''Government offered testimony from its expert fairly characterized as general conclusions regarding . . . [Applicant's] practice, and that the prescriptions charged were merely examples of a larger number of violative prescriptions within the files.'' RD, at 30. It concludes that ''[d]ue process requires more specificity and more notice than that'' and, as such, ''[t]hey have not been considered herein, as substantive evidence in support of the allegations.'' *Id.*

This section of the RD references three transcript cites, the first of which it quotes in footnote 30. The first transcript cite, Tr. 209–10, concerns whether Dr. Kaufman's review of Applicant's medical records indicates that any of Applicant's patients are ''suspected or known drug abusers.'' *See* RD, at n.30. Second, the RD references Tr. 213, apparently for Dr. Kaufman's statements that he identified improper prescriptions written by Applicant in ''the various case files'' although he did not attempt an exhaustive identification of every improper prescription. Third, the RD references Tr. 224, apparently when the ALJ requested clarification about Dr. Kaufman's having said that ''there were so many [prescriptions written for Applicant's daughter], it looked like this was a continual treatment'' and Dr. Kaufman responded that ''there are prescriptions that are not here, but there were quite a few more.''

I agree with the RD that conclusory statements about unspecified record evidence in this matter are insufficient to prove the allegations in the OSC. I note, though, that there is sufficient evidence in the record to prove the Applicant issued improper controlled substance prescriptions, prescribed controlled substances for suspected or known drug abusers, and wrote multiple controlled substances prescriptions for his daughter.

[21] Portions of the RD are critical of aspects of Dr. Kaufman's testimony. The results of my close examination of the RD and the portions of Dr. Kaufman's testimony it criticizes give me no pause in crediting Dr. Kaufman's testimony. For example, the RD, while explicitly stating that it is ''not directly contradictory to Dr. Kaufman's earlier testimony regarding the lack of physical exam,'' states that an MRI of D.C.'s lumbar spine in September 2013 and a chest x-ray in August 2013 ''were relevant to Dr. Kaufman's opinion regarding the absence of a back examination, and diminishes his opinion on this issue in that regard.'' RD, at 28. I disagree. Dr. Kaufman's testimony was that Applicant's treatment of DC with controlled substances ''over several years'' for ''chronic pain . . . sometimes described as chronic headaches, . . . sometimes from knee pain, . . . sometimes the back pain'' was supported by ''very inadequate and not credible at all'' physical exams ''[a]s documented'' in the medical records for DC Tr. 229. I see no evidence in the record to support the RD's conclusion that one chest x-ray and one MRI in August and September of 2013 are a sufficient basis to support Applicant's prescribing controlled substances ''over several years.'' *Id.* While Dr. Kaufman's testimony does not specify the several year period he referenced, I note that there are medical records in Applicant's file for DC dated as far back as the late 1990s. Accordingly, I disagree with the RD's statement that this portion of the record ''diminishes . . . [Dr. Kaufman's] opinion on this issue in that regard.'' RD, at 28.

By way of further example, the RD states that ''Dr. Kaufman was confronted with a referral by . . . [Applicant] to a specialist in lumbar osteoporosis in 2003, a referral to a pain specialist in 2002, and to a headache specialist in 2003'' and that those documents ''certainly qualified Dr. Kaufman's . . . opinion . . . that . . . [Applicant did not] pursue testing or alternative treatment for DC's pain issues.'' *Id.* The pain and headache specialist referrals referenced in the RD, however, concern M.B., not DC, and Dr. Kaufman cautioned against using opioids to treat headaches ''because they cause rebound headaches.'' Tr. 485–86. I do not agree that these matters ''certainly qualified Dr. Kaufman's subject opinion,'' and they do not change my positive assessment of Dr. Kaufman's testimony. RD, at 28.

Further, Dr. Kaufman's testimony about a patient named in the OSC, and whom the Government subsequently withdrew from the adjudication, shows the expert's willingness to accept Applicant's *post hoc* injection of information and justification for a prescribing pattern Dr. Kaufman had concluded was outside the applicable standard of care. Tr. 226–27 (Dr. Kaufman testifying that ''I always want to give the physician the benefit of the doubt. And after reading what he had written, I was willing to say that if that material was correct, then I would not judge that substandard care'' and noting that, under the applicable standard of care, Applicant's *post hoc* information and justification ''should have been in the [medical] records.'').

concluding that any controlled substance that Applicant prescribed for M.B. before the 2014 compression fracture was issued outside the usual course of professional practice in Georgia. *Id.; see also id.* at 326; *id.* at 343–46; *id.* at 455 (''[T]he last two months, it's very clear that since her fall she's being treated [with pain medicine] for the fall. The preceding 11 years or so, it's impossible to know why she's in treatment.'').

Dr. Kaufman found Applicant's controlled substance-related actions to be below the standard of care based on the documentation in the medical records of Applicant's practice.[22] *Id.* at 230–31 (Dr. Kaufman testifying about D.C.'s complaint of knee and back pain and Applicant's medical records for D.C.: ''So, there was no [ ] examination of the back, there was no examination of the knee. Furthermore, this is pretty disturbing, every physical examination documented a normal rectal examination, a normal prostate examination, normal testicles, and I would seriously doubt that that was done on every visit. . . . I don't think it's credible at all.''); *id.* at 231 (Dr. Kaufman testifying about Applicant's medical records for D.C.: ''[I]n the face of repeated normal prostate exams, there is a diagnosis of prostate hypoplasia, which means enlargement of the prostate. Which is something you would pick up on a prostate exam. So, if you're going to do a prostate exam every visit and you're going to give the diagnosis of an enlarged prostate, you should document, at least once, that there's an enlarged prostate. And that was never done [against the Georgia standard of care].''); *id.* at 501–05 (Dr. Kaufman agreeing that there needs to be follow through on language in a patient's medical records to meet the standard of care); *id.* at 226–27 (Dr. Kaufman determining that medical records show a pattern of prescribing that is outside the standard of care and that did not comply with Georgia's rules, and even though additional information provided by Applicant, if accurate, would change the substandard care conclusion, it is still a violation of the Georgia standard of care not to have that information in the medical records); *id.* at 451–53 (Dr. Kaufman discussing internally inconsistent information in a patient file and countering the suggestion that the inconsistency is the patient's fault by explaining that only the physician (not a scribe or the patient) is allowed to enter the history of the present illness ''[a]nd so, it was . . . [Applicant's] obligation to enter this, nobody else and it is not correct.'').[23]

Dr. Kaufman found that Applicant did not re-evaluate patients, did not always document the changes he made to a patient's therapy, and did not always document the impact of a change in therapy. *Id.* at 204, 202, 207–08, 346–48.

Dr. Kaufman concluded that Applicant did not comply with the applicable standard of care when, for example, he prescribed controlled substances for M.B., who exhibited signs of abusing, or being addicted to, controlled substances. *Id.* at 287–326 (explaining that signs of patient addiction include requesting early controlled substance refills and an abnormal urine drug screen, evaluating Applicant's response to the signs of addiction the patient exhibited over the course of years, noting that Applicant continued to prescribe controlled substances for M.B. despite signs of her addiction, thereby ''basically just feeding her addiction,'' concluding that Applicant did not apply his own protocols to his treatment of M.B. and did not implement the Georgia standard of care response to an abnormal urine drug screen, and calling Applicant's response ''a mockery of the rules,'' ''not excusable,'' ''irresponsible,'' ''beyond ridiculous,'' and outside the Georgia standard of care); *see also, e.g., id.* at 439–41 (Dr. Kaufman's explanation that the applicable standard of care for an abnormal urine screen is discussing it with the patient, documenting the abnormality in the chart, and documenting ''what you as the treating physician are thinking about this abnormality,'' and that implementation of the standard of care involves ''com[ing] up to some solution that you and the patient work out,'' and cautioning that the ''fact that [the patient] stopped being positive doesn't indicate that she all of a sudden listened to . . . [Applicant] necessarily. Perhaps she stopped obtaining that medication in whatever fashion she was obtaining it. . . . I do know that it wasn't documented and there was no explanation and this went on for quite some time.''); *id.* at 327–32, 336–42, 459 (Dr. Kaufman's testimony about Applicant's failures to comply with the standard of care regarding abnormal urine drug screens, and opinion that Applicant did too little too late because ''[i]t just keeps going on and on and there's no consequence and it's nuts, sir. This is not the standard of care.''); *id.* at 332 (concluding that Applicant's failure to refer a patient to an addiction specialist ''because she's clearly addicted to medications and clearly needs help and she's not getting any help. She's just getting more medication'' violates Georgia's pain management rules and constitutes ''unprofessional conduct.'').

Dr. Kaufman identified issues with, and testified about, Applicant's controlled substance prescribing. For example, he testified that Applicant prescribed, and continued to prescribed, controlled substances groundlessly. *Id.* at 323–26 (Dr. Kaufman stating that ''it's the same repetitive situation where there's no complaints to justify it. There's no exam that justifies this. The urines are all out of whack. The patient has been told she won't get these . . . without a letter from a pain specialist which is nowhere to be seen . . . it's all wrong. . . . [T]he patient is not needing refills and you give her refills. Something is clearly off.'').

Dr. Kaufman also testified about specific controlled substances that Applicant prescribed. More specifically, he pointed out Applicant's inadequate actions and, therefore, the illegality of, and danger posed by, Applicant's methadone prescribing for D.C. *Id.* at 232–39. He explained that methadone is used in two ways. First, it is prescribed for people who have an addiction. Tr. 232. The correct methadone dose suppresses cravings for a day and keeps the patient out of withdrawal. *Id.* In Georgia, only narcotic treatment clinics may dispense methadone, and they only dispense it to treat addiction. *Id.* at 498; *see id.* at 233–34 (''If you were to go to a methadone clinic and say, I have chronic knee pain. Could you give me methadone? They would turn you down. It's not their expertise. . . . So, anybody who is going to a methadone clinic is a person who has an addiction issue.''); *see also id.* at 605 (testimony of one of Applicant's experts (Dr. Downey), *infra* section III.E., that, in Georgia, only specially licensed narcotic treatment programs are authorized to issue methadone for addiction).[24]

Second, Dr. Kaufman explained, methadone is used as a pain medicine. *Id.* at 232. He testified that, when

[22] In the case of one of the patients whose treatment is referenced throughout this decision, M.B., Dr. Kaufman reviewed fifteen years of Applicant's medical records for the patient. Tr. 338.

[23] The context of this testimony referenced in the penultimate citation was a medical record cited in the OSC that the Government subsequently abandoned.

[24] *See, e.g.,* GX 51, at 672, 675 (Applicant's medical record documenting D.C.'s office visit on August 10, 2012, stating in the ''Diagnoses'' section that D.C. ''went to clinic this morning so he has two weeks[']' worth of methadone 190 mg QD [once a day] and would like to RTC [return to clinic] at the end of two weeks and begin to be tapered off of it to try the Suboxone for his chronic pain instead (will not be for dependence) OK per Dr P dose will be dropped to 180 mg on 8/24/2012.'').

prescribed for pain, methadone is taken more than once a day, depending on the dose. *Id.* at 233. When prescribed for pain, Dr. Kaufman elaborated, methadone ''has a lot of difficult issues related to the way it's metabolized in the body.'' *Id.* at 232. He testified that, although it constitutes ''less than five percent of the pain prescriptions in the United States,'' it accounts for thirty percent of the overdose deaths. *Id.* at 233. ''One of the reasons, is that the pain effect wears off, and the patient will take an extra pill, even though they are not supposed to,'' he explained. *Id.* ''When they take that extra pill,'' he continued, ''because of the very long half-life, the medicine tends to accumulate in the body and people stop breathing.'' *Id.*

Dr. Kaufman testified that Applicant's methadone prescriptions for D.C., with their instructions to ''taper as directed,'' were dangerous. *Id.* at 254 (Dr. Kaufman's analysis of Applicant's medical records for D.C.: ''It just says, 'taper as directed.' So, you don't know what the dosage is. I mean, if the patient was, in fact, cutting back. It should be indicated on the chart, what the dosage is at the current time. But you have no idea. I have no idea what's going. I don't think anybody did.'').[25]

Dr. Kaufman concluded that Applicant unlawfully prescribed methadone for D.C. for addiction. *Id.* at 246–48 (Dr. Kaufman's explanation for his opinion that Applicant unlawfully prescribed methadone for addiction, not for pain, in the context of the RX 17, at 60 version of Applicant's office notes for D.C.'s visit on May 28, 2013: ''I believe that . . . [methadone] is being given for addiction. It had been given for addiction in the clinic. The clinic will not treat patients for chronic pain. They are a treatment for addiction. The statement due to chronic pain, he became dependent on opioids, so there is a dependency. And the [handwritten] statement [on the RX 17, at 60 version] about where the Suboxone came from, is probably not correct, but it's not clear. . . . It's an illegally obtained substance. So, that's really a problem. Again, who knows. . . . He certainly did not get this . . . [in] a methadone clinic and . . . [Applicant] did not prescribe it until the next month. This is a problem.''); *id.* at 248–51 (continuing Dr. Kaufman's explanation for his opinion that Applicant unlawfully prescribed methadone for addiction, not for pain, in the context of the RX 17, at 64–68 version of Applicant's office notes for D.C.'s visit on June 25, 2013: ''[T]here's no mention of a back examination. It's not even listed as a possibility. There's no mention of the knee examination. And on the next page, there's further examinations, where again, no back exam, no knee exam. . . . And then the next page is the list of diagnosis. And the first diagnosis is lumbago, which means back pain. And the medicine for that is Tylenol. And it says, 'opioid dependence, counseled patient on the condition, advise him to seek group or individual therapy, anxiety state, take the medicines as prescribed.' And another diagnosis is 'long term use of medications, with a urine drug screen having been performed.' . . . [The methadone is] not being used as a pain reliever, because it's not be[ing] given several times a day, what you notice is the methadone pain effect wears off, so they're going to tell you the pain is much worse at night, because it's worn off. It's not a pain medicine anymore. It will still work to prevent you from being an addict prevent the addictive behavior, but it's not going to work for the pain. . . . But if you give somebody Suboxone, you [are] going to really make the methadone not work as a pain medicine, whatever pain medicine effect it was having. And they're going to say my pain is much, much worse. . . . Yes, [methadone was given as related to addiction a]nd very inappropriately, because they are both being given at the same time.'').[26]

Dr. Kaufman addressed other issues with Applicant's controlled substance prescribing during his testimony that Applicant prescribed both Percocet 10/650 and Lorcet 10/650, two short-term opioids, to M.B. It was ''not good medicine in any term,'' he testified. *Id.* at 447. Dr. Kaufman explained that ''there could be no other reason to give two drugs'' than for ''breakthrough pain.'' *Id.* at 446. Yet, he testified, prescribing two controlled substance pain medications for M.B. ''doesn't make much sense'' because they have the ''same duration of action.'' *Id.* at 447. Further, both Percocet and Lorcet are preparations containing 650 mg. of Tylenol. *Id.* at 446. This means that one dose of the two controlled substances is 1300 mg. of Tylenol. ''If you go above 4,000 mg. in a day,'' Dr. Kaufman continued, ''it's exceptionally bad for your liver.'' *Id.* at 447.

In the face of suggestions that M.B.'s narcotic-seeking actions were caused by obsessive compulsivity, not addiction, Dr. Kaufman answered that one of the problems he had with the patient's chart was assessing the credibility of the controlled substance prescribing given that ''there are many things that are listed, many things, many things that are stated . . . they're not always documented and in fact I would've paid it a lot more credence if I kn[e]w she did see a onetime psychiatrist . . . if she's getting some ongoing suggestions . . . but that wasn't the case.'' [27] *Id.* at 435.

Dr. Kaufman addressed the allegation that Applicant unlawfully prescribed controlled substances for his daughter. Based on his review of the record, he concluded that Applicant violated the applicable standard of care by prescribing controlled substances for his daughter because ''there was . . . nothing in . . . the chart to reflect an emergency.'' *Id.* at 490. In response to the ALJ's questioning about Adderall and Vyvanse, that the ALJ described as ''like a maintenance medication for ADHD or ADD,'' Dr. Kaufman pointed out a preauthorization insurance form. *Id.* at 494. According to the form, Dr. Kaufman testified, the physician for Applicant's daughter had cancelled the treatment, but Applicant sought to revive it ''indefinitely.'' *Id.*

Applicant's counsel suggested that a physician treating a patient or a family member might try to get insurance approval for a long period of time

[25] Applicant's testimony acknowledged dangers associated with his methadone prescribing. *Infra* section III.E.

[26] Dr. Downey's testimony on this matter was not helpful. He testified that he thinks Applicant prescribed methadone for D.C. for pain, adding that ''[i]f someone's treating pain with methadone, the prescription should say for pain, just to make it clear.'' Tr. 615, 618. Dr. Downey did not, however, identify any record evidence showing that Applicant wrote ''for pain'' on any of the methadone prescriptions he issued.

[27] In addition, according to Dr. Kaufman's testimony, Applicant's medical records for M.B. indicate that Applicant, himself, suspected that M.B.'s drug seeking behavior was due to addiction, not obsessive compulsive disorder. Tr. 454–55 (Dr. Kaufman's interpretation of Applicant's medical record for M.B.). Applicant is not an orthopedic surgeon, a neurosurgeon, or an interventionalist, so he sent M.B. to obtain Dr. Bundy's opinion about the proper treatment of her compression fracture. If Dr. Bundy said that the fracture was not bad enough for M.B. to have a procedure or to have pain medications, and if Dr. Bundy did not think anything should be done, Applicant indicated in the medical record that ''we're going to stop the pain meds and we're going to start her on Suboxone.'' This, according to Dr. Kaufman, shows that ''there's a suspicion [on the part of Applicant] that maybe . . . [M.B. is] a drug seeker and she should be put on Suboxone.'').

When Applicant's counsel suggested that Applicant's ''putting up with and that's probably a poor choice of terms, being willing to undertake to continue to treat a patient like . . . [M.B.] speaks . . . well of him, does it not,'' Dr. Kaufman responded that ''perhaps . . . [Applicant] should've referred . . . [M.B.] to somebody with more expertise.'' *Id.* at 489. Dr. Kaufman also pointed out that there are ''very different approaches to treatment'' for obsessive compulsive behavior and for addiction to narcotics, indicating that a physician is ''only going to get . . . [the patient] better by treating'' the actual cause. *Id.* at 499–500.

because, even if the physician ''may mentally think that it's not going to last that long[,] . . . you don't want to have to keep going back to the insurance company every month or every special occasion.'' *Id.* at 495. Applicant's counsel, then, asked ''[w]ouldn't it be common just to say, well this could go on for a while?'' *Id.* Dr. Kaufman replied that, ''unfortunately, this medication you cannot prescribe to a family member unless it's an emergency and if you're going to do this several times, . . . that is not the way to deal with an emergency.'' *Id.* at 495–96. He elaborated that an ''emergency is three days and then the real doctor shows up to take care of this.'' *Id.* at 496. When Applicant's counsel opined that Applicant did not commit a legal violation, Dr. Kaufman stated that ''[e]very one of these is a violation because you're saying that there were five 30-day emergencies in which a physician couldn't be reached.'' *Id.* He restated that ''a 30-day prescription is certainly not an emergency.'' *Id.*

In sum, I find that Dr. Kaufman's testimony about pain management and about the applicable standard of care is of sufficient clarity, authority, and candor to merit controlling weight in this adjudication.[28] *See also supra* section II. Accordingly, when Dr. Kaufman's testimony conflicts with other record evidence, I will credit Dr. Kaufman's testimony.

E. Applicant's Case

At the hearing, Applicant testified after calling two expert witnesses, four staff witnesses, four character witnesses, and one witness from the software company whose application he used to manage his in-office pharmacy.[29] The ALJ admitted into evidence thirty-seven Applicant exhibits, including ''a small trove of favorable letters'' from colleagues, patients, and others that the ALJ admitted over the Government's objection. RD, at 70.

During his testimony, Applicant addressed his family life, his employment experience before enrolling in medical school, including as a nursing assistant on a hospital's acute drug and alcohol detox unit, his medical internship and residency, and his varied positions as a medical doctor. Tr. 960–75. He testified about his private practice of about 4,400 active patients, his twenty-six years of emergency room work, and his simultaneous positions as medical director for the Youth Development Center of the Georgia State Department of Juvenile Justice, as Assistant Medical Director for a large hospice home health company attesting to patients' need for hospice care, as medical director for about seven nursing homes, and as attending to nine nursing homes serving ''probably'' 1,600 patients in a year and ''probably at any one time'' 900 nursing home patients. *Id.* at 975–81. In response to a question asking how he organized his staff to assist his medical practice, Applicant stated that his employees ''just try to get the patient organized so that I could see the patient, examine the patient and make a good decision, based on, you know, the information to [sic] labs and a physical exam and then we come up with an assessment and plan.'' *Id.* at 998. Applicant confirmed that RX 2 and RX 3 ''relating to protocols with controlled substances and new patients'' are ''accurate as to what . . . [he] wanted the staff to be doing as far as controlled substances and prescriptions.'' *Id.* at 1000.

Applicant used testimonial narrative to address the medical care he provided patients named in the pending OSC charges against him. *Id.* at 1002–40. In other words, he rarely relied on a specific page or pages of any of the exhibits entered into the record. *Cf. id.* at 175–508 (Dr. Kaufman's testimony). Regarding D.C., Applicant painted the portrait of a man who began seeing him in the early 1990s, who worked hard at two jobs, and who suffered from depression and anxiety related to feeling the pressure of a ''very demanding wife.'' [30] *Id.* at 1003. According to Applicant's testimonial narrative, D.C.'s ''biggest problem and . . . the reason . . . [D.C.] ended up home dependent on pain medicine is he had cluster migraines.'' *Id.* Applicant described cluster migraines as ''probably the worst type of migraine headaches'' that cause ''very severe'' pain that usually comes on at night. *Id.* He explained that cluster migraines ''might come every other night or come every night'' and ''go on for three-four months and then, all of a sudden they just go away [a]nd then, . . . [the patient] might not have a headache for two or three years. And then they would come back.'' *Id.* at 1005. D.C. started having cluster migraines ''at a very early age'' and his doctors treated them with Demerol and Phenergan, ''which was a very common thing,'' according to Applicant. *Id.* at 1004.

Applicant testified that he treated D.C.'s headaches with medicine that ''would get rid of . . . [D.C.'s] headaches,'' but if Applicant's office ''wasn't open, . . . [D.C.] ended up going to the Emergency Room . . . [and] started to use more and more Demerol and all that sort of stuff.'' *Id.* at 1008. According to his narrative, Applicant told D.C. that ''you may want to go to try and find a pain center.'' *Id.* Applicant reported that D.C. followed his advice and that the pain center ''put . . . [D.C.] on methadone and

[28] I agree with the RD that Dr. Kaufman ''generally offered detailed assessments of individual prescriptions and actions by the . . . [Applicant], and tied these directly to the relevant regulation or statute.'' RD, at 76. I do not, however, adopt all of the statements in the RD about Dr. Kaufman. *Id.* I do not agree that Dr. Kaufman's assessments of Applicant's ''prescribing practices had a notable weakness: he did not review all of the relevant patient records.'' *Id.* My review of the record does not identify any ''relevant'' patient record that Dr. Kaufman did not review. *See, e.g.,* Tr. 505–07 (ALJ's questioning about Applicant's forty-page response to Dr. Kaufman's Report and Dr. Kaufman's confirmation that he adjusted, altered, and modified his opinions accordingly.). In response to the ALJ's questions about whether Dr. Kaufman was confronted with ''additional reports or medical records'' since his ''initial opinion,'' Dr. Kaufman replied that he thinks he saw ''a few things'' that he did not have originally, ''handwritten things.'' *Id.* In response to the ALJ's follow-up question, Dr. Kaufman indicated that these items did not change his opinion. *Id.* at 506. ''I think if you do great care 90 percent of the time but miss 10 percent, you've missed 10 percent, and that's the 10 percent I think we're discussing.'' *Id.* at 506–07.

Further, I do not agree that Dr. Kaufman's analysis of Applicant's prescribing practices is impugned because Dr. Kaufman did not hear Applicant's ''justification'' for those practices. RD, at 76. Dr. Kaufman's testimony addressed, as it should, whether Applicant complied with the applicable standard of care based on Applicant's actions documented in the medical records. *Post hoc* written or oral justifications for Applicant's actions are not controlling in this proceeding. *Lesly Pompy, M.D.,* 84 FR 57,749, 57,760 (2019) (''[A] physician may not expect to vindicate himself through oral representations at the hearing about his compliance with the standard of care that were not documented in appropriately maintained patient records.''). In addition, I found nothing persuasive enough in ''Dr. Downey's critique'' to outweigh Dr. Kaufman's testimony entirely. RD, at 76; *see also supra* section II and section III.D. and *infra* section III.E. Finally, although Dr. Kaufman admitted to missing or forgetting about some pages in Applicant's voluminous exhibited medical records, he also convincingly testified that those pages did not change his opinion about Applicant's compliance with the applicable standard of care. *E.g.,* Tr. 506–07.

[29] After the Government objected that the line of questioning was outside of the Prehearing Statement and the ALJ noted that the witness was the ''third . . . describing the same procedures,'' Applicant withdrew one staff witness who had worked at the front desk and was responsible for nursing home-related billings. Tr. 946.

[30] According to Applicant, D.C. died of mesothelioma. Tr. 1002. Although D.C. was a smoker, ''which made him . . . a greater risk to develop mesothelioma,'' mesothelioma was not an issue when D.C. first began seeing Applicant. *Id.* at 1002–03. Applicant's controlled substance prescribing to D.C. at issue in this proceeding is not related to D.C.'s mesothelioma diagnosis.

Regarding Applicant's medical records, I note that at least one record states that D.C. ''never smoked.'' GX 51, at 192. Other medical records for D.C. state that he smoked. *E.g.,* GX 51, at 138 (ten cigarettes a day). Thus, Applicant's medical records do not report consistently on whether or not D.C. smoked and some of Applicant's medical records conflict with Applicant's hearing testimony.

oxycodone.'' *Id.* Although Applicant stated that he was the doctor who ''still managed . . . D.C.'s] headaches,'' he attributed D.C.'s having ''entered himself into the methadone clinic'' to three areas of pain—migraines, osteoarthritis in both knees, and chronic low back pain concluding that ''actually, you know, the methadone helped.'' *Id.* at 1008–09; *see also id.* at 1010 (confirming that D.C. received methadone from a methadone clinic).

According to Applicant, he thought that the 190 milligrams of methadone that the methadone clinic was giving D.C. was too much, causing memory issues and ''more shortness of breath and coughing.'' *Id.* at 1009–10; *see also id.* at 1101 (''Methadone has a seven-day half life. Every methadone you take is going to stay in your body for seven days. For the first four days, you get adequate pain control. The—for the whole seven days you're at risk for respiratory depression. And that's what's dangerous about the drug because at 190 milligrams, I would really be worried about some of this shortness of breath also being respiratory suppression.''). D.C. agreed ''[b]ecause he wanted to go ahead and get down.'' *Id.* at 1011.

Applicant's testimony recounted what he determined to have been successful tapering of other chronic pain patients down from methadone, stating the way he ''did it was ten milligrams every week or every two weeks.'' *Id.* ''And then, usually what I would do is wait a week before I drop them again,'' Applicant explained. He stated that he ''had a lot of success with that,'' predicted that he could get D.C. ''down to you know 30 milligrams of methadone,'' and concluded that ''then I could switch him to a short acting substance like oxycodone and give him that for a week, four days a week . . . [to] keep him from going into withdrawal.'' *Id.* at 1011–12. According to Applicant, ''we finally got him down to I think 30 milligrams and I gave him the prescription that's been brought up in testimony and oxycodone 50 milligrams.'' *Id.* at 1013. ''I gave him that prescription to help him through that period . . . when he stopped the methadone, he would not go into complete withdrawal, but it would . . . help him to get to the point where he had the methadone out of his system and . . . he could take the Suboxone,'' Applicant testified. *Id.*

Applicant stated that D.C. reported his pain was no better and he just did not feel good even though he was not in withdrawal. *Id.* When Applicant increased the amount of Suboxone, D.C. ''ended up with a rash . . . [and] couldn't tolerate it.'' *Id.* So, D.C. ''ended up back on 60 milligrams of methadone, which . . . controlled his pain.'' *Id.* Applicant's testimony did not explain his plan to use Suboxone to treat D.C.'s pain, particularly in light of his own office procedures stating that ''Suboxone is not to be used to treat pain.'' RX 3C (Orientation Manual for Dr. George C. Pursley's Office Based Treatment of Opioid Dependence with Buprenorphine/Naloxone (Informally know[n] as the Suboxone Program)), at 11; *see also id.* at 2 (''Suboxone (buprenorphine + naloxone) is an FDA approved medication for treatment of people with opiate (narcotic) dependence.''); *id.* at 4 (''Who Can Prescribe Suboxone? Not all physicians can prescribe Suboxone. To prescribe Suboxone, a physician must either be a specialist in Substance Abuse treatment or they must have completed specialized training that certifies them as a Suboxone Provider. Once a physician is certified as a Suboxone Provider, they may care for up to 30 patients during their first year of practice and up to 100 patients per year thereafter.'').

At the end of his testimonial narrative of his medical care of D.C., Applicant concluded that D.C. ''was not a diverter. He was just somebody that had pain.'' Tr. 1015. He stated that ''pain is . . . like an emergency . . . everybody's definition of an emergency is different and everybody's definition of pain is different.'' *Id.* His testimony was that ''I've learned one thing in medicine, is patients don't sit in the waiting room waiting to see you for two or three hours, if they don't have something wrong [with] them . . . [and] it's your job to figure out what's wrong,'' and ''that's one thing I've learned in treating pain or any illness, . . . most of the majority of patients, they don't lie to you.'' *Id.* Applicant did not testify that he applied any specific step of the Georgia standard of care or any Georgia requirement, whether issued by the GCMB or the Georgia legislature, as he did his ''job to figure out what's wrong.'' *Id.* He did not describe any physical examination he performed or medical data he gathered to use in his analysis or to inform his assessment of what his patients were telling him about their pain. I find that Applicant's testimonial narrative of the medical care he gave D.C. did not rebut Dr. Kaufman's criticism of it nor did it attempt to counter Dr. Kaufman's exhibit page-by-exhibit page analysis. I find that Applicant did not address, let alone acknowledge, how unusual it would be for a Georgia methadone clinic to give D.C. methadone for pain. *Id.* at 1060–61. Instead, Applicant testified that he is ''still of the belief that all the prescriptions that . . . [he] issued for D.C. in this case were issued within the usual course of professional practice,'' and that he believes he ''complied with all the relevant rules and laws dealing with the prescriptions of controlled substances to D.C.'' *Id.* at 1051.

Applicant similarly presented a testimonial narrative about the medical care he provided M.B., even including some of the same themes that were part of his testimony about D.C. He repeatedly returned to his view that M.B. ''was a very difficult and hard patient to manage, but . . . [he] took it on.'' *Id.* at 1016. Calling M.B. ''a problem patient, a person with problems . . . [a]nd unlucky or another unfortunate person in life,'' Applicant listed physical and mental health challenges that M.B. faced and endured. *Id.* at 1026, 1016–34. Possibly in an attempt to exonerate himself, Applicant emphasized his belief that the physician who treated M.B. before she became his patient started her on a controlled substance. ''I think, he had her on Oxycontin like, 30 milligrams, twice a day or something,'' Applicant stated. *Id.* at 1018. He asked ''what am I going to do with this lady'' because ''when she came to see me, she was dependent.'' *Id.* at 1022. His own office procedures provided the answer to his question, although the record does not support the conclusion that he always followed those procedures. For example, he testified that ''I think, some of her hydrocodone, she got from her husband.'' *Id.* at 1025. According to the second page of Applicant's Pain Management/Drug Addiction Contract, RX 3A, Applicant's patients' relationship with him will be terminated for ''use [of] another person's medication.'' RX 3A, at 2. By way of further example, Applicant testified that he thinks M.B. ''also got a [hydrocodone] script from Dr. Bundy, I think.'' Tr. 1025. Again, according to Applicant's Pain Management/Drug Addiction Contract, Applicant's patients' relationship with him will be terminated if they ''seek or obtain controlled substances from any other doctor or clinic.'' RX 3A, at 2. Applicant did not explain why he did not follow the terms of his own contract when he believed M.B. had violated it.

As if it conclusively established his compliance with the applicable standard of care, Applicant stated that the doses of the controlled substances he started M.B. on when she became his patient, specifically mentioning Klonopin, Adderall, and Percocet,

''pretty much'' remained the same throughout his tenure as her physician. Tr. 1034. ''If you look at from the time I picked her up,'' he stated, ''she was pretty much on the same dosages all the time. . . . [D]id she have exacerbations . . .? Yeah. But I managed her, I dealt with her, . . . that's really, I think a true picture of what I was dealing with.'' *Id.*

While he stated that M.B.'s previous physician ''sent her to a very good psychiatrist'' who diagnosed her with obsessive compulsive disorder, attention deficit disorder, anxiety disorder, and a panic disorder, he also stated that ''Blue No Choice doesn't allow us to—we don't have psychiatrists in practice.'' *Id.* at 1018–19, 1022. Applicant did not address why he did not consult with the ''very good psychiatrist'' about options for their mutual patient. Although he admitted violating the Georgia standard of care when he stated that ''you had to overlook'' M.B.'s drug screens, he did not explain or justify his conscious violations. *Id.* at 1025 (''And so, was she compliant? No. Was she dismissible? No. I mean, but if you look at obsessive compulsive disorder, the more you try to control these people, the more they [sic] going to bunk you.'').

I find that Applicant's testimonial narrative of the medical care he gave M.B. did not rebut Dr. Kaufman's criticism of it or attempt to counter Dr. Kaufman's exhibit page-by-exhibit page analysis. I find that Applicant did not testify about, or seek the admission of, a statute, regulation, or any applicable standard of care that exempts practitioners treating patients with a diagnosed mental illness from the provisions of the GA Pain Management Rule, GCMB Rule 360–3–.02, or the Ten Steps. *Id.* at 1024–26. Instead, I find Applicant testified that he ''believe[s] that all the prescriptions that . . . [he] issued to M.B. . . . [were] issued within the usual course of professional practice.'' *Id.* at 1051.

Applicant addressed the medical care he provided his daughter. He admitted treating her, explaining that he ''thought it was an emergency.'' [31] *Id.* at 1038. He specifically admitted to issuing eight controlled substance prescriptions to her between August 2014 and June 2015. *Id.* at 1056. He also admitted that he did not follow his urine drug screen-related office procedures when treating his daughter. *Id.* at 1053–54; *see also* RX 4, at 2 (ADD and ADHD patients take a urine drug screen at visits). ''I understand it is wrong in hindsight. And, you know, I'm sorry I did it,'' he stated. Tr. 1038. His testimony was that he understood the GCMB position on treating family members, ''but it's not a perfect world and it's my daughter.'' *Id.* When asked if he was willing to make a condition of being granted a registration that he ''not treat anybody under . . . what is ultimately a Georgia regulation'' about the treatment of family members, Applicant stated, ''Oh, yeah. I mean, I make amends.'' [32] *Id.* at 1040.

Applicant testified about his position on his practice's compliance with his own office protocols and also addressed his medical recordkeeping. Regarding compliance with his own office protocols, Applicant stated that we got to have some kind of, you know, ordered system in which we all work in, whether we're digging ditches . . . [or] practicing medicine.'' *Id.* at 1063. He continued: ''I think, you try to, you set protocols, you try to stick with them. Does that always happen? No. . . . [E]verything 100 percent? No.'' *Id.* He restated that ''my practice was a big practice,'' pointed out that ''what we've looked in these charts have been mainly four or five patients,'' and concluded that, ''if you look at my overall practice, . . . I don't think that's a really a good statistical sampling, if I could memorize [sic] my statistics of my practice of that many people.'' *Id.* He then admitted, again, that he's ''sure'' his ''protocols weren't 100 percent.'' *Id.* On re-direct, he added that ''I think you need to be able to deviate from a protocol if you really find that it's necessary.'' *Id.* at 1064.

Regarding his medical recordkeeping, Applicant agreed that, when he signs off on a record of a patient office visit, he accepts responsibility for everything in that record.[33] *Id.* at 1052.[34]

Applicant described the instability in his medical practice after, and the ramifications of, his voluntary surrender of his registration. *Id.* at 981–85. He testified that both Georgia and South Carolina renewed his medical licenses after his surrender, and that he was able to retain his hospital privileges on a temporary basis for a year after the surrender. *Id.* at 983, 985–97. Applicant testified that he stabilized his practice by hiring a physician whom he knew, among other ways. *Id.* at 981–82, 987. They found other physicians for Applicant's Suboxone patients but a ''lot of the . . . heart failure, hypertension guy, diabetes, whatever patients, chronic, other chronic patients, we were able to just continue taking care of those people.'' *Id.* at 988. After sixteen months, though, Applicant testified that he closed his practice. *Id.* at 992. He stated that even though his nursing home business enabled him to pay for his staff and his building, he did not have a salary. *Id.* For the sixteen months, he testified, he ''was able to live off of some of . . . [his] medical director[']s reimbursement, being a medical director.'' *Id.* After he closed his practice, he testified, ''we have been able to just do the long-term care and I do some hospice work.'' *Id.* at 993–94. Subsequently, Applicant testified that ''if my mind stays good and I can practice, I'm going to practice as long as I can. . . . I'd like to just be able to

[31] Even though the OSC does not charge it, Applicant admitted treating his wife and stated ''I treated my wife, thought I was being helpful and I understand that it was wrong and I—it is what it is.'' Tr. 1039–40. I note that the OSC alleges that Applicant treated his daughter, but not his wife. I see the record evidence documenting the dispensing of controlled substances to his wife and the RD's analysis of Applicant's testimonial admission that it was wrong for him to treat his wife. *See, e.g., id.* at 1040; RX 11F, at 66; RD, at 56, n.42. Given the content of this case, I see no reason to consider Applicant's admission that it was wrong for him to treat his wife, and I do not do so.

[32] I note that it is incumbent on Applicant to follow the applicable standard of care regardless of his DEA registration status.

[33] I disagree with the RD's conclusion concerning Applicant's testimony on Tr. 1052. RD, at 56 (''Ultimately, . . . [Applicant] accepted full responsibility for everything within the medical records for which he signed off.''). Instead, Applicant was agreeing, on cross examination, with Government Counsel that ''You also understand that when you sign a record of a patient office visit, right. When you're done, if they're there, however you did it, you would sign off on a patient record? . . . You understand that once you've signed off on it, you accepted responsibility for everything that . . . was in that record.'' Tr. 1052.

I note Applicant's testimony indicating that he knowingly sacrificed having medical records that met the standard of care so that he could take care of his patients. *Id.* at 1041 (''I think I did the best documentation. I put more—my hands on the patient and taking care of the patient then [sic] I do treatment chart. But I know that's not what we need to do, but sometimes you got to give your patients the time and not a computer.'').

[34] RD footnote 43 correctly states that recordkeeping is a ''substantive allegation . . . upon which a denial of Registration can be based.'' RD, at 56, n.43. Its statement that ''deficiencies in maintaining . . . [Applicant's] medical files . . . [were] not alleged in the Order to Show Cause'' may be referring specifically to the OSC section entitled ''Recordkeeping Violations,'' as opposed to the OSC section entitled ''Unlawful Prescribing of Controlled Substances,'' whose legal underpinnings include medical record requirements related to controlled substance prescribing. OSC, at 3–8; *supra* section II and section III.

commit my practice to long-term care, home health, hospice.'' *Id.* at 1067–68.

Applicant also testified about his in-office pharmacy. He stated that ''the reason I started it, it was—I could get people medications for, like, $10, like . . . high blood pressure medicine, diabetes medications, COPD medications and so forth, anti-inflammatories. . . . '' *Id.* at 991. ''[O]r they would do copays on these same drugs I had, excluding schedules, for $4,'' he continued. *Id.* Regarding controlled substances, Applicant testified that ''we had some patients that did not have insurance and they did not have—they had to pay cash and so, . . . [the in-office pharmacy] was good for my patients.'' *Id.* Applicant admitted that he did not have a licensed pharmacist working at his in-office pharmacy. *Id.* at 1051–52. He stated he was unaware that only a licensed pharmacist may lawfully fill a written prescription. *Id.* at 1052. Since the OSC does not charge Applicant with a violation of this requirement, his admission is not relevant to this proceeding. *See id.* at 1080–81.

After he admitted to not being ''aware'' that the only person who is allowed to fill a written prescription is a licensed pharmacist, Applicant addressed his prospective compliance with applicable state and federal medical standards in response to questions from ALJ Dowd. He testified that it is his ''intention to become fully compliant with all of the regulations.'' *Id.* at 1068. ALJ Dowd asked ''[w]hat about learning any of these regulations. . . . [N]obody knows them by heart, but . . . you're responsible for knowing . . . both the Georgia regulations as well . . . [as] the DEA regulations if you're going [to] run a doctor's office.'' *Id.* Applicant answered, after having stated that his current age is 66, that he is ''always willing to learn anything.'' *Id.* at 1068–69. He added that, ''I think, the one thing, I don't think I left a lot of dead bodies laying around.'' *Id.* at 1069.

Having read and analyzed all of the record evidence, I find that Applicant is the witness with the most at stake in this adjudication.[35] I find that, while Applicant's testimony does include reliable statements, it also includes statements that lack credibility, are implausible, and/or are not persuasive. I find that Applicant's testimony must be considered with much caution, and where his testimony conflicts with credible record evidence, I do not credit it.

The ALJ certified Applicant's first expert, Dr. John Martin Downey, as an expert in pain management and interpretation of medical records.'' *Id.* at 534. Dr. Downey testified about his education, his military service, his medical practice, his affiliations, and his involvement with the Pain and Investigation Committees of the GCMB. *Id.* at 525–34. He confirmed on the record his familiarity with three Applicant exhibits: RX 17 (concerning D.C.), RX 18, RX 19 (concerning M.B.), and RX 20 (concerning a medical record that the Government abandoned). *Id.* at 534–37. Likewise, he denied being familiar with RX 21 (concerning Applicant's daughter). *Id.* at 537. In addition, he testified that he reviewed the ''Georgia Professional Conduct Rule,'' ''the control [sic] substance guidelines and the pain management rule, I guess that would be called,'' a letter from a patient, the OSC, and Applicant's ''summaries.'' [36] *Id.* at 545–46.

Dr. Downey testified that he knows of Applicant because they practice in the same community and Applicant has referred patients to him over the years. *Id.* at 546. He referred to Applicant as a ''colleague in a sense, yes. Consulting.'' *Id.* at 547. Dr. Downey stated that he had the occasion to review the medical records for Applicant's patients who were referred to him for a pain consultation or an electrodiagnostic study, or who became his patients after Applicant closed his practice. *Id.* According to Dr. Downey, ''as a general rule,'' his medical record review of Applicant's patients did not indicate practice below the standard of care expected of doctors in Georgia. *Id.* at 547–48. ''In fact,'' he testified, ''I looked, with the patients I recall, no changes were made in their pain regimen.'' *Id.* at 548. Dr. Downey did not explain why ''no changes were made in their pain regimen'' necessarily meets the applicable standard of care. Dr. Downey admitted that he did not know if the medical records on which he based this assessment had been prepared by Applicant or by the physician Applicant hired to write all of the controlled substance prescriptions after Applicant voluntarily surrendered his registration. *Id.* at 608–12.

In Dr. Downey's opinion, Dr. Kaufman's evaluation was ''a little overly critical, because Dr. Kaufman and I are both pain specialists and critiquing a primary care physician . . . it was a little bit of an overstep to be so critical, I think.'' *Id.* at 549. Dr. Downey did not testify that Applicant was exempt from complying with GA Pain Management Rule, GCMB Rule 360–3–.02, or the Ten Steps, for example, because he is a primary care physician, not a pain specialist.

Dr. Downey stated that, taking ''as a whole'' the medical records for Applicant's patients that he reviewed for this proceeding, he ''was impressed with the care. The multiple medical conditions, managed the consultations, the bracing, the referrals to physical therapy, . . . hospitalization, post-hospitalization management. I was impressed. I would say they stack up highly.'' *Id.* at 569. He did not explain whether ''stack up highly'' meets the applicable standard of care and he did not address the standard of care for medical record required by the GA Pain Management Rule, the GCMB Rule 360–3-.02, or the Ten Steps.

Dr. Downey testified that he found, in Applicant's medical records, mentions of urine drug screens, office visits, referrals, medical testing, counseling, and pain contracts. *Id.* at 577–78. He stated that he found documentation of health, physicals, labs, x-rays, prior medical records, records from and consultations with other doctors, and ongoing evaluation and treatment. *Id.* at 580. Dr. Downey opined that Applicant treated pain diagnoses appropriately.[37] *Id.* at 579. He did not present persuasive elaboration on the connection among what he ''found'' in Applicant's documentation, his opinion that Applicant treated pain diagnoses appropriately, and the applicable standard of care.

During his testimony, Dr. Downey offered his opinion and evaluation of electronic medical records. *Id.* at 537–45. According to Dr. Downey, electronic medical records are ''one of the worst things to happen to medical practice that I can recall in my experience since 1983. . . . Being an old doctor that can't type, a lot of the things get left out.'' *Id.* at 538–39. Dr. Downey testified that electronic medical records ''took the physician contact with the patient out of the picture, put the physician's head and face and fingers into a computer, and poor records result[ed].''

[35] The RD does not address Applicant's credibility in one spot.

[36] There is no indication of the content of Applicant's ''summaries,'' and there is no admitted exhibit with this title.

[37] During his testimony, Dr. Downey offered his views, that he developed since 1995, on treating pain patients —specifically that there is ''outside pressure'' to reduce the amount of pain medicine given to legacy patients, and that treating pain patients has turned doctors into being ''almost policemen'' due to urine drug screen and prescription drug monitoring program requirements. Tr. 549–61.

Id. at 538; *see also id.* at 542. He recounted an experience he had to make the point that a Post-it note ''with just a few chicken scratches on it . . . told us more . . . than ten pages of electronic medical records that say nothing.'' *Id.* at 538–39.

Dr. Downey testified that both his and Applicant's practice used ''AdvantaChart.'' *Id.* at 539. According to Dr. Downey, this electronic medical record software has ''limited space to put physical examinations. If you're typing or trying to put in a physical examination, even with voice-activation, you'll get the 50 characters, and it stops. So you just—you give up. I gave up on it.'' *Id.* Dr. Downey also testified that ''[i]t's very common to see an error'' in electronic medical records. *Id.* at 540. About ''some of the records I saw for review of this case,'' he testified, ''obviously, the wrong button was pressed.'' *Id.* According to Dr. Downey, ''the history is somewhat reliable because that's typed in, . . . and in most of the time the plan is somewhat reliable because it's typed in. But anything between . . . is just kind of well, let's see if we can get something out of it.'' *Id.* at 540–41. Handwritten records are ''much easier'' and ''much more accurate,'' according to Dr. Downey, because ''you can write what you're thinking.'' *Id.* at 542. Dr. Downey concluded that ''records before were handwritten and you couldn't read them. . . . [T]he records now are typed . . . and . . . they tell you nothing.'' *Id.* at 541.

Whether doctors handwrite or type their medical records, Dr. Downey agreed that they ''are still required to properly document patient visits.'' *Id.* at 606. To ensure a complete medical record, Dr. Downey supplemented the electronic AdvantaCharts record with his handwritten notes. *Id.* at 607. ''Well, when I had the AdvantaCharts . . . , because I couldn't put enough information [in electronically], . . . we had a separate sheet, separate office visit sheet.'' *Id.* During cross-examination, Dr. Downey did not answer when asked whether he saw that Applicant had supplemented his AdvantaCharts electronic medical records with handwritten notes. *Id.*

Dr. Downey compared the medical records he has reviewed, apparently during his work for the GCMB physician investigations committee, with Applicant's medical records. *Id.* at 531–32, 543. According to his analysis, ''actually, [Applicant's medical records are] better than most that I see at the record requests for the Georgia Board, because there's a paragraph at the front that's the beginning. It says what's going on. There's a paragraph, again, of what's the plan, and a lot of medical records don't even have that.'' *Id.* at 543–44; *see also id.* at 578. Dr. Downey continued by stating that, although ''you can't find what the result of that office visit is going to be . . . [a]t least . . . [Applicant's] records have a plan, have a start, and that's really what you need.'' *Id.* at 544. He concluded that Applicant's records are not ''outside the usual standard of care or course of professional practice in Georgia,'' explaining his conclusion as ''that's comparing medical records across multiple specialties, over three years of doctors that received complaints, either erroneous complaints, or hassle complaints, or genuine complaints,'' and that Applicant's records are ''not unprofessional.'' *Id.* at 544–45. In other words, Dr. Downey's conclusion that Applicant's records are not ''outside the usual standard of care or course of professional practice in Georgia'' is based on his comparison of Applicant's records with the records of Georgia physicians whom the GCMB is investigating due to complaints.[38]

Dr. Downey testified that Dr. Kaufman ''implied'' that Applicant ''would be expected'' to conduct a urine drug screen, possibly referring to Applicant's legacy patients when he stated that ''[t]here was no concept of a urine drug screen back in those days.'' *Id.* at 584. Dr. Downey stated his disagreement with what he characterized as Dr. Kaufman's implication. *Id.* ''A urine screen 18 years after the first office visit,'' Dr. Downey testified, ''[i]t didn't make sense to me for that to be a criticism.'' *Id.* According to Dr. Downey, ''there is no law or regulation that says . . . [a urine drug screen] needs to be done, but it's kind of filtering through the literature. And that's what it is, it's to say what's in the system the first day they come in the office.'' *Id.; but see id.* at 624–25 (Dr. Downey's testimony that GCMB investigations of physicians inquire whether they are checking urine drug screens. ''And the answer is yes, and then they go back down to the next question. . . . [T]hey don't really delve into the . . . [urine drug screen] result. They look at are you . . . performing . . . [urine drug screens]? Are you meeting the checkmark.''). Despite his criticism of Dr. Kaufman, though, Dr. Downey admitted that the GA Pain Management Rule applies to Applicant's controlled substance prescribing since the Rule's enactment in 2012, including to the controlled substance prescriptions that Applicant subsequently wrote for patients he had been treating for years before the Rule's enactment. *Id.* at 602; *see also id.* at 600–03 (Dr. Downey's agreement that Applicant must comply with the GA Pain Management Rule (GX 4) and GCMB Rule 360–3–.02 (GX 5)).

Dr. Downey stated that he and the other members of the GCMB would be ''concerned'' if they were presented with evidence of a doctor's ''ongoing practice for a number of years . . . [of] prescribing to an immediate family [member] over and over and over, over again for prescriptions such as Adderall and Vyvanse.'' *Id.* at 613–14. He agreed that such a scenario ''starts to look less like an emergency.'' *Id.* at 614. He stated that he does not believe he would consider a doctor's seeking insurance preapproval for prescribing to a family member for an entire year to be a demonstration of emergency prescribing. *Id.*

I agree with the RD that Dr. Downey, as one of Applicant's experts, ''offered more summary opinions or assessments, and less frequently tied . . . [his] conclusions directly to specific regulatory provisions.'' RD, at 76. I also agree with the RD that Dr. Downey ''appeared to be influenced by the practicalities and realities of medical practice . . . in evaluating'' Applicant's medical practice and did not elucidate, or tie his opinions or assessments to, the applicable standard of care.[39] *Id.* The record of Dr. Downey's testimony is replete with examples.

For example, concerning electronic medical records in general and Applicant's medical records in particular, the primary focus of Dr. Downey's testimony was his opinion that electronic medical records are ''one of the worst things to happen to medical practice that I can recall in my experience since 1983'' and his self-interested conclusion that ''[b]eing an old doctor that can't type, a lot of the things get left out.'' Tr. 538–39. It is in

[38] Applicant's sixth exception urges me to adopt Dr. Downey's assessment of Applicant's medical records. Applicant Exceptions dated September 10, 2018 (hereinafter, Applicant Exceptions), at 7. I reject Dr. Downey's assessment as it is not an accurate statement of the applicable standard of care. *Accord* Tr. 591–92; *see also infra* n.39.

[39] I do not agree that Dr. Downey always ''presented his testimony in a professional, candid, and straightforward manner.'' RD, at 66; *see, e.g.,* Tr. 590 (Dr. Downey testifying that ''I hate to say this. Could you repeat that question? I forgot how I was supposed to answer that.''); *id.* at 591–92 (ALJ's statements accompanying his sustaining a relevance objection by the Government to Dr. Downey's testimony: ''Dr. Downey, you've been giving your opinion, and you've compared . . . [Applicant's] treatment and whatnot to a lot of the doctors that you've reviewed . . . for possible disciplinary action before the . . . [GCMB], but that's not the standard that we're going to use. We're going to use whether it complied with the regulations of Georgia.'').

this context of derogatory statements about electronic medical records, in general, and the resulting inadequacy of his own medical records that Dr. Downey summarily forgave the deficiencies of Applicant's medical records. While ''you can't find what the result of that office visit is going to be,'' Dr. Downey testified, ''[a]t least . . . [Applicant's] records have a plan, have a start, and that's really what you need.'' *Id.* at 544. Although acknowledging that ''[t]here are some [electronic medical record] software programs that allow a[n] unlimited amount of information,'' Dr. Downey's evaluation of Applicant's medical records did not state the applicable standard of care for medical records or address whether Applicant could have availed himself of one of the software programs with more functionality to assist his compliance with that standard. *Id.* at 539. While he testified that he, himself, resorts to adding handwritten paper records to his electronic medical records, he did not even suggest using handwritten paper records, as he did, as a way that Applicant could bring his medical records up to the applicable standard of care.

By way of further example, while stating that he is ''not complaining,'' Dr. Downey testified that ''the physicians in pain management are now almost policemen'' due to the ''opioid epidemic.'' *Id.* at 552; *see also id.* at 554 (''[T]he patient has to pay for the test that's required to prove that they are taking the medication they're taking and not taking something else, which 70 percent of the people that are in pain are compliant. And sometimes more, 80 percent.''). ''We have to monitor urine drug screens, for example, to make sure there's compliance, which is almost a legal aspect,'' he added. *Id.* at 552. He spoke extensively about his involvement in a proposal that the GCMB ''reduce the urine screen requirement from four per year to one per year because . . . [s]o many doctors are pulling away from taking care of people in pain because of the police aspect.'' *Id.* at 553.

Dr. Downey also described point of care urine drug screens as ''disappointingly inaccurate'' and spoke extensively about how the interpretation of results ''can be a challenge.'' *Id.* at 555. ''Has anyone seen one of these cups,'' he asked. *Id.* He elaborated:

> It's a plastic cup, and it's got some stripes on it, some paper stripes with chemicals in there. Urine goes in, and you try to read that chemical. If two lines show up on the paper strip, then that test is negative. If one line shows up, and that little pink line is so subtle that a lot of times three or four people have to look and say is there a line there or not? If it's not there, the test is positive for that substance. If the line is there, this is negative, and it's okay. So it can be some visual acumen challenge to determine whether it's positive or negative . . . for any particular one of those substances that it can test.

Id. at 555–56. He stated that ''[y]ou're taking that urine screen because you have to. It's state law to take it four times a year, so you take it, but the interpretation is almost anybody's guess.'' *Id.* at 557. ''It becomes a, basically, an exercise in frustration,'' he concluded. *Id.* At the forefront of Dr. Downey's testimony were what he considers to be impositions on doctors by medical, legislative, and law enforcement attempts to address the ''opioid epidemic.'' *Id.* at 552–54.

In subsequent testimony, Dr. Downey stated that the GCMB does not ''delve into the . . . [urine drug screen] result'' in evaluating a doctor's prescribing habits. *Id.* at 624–25. ''They look at are you . . . meeting that checkmark,'' he testified. *Id.* at 625. How a doctor deals with multiple, inconsistent urine drug screens is ''not even brought up,'' Dr. Downey stated. *Id.* When asked if the GCMB would intervene regarding how a doctor handles multiple, inconsistent urine drug screens, Dr. Downey answered that ''I wouldn't say never, but it hasn't happened in my three years.'' *Id.* Dr. Downey did not explain the differences between his testimony and section (2)(f) of the GA Pain Management Rule. GX 4, at 2 (360–3–.06(2)(f)) (''The physician shall respond to any abnormal result of any monitoring and such response shall be recorded in the patient's record.'').

I base my Decisions and Orders on the CSA and, as the ALJ indicated during the hearing, on all other applicable authorities. Tr. 591–92. Accordingly, I find that Dr. Downey's testimony is largely not germane and certainly not as germane to my adjudication of this matter as Dr. Kaufman's testimony. In the event of inconsistencies between the testimony of Dr. Downey and the testimony of Dr. Kaufman, I will credit Dr. Kaufman's testimony.[40]

The ALJ certified Applicant's second expert, Dr. Joseph Bailey, as an expert in general medicine after the Government's initial objection. *Id.* at 926–27; RD, at 67. Dr. Bailey retired after a thirty-three year career as Chief of Rheumatology at the Medical College of Georgia. Tr. 920. He stated that the ''loss of . . . [Applicant's] presence . . . has been a major negative,'' that Applicant ''has demonstrated, repetitively in my judgment, the highest quality of the practice of medicine that one could ask out of anyone,'' and that Applicant ''is the kind of physician that I would go to if I had illness and was in need of care.'' *Id.* at 935–36.

Dr. Bailey testified that he spent fifteen to twenty minutes reviewing M.B.'s medical records, and ''did not make an effort to go through every component of that chart. I was unable to.'' *Id.* at 941. Based on his review of the medical records for M.B., he agreed that ''M.B. had complex medical issues . . . , as well as psychiatric issues.'' *Id.*

The RD states that ''Dr. Bailey's limited review of the medical records would limit the weight given to his testimony.'' RD, at 68, n.46. I agree. Further, I find that, given the very limited relevance of Dr. Bailey's testimony to the adjudication of this matter, I see no need to assess Dr. Bailey's credibility.

Applicant also called three licensed practical nurses he employed at his practice to testify. The first one, the nurse manager at his practice (hereinafter, LPN), testified about her education, her employment history, and her current lack of employment due to the closure of Applicant's office. Tr. 637–38, 806–07. When she worked for Applicant as nurse manager, she was responsible for the staff and student schedules, and ''made sure office policies and procedures were handled.'' *Id.* at 639. She described the daily operation of Applicant's office, including Applicant's demeanor with patients and the procedures for new and existing patient office visits. *Id.* at 641–44. LPN testified that, for the six years before the practice closed, Applicant had a nurse with him during patient visits. *Id.* at 647. She testified that the nurse would help Applicant enter information into the electronic medical record. *Id.* If Applicant decided during the office visit to put the patient on a controlled substance, the nurse ''would type it up into the system'' when Applicant was with her. *Id.* The nurse would print the prescription and get it from the printer. *Id.* Applicant ''would make sure that that's exactly what was in the computer, and then he'd sign it and give it to the patient,'' LPN

[40] I do not agree that Dr. Downey's testimony was always ''sufficiently objective, detailed, plausible, and internally consistent to be generally reliable.'' RD, at 66. As already discussed, Dr. Downey's testimony is marked by his personal opinions about matters such as the state of the medical profession and legal and professional requirements currently imposed on doctors who prescribe controlled substances. I find that his reference to, and discussion of, Applicant's controlled substance prescribing documented by Applicant's medical records is virtually non-existent, and that the usefulness of his testimony to evaluate the relevant evidence pales when compared to Dr. Kaufman's testimonial contribution to the adjudication of this matter.

stated.[41] *Id.* LPN testified that Applicant ''would see . . . [patients receiving a prescription] at least once every 90 days.'' *Id.* at 649; *but see id.* at 815–16 (LPN testimony that ''[w]e didn't see . . . [Applicant's daughter] on a regular basis. . . . I wouldn't even say a few times a year. . . . Maybe once her dentist was out of town. . . . It wasn't a regular thing. It was just . . . [e]mergency kind of reasons.''). LPN testified that Applicant ''never'' signed blank prescriptions. *Id.* at 649–50.

LPN testified that the office policy for patients for whom Applicant prescribed controlled substances was a monthly urine drug screen and a visit every three months.[42] *Id.* at 644–45, 773. She stated that a patient would call the office thirty days after Applicant prescribed the controlled substance and say, ''I've had my 30 days, I'm going to come in tomorrow and pick up my prescription.'' *Id.* at 645. Then, according to LPN, ''[w]e would get the prescription ready if, after we looked at the chart and made sure that they did have a visit, and then the patient would come in the next day.'' *Id.* LPN continued to describe the controlled substance refill process by stating that ''[w]e would do a urine drug screen on them, and if they didn't fail the urine drug screen, if it was positive for what they were on and negative for what they weren't, we would get them their prescription.'' *Id.*

LPN's testimony did not explicitly state who interpreted urine drug screens administered before a controlled substance refill prescription could be given out. Her testimony, though, did not describe a role for Applicant or for the practice's Physician Assistant in the process. Her description first advised that ''[w]e would do a urine drug screen on them'' and, after explaining what passing a urine drug screen means (''it was positive for what they were on and negative for what they weren't''), she continued by stating that ''we would get them their prescription.'' *Id.* From LPN's continued use of the pronoun ''we,'' without defining it, and her use of the word ''get,'' I find that the staff, not Applicant or any registrant, interpreted urine drug screen results during the controlled substance refill process implemented in Applicant's practice.[43]

When asked what would happen if there were an abnormal urine drug screen, LPN testified that ''[w]e would send it off for a confirmation.'' *Id.* On follow-up, when asked if the ''patient would have to see anybody if there was an abnormality,'' LPN stated that ''[i]t depended on the abnormality.'' *Id.; see also id.* at 739–40. In other words, LPN did not testify that all abnormal urine drug screens required the immediate attention of a registrant, or at least the attention of a registrant before the controlled substance refill was handed out. ''[S]ay he [Applicant] had given them Klonopin before, and they were negative for Klonopin, then we would go ahead and give them their prescription . . . [and] [w]e would send it off for confirmation,'' LPN testified. *Id.* at 646. In other words, LPN's testimony distinguished between the prior action of Applicant in having prescribed the controlled substance Klonopin and the subsequent unilateral action by the staff (''we would go ahead and give them their prescription''). *Id.* LPN's testimony continued with her stating, ''Klonopin, it's a benzo[diazepine], and it's affected by light . . . [s]o then we may get a negative . . . when they've been on it before. So we would go ahead and continue the Klonopin.''[44] *Id.*

When asked if ''someone like M.B. . . . failed to [sic] test would she have to see somebody,'' LPN responded that ''[s]he would normally see'' Applicant or the Physician Assistant. *Id.* I note that LPN was not asked, and did not state, whether ''someone like M.B.'' would be *required* to see Applicant or the Physician Assistant *before* being given the controlled substance refill prescription. I find, however, that LPN's use of the word ''normally'' means that there were times when ''someone like M.B.'' would not see either Applicant or the Physician Assistant before receiving a controlled substance refill prescription. In addition, according to the ''Office Protocol and Pain Treatment'' that LPN authenticated, ''established patients'' on ''controlled meds'' visit every ninety days ''unless [urine drug screen] failure . . . then sched[ule] visit.'' RX 2, at 1. I find that the language in the Office Protocol and Pain Treatment document, ''then sched[ule] visit,'' makes clear that ''established patients'' are not required to see Applicant on the same day as the urine drug screen failure. The same Office Protocol and Pain Treatment document also instructs that the results of the urine drug screen given at the time of prescription ''pick up'' are ''scanned into chart for review'' and ''notes'' that urine drug screen ''failure, p[atien]t needs app[ointmen]t to discuss. Chart and UDS will be reviewed at time of visit, p[atien]t will be counseled and may be released from our care.'' *Id.* Thus, I find that the Office Protocol and Pain Treatment document does not make a meeting with Applicant or any registrant a prerequisite to the release of a controlled substance refill prescription. I also find that Applicant's Office Protocol and Pain Treatment document does not instruct the staff to withhold a controlled substance refill prescription in the event of an abnormal urine drug screen.

LPN testified that for ''suspicious patients, patients that failed their drug screen,'' or about ten to fifteen times a week, and for new patients, ''[t]here was a DEA website that we . . . would go on . . . [to see] what doctors they had gotten prescriptions from, if they were controlled prescriptions, when those were filled at the pharmacy, [and] what pharmacy filled it.''[45] Tr. 649, 794. I find that this testimony and the portion of the Office Protocol and Pain Treatment document stating that the ''rx website'' is only to be checked if the new patient ''states recently on controlled meds and if the pt does not have records'' are inconsistent. RX 2, at 1.

A patient who received a prescription could fill it at the pharmacy in Applicant's office. A licensed practical nurse (hereinafter, PLPN) on staff ''ran'' the pharmacy, filled prescriptions, and was responsible for maintaining the controlled substance records. Tr. 650, 807. The office manager auto-ordered the medicine for Applicant's office pharmacy. *Id.* at 651. The medicine came in prefilled, sealed, and labeled bottles. *Id.* According to LPN, the office pharmacy was opened to help patients without insurance who could not afford their medication. *Id.* at 662. ''[S]hortly after,'' she added, a ''year, year and a half after we started our pharmacy, big-name pharmacies started doing the $4 plan, where patients could go and get some of their generic medications for $4.'' *Id.* She stated that the office pharmacy ''couldn't beat $4, so we didn't do well with that.'' *Id.* LPN

[41] LPN testified that Applicant used blue watermark prescription paper and signed prescriptions in red ink. Tr. 648.

[42] According to DI, however, a urine drug screen was not required when a family member picked up the controlled substance refill prescription including, possibly, a Schedule II refill prescription. Tr. 131.

[43] The testimony of other witnesses whom Applicant called informs this finding. *Infra* section III.E.

[44] LPN testified that ''also, if you stop Klonopin that patient might have a seizure.'' Tr. 646.

[45] From the description, it appears that LPN is describing the Prescription Drug Monitoring Program, not a DEA website. *See, e.g.,* RX 10; *see also* Tr. 792–95.

continued by stating that ''our pharmacy was on auto-order, so they were automatically just sending us a standard order . . . and we ended up having to dispose of those that were expired'' since ''we didn't sell a lot of medications.'' *Id.*

LPN was at work when DEA inspected Applicant's office on August 11, 2015. *Id.* at 653. She testified that the DEA team arrived ''right after lunch'' and asked to see Applicant, the Physician Assistant, and the pharmacy. *Id.* at 653–54. She stated that she, Applicant, PLPN, and GS went to the office pharmacy. *Id.* at 654. Applicant returned to seeing patients, as permitted by the DEA team. *Id.* According to LPN, the DEA team asked her questions and asked her to get and show them things. *Id.* at 658. LPN testified that the DEA team asked her ''if we had a patient that came in at 2:00 [on August 6, 2015], and who was that patient, and did they get a prescription.'' *Id.* at 738. She reported her response as ''[w]e did not have a patient that came in on 2:00 that Thursday. We closed early that day. It was 12:30 when we closed.'' *Id.* LPN stated that Applicant was in the office on August 6, 2015, ''just to review some paperwork, review some prescriptions, sign some things,'' and that the Physician Assistant was in the office to see all of the patients who came in on August 6, 2015. *Id.* at 738–39. He was also in the office all day on August 7, 2015. *Id.* at 739. On cross-examination, LPN testified that the ''printed'' dates on RX 6 and RX 7 (August 18, 2015) mean that she could not have given the DEA team either of those documents on August 11, 2015. *Id.* at 809. Instead, she stated that the August 6 and 7, 2015 patient schedule reports she handed the DEA team are marked GX 86. *Id.* at 810.

LPN testified that the DEA team asked ''for certain records and patient paper records, which we did not have because . . . we had [electronic medical records].'' *Id.* at 658; *see also id.* at 668–69, 736–37. LPN testified that she offered to show GS the three-ring binders containing the medication information stickers attached to the corresponding filled prescription, but ''he said he didn't want to see that right then.'' *Id.* at 661, 664–65. She said that GS told her, Applicant, and PLPN that ''there were just minor issues, and . . . he would send a letter, and we would have to comply with the letter, you know, fix the issues, and he said other than that, the pharmacy was okay.'' [46] *Id.* at 666. LPN testified that Applicant told the staff that ''DEA threatened to take us all to jail, and he signed over his things.'' *Id.* at 742. She clarified on cross examination that no one on the DEA team told her that she would go to jail, only Applicant. *Id.* at 807.

During LPN's testimony, many Applicant exhibits were admitted into the record.[47] *Id.* at 746–805. LPN described RX 5A as concerning ''patients that we released from our office'' and including a list of ''[m]aybe more'' than 100 names and, annotated by her handwritten notes, ''[l]etters to different patients letting them know that they were released from our care.'' *Id.* at 774, 776, 779; *see* RX 2, at 1 (''Release from our care-pts that have been released will not be allowed to become pts again. Pts can be released for non compliance, deception, . . . [urine drug screen] failures.''); Tr. 814–15 (LPN explaining that ''[t]hings would happen'' such that instructions were not followed and precautions were not taken). I find, from my review of pages in RX 5A containing legible handwritten notes, at least five situations in which Applicant was prescribing controlled substances concurrently with another physician. RX 5A, at 28, 41, 43, 50, and 55; *cf.* Tr. 649. I see nothing in the record that explains convincingly why it took months for Applicant's office to address matters that would appear on a query of the Prescription Drug Monitoring Program. I also find at least nine instances in which Applicant continued to prescribe controlled substances despite abnormal urine drug screens. RX 5A, at 29, 46, 48, 49, 52, 76, 83, 87, and 89; *cf.* RX 2, at 1. Again, I see nothing in the record that explains convincingly the continued controlled substance prescribing.

I agree with the RD that LPN ''presented her testimony in a professional, candid, and straightforward manner'' and, ''[f]or the most part, . . . [her] testimony was sufficiently objective, detailed, plausible, and internally consistent to be reliable.'' RD, at 37. As did the ALJ, I ''merit [LPN's testimony] as generally reliable.'' *Id.* I note, though, that there are discrepancies between the testimonies of LPN and PLPN, particularly regarding the controlled substance refill process.

Applicant also called PLPN, the licensed practical nurse staffing the pharmacy, who testified about her professional education, her lack of a pharmacist license, her past employment, and her current unemployment after working for Applicant since 1999 until he closed his practice in November 2016. Tr. 819–22, 911. PLPN described the pharmacy in Applicant's office, including her duties, and how she dispensed medicine, including controlled substances, from it. *See, e.g., id.* at 820–23. She testified that the office handled the prescriptions for the nursing homes Applicant visited. *See, e.g., id.* at 837–38. She explained how Applicant's practice processed requests for refills, including administered urine drug screens, and the use of a box at the front desk as the repository for signed refill prescriptions. *Id.* at 823–38, 840–69, 889–90, 892–901, 903–12, 914–18.

According to PLPN, the process at Applicant's practice for handling requests for refills of controlled substance prescriptions started with a telephone call requesting a refill. *Id.* at 825. ''As long as it was . . . right there at the 30 days and there's no notation that they had to be seen, . . . then we—the prescription would be printed, it would be put in the folder for . . . [Applicant] to sign, so he always viewed everything, signed everything,'' she testified. *Id.* PLPN's testimony was inconsistent regarding whether Applicant always approved and signed all of the controlled substance refill prescriptions she prepared.[48] *Id.* at 832 (''He always approved them.'') *contra id.* at 826 (''Sometimes . . . [Applicant] would come around and say they need to come in.''). PLPN's testimony is consistent that Applicant did pre-sign controlled substance refill prescriptions. The prescriptions that Applicant signed were ''filed in the prescription pickup bin that we have'' at the front desk, PLPN testified. *Id.* at 827. They were filed alphabetically ''to try to find them easier,'' she added. *Id.*

When refill requesters came to the office to pick up refill prescriptions,

[46] LPN stated that ''[i]n June 2012 the State came in and inspected the pharmacy. We didn't have any problems. . . . We didn't hear anything else back from them after that. They said it was fine when they were there.'' Tr. 667–68.

[47] LPN also testified that the handwriting on one of the medical records for D.C, RX 17, at 64, ''looks like [Applicant's spouse's] handwriting . . . [t]hat was added later. That wasn't part of the patient's record.'' Tr. 805; *see also supra* section III.D. (Dr. Kaufman's testimony that the handwritten statement in DC's medical records about where the Suboxone came from is probably not correct, yet the Suboxone was an illegally obtained substance, a problem that Applicant did not address).

[48] Counsel's question to PLPN was not specific (''We may have covered this in part, but I would like to make sure we cover it in depth. When the patient came to the office to pick up a . . . prescription, what was the procedure that was followed?). Tr. 831–32. Nevertheless, the context of PLPN's testimony makes clear that she was describing the procedure followed for picking up controlled substance refill prescriptions because she stated that, after the pre-signed refill prescription was located in the box up front, ''then they would put into the system for a urine drug screen.'' *Id.* at 832. According to the Office Protocol and Pain Treatment document, it is controlled substance refill prescriptions that involved a urine drug screen. RX 2, at 1.

they would first have a urine drug screen. *Id.* at 826. PLPN described how she and ''the office'' monitored the submission of urine samples. *Id.* at 833. She also described how the staff interpreted the urine sample. *Id.* at 834. ''They would check the temperature. They were also looking at the color, and . . . the panel on the cup would tell them what substance was in the urine, and there's . . . we had a sheet that was a checklist. As to whether it was positive or negative, you would check, you know,'' she testified. *Id.* She testified that ''what they're checking for is to make sure the medications they were prescribed were in the patient's system and nothing else.'' *Id.* at 835. Based on PLPN's testimony, I find that she or other staff in Applicant's practice, not Applicant or a registrant, interpreted and analyzed urine samples and determined if the urine drug screen was normal or abnormal.

PLPN testified that ''[i]f their urine drug screen was good, then they would be able to get their prescriptions.'' *Id.* If the urine drug screen was not good, ''we would take them and put them in a room, so that . . . [Applicant] could see them and discuss the test,'' she stated. *Id.* at 836; *see also id.* at 826 (''[T]hey have to be put in a room and be seen by'' Applicant if the urine drug screen showed the presence of marijuana.).

PLPN's testimony was not internally consistent about Applicant's office policy regarding the release of a controlled substance refill prescription and whether Applicant or any registrant first met with the person who failed the urine drug screen before determining whether the pre-signed refill should be released. On one occasion, PLPN testified that ''if they failed'' the urine drug screen, LPN would say ''you've got to come in and talk to'' Applicant. *Id.* at 828. On another occasion, PLPN testified that if a urine drug screen was bad, such as showing marijuana, ''they have to be put in a room and be seen'' by Applicant). *Id.* at 826; *see also id.* at 836. PLPN's testimony about the process implemented prior to the time Applicant was scheduled to be out of town indicates that the staff was pre-authorized to release a controlled substance refill prescription even when the urine drug screen was abnormal and before a meeting with Applicant or any registrant took place.

The process at Applicant's practice that PLPN testified took place before Applicant went out of town was that ''some of us girls would get together and figure out, okay, we need to look back on the schedule of who come [sic] in 30 days prior on those days.'' *Id.* Based on that research, the ''girls'' identified what prescriptions were needed and who needed to be ''squeezed'' in so that Applicant saw them before he went out of town. *Id.* If someone ''failed a urine drug screen'' when Applicant was out of town, PLPN testified that ''we would defer that to . . . [LPN], and most of the time, you know, it was always sent off for confirmation . . . [a]nd a lot of time she was—you've got to come in and talk to'' Applicant. *Id.* at 828. By testifying that ''a lot of time'' LPN stated ''you've got to come in and talk to'' Applicant, PLPN was stating, at a minimum, that there were times when someone who failed the urine drug screen received the controlled substance refill prescription that Applicant had pre-signed without having to speak with Applicant. *Id.* PLPN's testimony does not address whether those whom LPN told ''you've got to come in and talk to'' Applicant received the pre-signed controlled substance refill prescription before subsequently meeting with Applicant. *Id.*

PLPN testified that the office manager handled ordering for the pharmacy. *Id.* at 901–03. PLPN addressed pharmacy-related documents that Applicant moved into evidence, including interactions with the DEA team about the pharmacy and pharmacy-related documents. *Id.* at 860–68, 873–98.[49]

Applicant also called the licensed practical nurse who staffed him during patient office visits (hereinafter, SLPN). She testified about her professional education, her current employment, and her duties in Applicant's practice. *Id.* at 948–49. She testified that she stayed with Applicant ''during the day to see all of his patients.'' *Id.* at 949. She entered the information into the electronic medical record that Applicant told her as he stood over her shoulder, she stated. *Id.* She added that Applicant also told her things that he wanted her ''to change and always made sure my spelling was correct and things of that nature.'' *Id.*

When asked about ''what appear to be template statements about advice about pain'' in the medical records, SLPN stated that a ''lot of the stuff was very repetitive.'' *Id.* at 954. ''[T]he plan of action for the patients is kind of, you know, the same,'' she testified. *Id.* She stated that Applicant ''always would tell patients to . . . take the least amount of medication possible'' and that ''[i]f they could taper off the medication that would be great. . . . [Applicant] would tell them . . . you can do it as slow as possible, even it [sic] just meant a ½ a pill every other day. . . . He would suggest swimming and stretches and exercises and physical therapy.'' *Id.* at 949–50; *see also id.* at 954–55 (When asked if Applicant ''discussed'' with patients ''every time'' and ''reminded'' them ''of these very basic physical therapy, swimming, . . . all the stuff that is in the pain plans,'' SLPN answered ''Yes. He would encourage them constantly to do those things, yes. Every visit, he would go through the same things, over and over and over with them.'').

According to SLPN, someone whose office urine drug screen was abnormal was not ''allowed to receive their medications unless . . . [Applicant] met with them.'' *Id.* at 956. Applicant would sometimes say ''there's lots of false positives in the cups in the office. False negatives, false positives,'' she testified. *Id.* She continued her testimony by stating that ''[i]f the patient, you know, disagreed with what was being said, . . . [Applicant] might give them one week's worth of medicine, send it to the lab and say, you got [to] come back in a week and we'll review the lab results.'' *Id.; see also id.* at 955–56 (SLPN's agreeing that Applicant met with the patient when the urine drug screen was confirmed.).

On cross-examination, SLPN testified that Applicant used Suboxone ''to help take people off opioids . . . and to treat pain as well.'' *Id.* at 958. On re-direct, however, when SLPN was asked if Applicant ever used Suboxone to treat pain, she did not answer the question directly. *Id.* Instead, she stated that ''sometimes patients would say that they felt like it controlled their pain . . . because you're not going through withdrawals having that pain.'' [50] *Id.*

Applicant also called a member of his office staff whose in-office employment tenure was almost six years. *Id.* at 944. She continued handling medical billing for Applicant's nursing home practice after he closed his office practice. *Id.* at 945. After some questioning, the Government objected to her testimony as being outside the parameters stated in Applicant's Prehearing Statement. *Id.* at 946. As he considered the objection, the ALJ noted that she was the third witness

[49] *See infra* n.50 regarding the reliability of PLPN's testimony.

[50] I do not see in the RD an assessment of the reliability of the testimony of PLPN or SLPN that parallels its assessment of the reliability of LPN's testimony. The topics covered by the testimonies of PLPN and SLPN are similar to the topics covered by LPN's testimony. The RD does not question the general reliability of the testimony of PLPN or SLPN and, based on my review, I find no reason to do so. As such, as with LPN's testimony, I merit the testimonies of PLPN and SLPN as generally reliable. I note again, though, that there are discrepancies among the testimonies of LPN, PLPN, and SLPN, particularly regarding the controlled substance refill process.

describing the same front desk protocols and procedures. *Id.* Before the ALJ ruled on the objection, Applicant's counsel withdrew the witness. *Id.* at 946–47.

Applicant called the Chief Information Officer (hereinafter, CIO) of the software company whose application he used to manage his in-office pharmacy. *Id.* at 671. CIO's testimony described the application's functionalities, including how it is able to interface with external data, how it tracks in real time inputted data and changes, and what reports it can generate. *Id.* at 672–709. The software does not, however, interface with distributor invoices or order forms such as DEA–222s. *Id.* at 710.

According to the RD, CIO ''presented his testimony in a professional, candid, and straightforward manner.'' RD, at 49. In addition, the RD concludes that CIO's testimony was ''impartial, objective, detailed, plausible, and internally consistent.'' *Id.* I agree with the RD and, as the RD did, I merit CIO's testimony as fully credible. *Id.*

The first character witness whom Applicant called was Joseph Newman, a former federal criminal prosecutor for the Southern District of Georgia and, at the time of his testimony, a part-time *pro tem* and substitute Judge in the State Court of Chatham County. Tr. 510. Judge Newman testified that he has known Applicant socially for eighteen years due to the longstanding, since childhood, friendship of their wives. *Id.* at 512–14. While he testified that he is not a member of the Augusta community, he also testified that Applicant's reputation in the community for being truthful and law abiding is ''good'' and, therefore, that he would ''absolutely'' believe him ''under oath.'' *Id.* at 514. He testified that, from his social conversations and dealings with Applicant, that Applicant is ''an extremely knowledgeable doctor with a broad range of medical knowledge . . . [who] has always administered great concern to his patients and the way he goes about practicing medicine.'' *Id.* at 515. He testified that he believes the Augusta community shares his sentiments as he underlined that he is ''not really a member of the Augusta community as such.'' *Id.* The Government did not cross-examine this witness.[51]

The second character witness whom Applicant called was Dr. Paul Allen Biladou, a retired general internist and oncologist who also served on the faculty of the Medical College of Georgia. *Id.* at 721. Dr. Biladou testified that he thinks he knows Applicant ''pretty well personally, and medically.'' *Id.* at 722–23. He stated that the individuals whom he knows whom Applicant ''treated . . . for both general medical conditions, as well as helping people with substance abuse . . . [had] good outcomes . . . [and] spoke highly of him.'' *Id.* at 723. Dr. Biladou testified that he is familiar with Applicant's reputation for truthfulness in the community and in the medical profession, and that reputation is good. *Id.* at 723–24. He stated that Applicant provided an important service to the community when he was practicing and that he would like to see Applicant get his DEA certificate back. *Id.* at 724. The Government did not cross-examine Dr. Biladou.[52] *Id.*

The third character witness whom Applicant called was Dr. Justin Voich Bundy, an orthopedic surgeon in August, Georgia. *Id.* at 725. Dr. Bundy testified that Applicant took care of ''a lot of . . . [his] patients over the past six to seven years'' and ''assume[s he knows Applicant] very well.'' [53] *Id.* at 726. Dr. Bundy testified that he is familiar with Applicant's reputation for truthfulness in the community and in the medical profession, and that reputation is good. *Id.* at 727. He stated that Applicant's practice provided a needed service to the community and that he believes it is in the public's interest for Applicant to get his DEA certificate of registration back. *Id.* at 728–29. The Government did not cross-examine this witness.[54] *Id.* at 730.

The fourth character witness whom Applicant called was Earl Wright, a pharmacist for about forty-eight years who became familiar with Applicant in the mid-1990s. *Id.* at 731, 734. He testified that Applicant double-signed prescriptions in red ink and that he has not seen any other doctor do that. *Id.* at 734. According to Mr. Wright, Applicant and his office ''have always been very receptive to resolving whatever questions we have'' about Applicant's patients and prescriptions. *Id.* at 735. Mr. Wright stated that Applicant's patients ''speak well of him . . . [and t]hat says a lot for him.'' *Id.* He testified that thinks it would be in the public's interest for Applicant to have a DEA certificate of registration. *Id.* The Government did not cross-examine this witness.[55] *Id.*

In addition, RX 22 consists of statements supporting Applicant from about fifty patients, colleagues, and others.

I find that the four individuals who offered verbal character witness testimony and the written statements of support for Applicant in RX 22 provided limited evidence relevant to Applicant's controlled substance prescribing, specifically evidence of his experience in dispensing controlled substances, and to whether I should grant Applicant's request for a registration.[56] 21 U.S.C. 823(f)(2). Heart-felt evidence, if it is not specific or presented in a context that explains it, is of limited value in an adjudication such as this one. I find that the record evidence of multiple controlled substance-related violations outweighs the evidence in the testimonies of the four individuals and in RX 22.

F. Allegation That Applicant Unlawfully Pre-Signed and Pre-Printed Prescriptions

Having read and analyzed all of the record evidence, I find that the Government has not presented a *prima facie* case that Applicant unlawfully pre-signed and pre-printed controlled substance prescriptions due to insufficiently developed record evidence. The fact that I am not sustaining this charge due to insufficient evidence, however, does not allay the concerns raised by evidence in the record.

As already discussed, the OSC charges that Applicant unlawfully pre-signed and pre-printed prescriptions. OSC, at 2. According to the Government's Posthearing Brief, ''[i]n order for a prescription to be valid, it must be signed and dated on the same date.'' Govt Posthearing dated July 30, 2018, at 3. The Government submitted testimonial and documentary evidence to support this allegation. The Government's documentary evidence includes patient sign-in sheets, GX 86, and double signed (computer software and wet signed) and single signed (computer software signed) prescriptions, many of which are for controlled substances, seized from Applicant's office on the inspection date. GX 87 (314 prescriptions) and GX 88 (four prescriptions). According to the

[51] *See infra* n.56 regarding the reliability of Judge Newman's testimony.

[52] *See infra* n.56 regarding the reliability of Dr. Biladou's testimony.

[53] Dr. Bundy testified that he does not have any business relationship with Applicant. Tr. 730.

[54] *See infra* n.56 regarding the reliability of Dr. Bundy's testimony.

[55] *See infra* n.56 regarding the reliability of Mr. Wright's testimony.

[56] The RD does not assess the testimony of Judge Newman. The RD states that the testimonies of Dr. Biladou, Dr. Bundy, and Mr. Wright were candid, straightforward, and ''sufficiently objective and plausible to be reliable.'' RD, at 69–70, 47 (respectively). Given the very limited relevance of these witnesses' testimonies to the adjudication of this matter, I see no need to make a reliability finding.

OSC, GX 86 ''demonstrated that patients received prescriptions authorized and signed by . . . [Applicant] on those days when neither . . . [Applicant or his Physician Assistant] were [sic] present at . . . [his] office.'' OSC, at 2.

Applicant submitted testimonial and documentary evidence to refute this charge. In terms of documentary evidence, Applicant submitted patient schedules for August 6 and 7, 2015. RX 6 and RX 7. During her testimony, LPN confirmed the notations on the face of each page of RX 6 and RX 7 showing that they were printed on August 18, 2015, seven days after the inspection. Tr. 807–08. I agree with the RD that the print date of RX 6 and RX 7, alone, makes them less credible than GX 86. RD, at 73.

I find that the Government's evidence includes circumstantial, but not substantial, evidence supporting this charge. GX 86 consists of seven pages. I find that the only legible date on GX 86, August 5, 2015, is on the top of its first page. GX 86, at 1. Throughout GX 86, I find that there are hours and minutes entered in handwriting under columns labeled ''Arrival Time'' and ''Appt. Time.'' One could infer from these handwritten times under ''Arrival Time'' and ''Appt. Time,'' and from the sequence of those times and any information in the ''Appointment with'' and ''New Patient'' columns, roughly what took place in Applicant's office on August 6 and 7, 2015. One could also infer from the handwriting in the column marked ''Appointment with'' which member of Applicant's office met with the person who filled in that row of the sign-in sheet. If one were to make these inferences, one would first need to be able to read the handwriting on the pages of GX 86, much of which is too light to be seen and illegible. I note that no Government witness testified about the specific content of any line or lines of GX 86 to assist the adjudication of this.

I find, though, that ''Dr Pursley'' is legibly written on the last page of the exhibit in the row stating that the arrival time was ''3:40'' and the appointment time was ''3:45.'' *Id.* at 7. If one were to infer that the last page of GX 86 proves what took place at 3:40 or 3:45 on Friday, August 7, 2015, as the Government's case theory suggests, then one could conclude from the last page of GX 86 that Applicant did, indeed, see a patient after 3:30 on that Friday. Such an inference conflicts with the Government's case theory, and other record evidence, that Applicant was not in the office that Friday.

Further, GX 86 does not contain legible evidence, let alone substantial evidence, that anyone actually received a controlled substance refill prescription on August 6 or August 7, 2015. Thus, I do not see substantial legible evidence in GX 86 that ''patients received [controlled substance] prescriptions authorized and signed by . . . [Applicant] on those days when neither . . . [Applicant nor his Physician Assistant] were [sic] present'' in Applicant's office. OSC, at 2.

Regarding the prescriptions in GX 87 and GX 88, I find that many, but not all of them, are for controlled substances. Of the prescriptions that are for controlled substances, I find that the prescriptions include orders for Schedule II and III controlled substances. *E.g.,* GX 87, at 12 (Schedule II); *id.* at 5 (Schedule III); GX 88, at 2 (Schedule II). I also find that many, but not all, of the prescriptions have Applicant's ''wet'' signature in addition to his computer-generated electronic signature. GX 87, at 214 (prescription for a Schedule II controlled substance bearing Applicant's electronic and ''wet'' signatures and dated August 6, 2015); *id.* at 127 (prescription for a Schedule IV controlled substance bearing Applicant's electronic signature and Physician Assistant's ''wet'' signature and dated August 7, 2020); GX 88, at 1–4 (prescriptions for Schedule II and Schedule IV controlled substances bearing only Applicant's electronic signature and dated August 11, 2015). I do not see substantial evidence in the record, however, explaining why some of the controlled substance prescriptions in these exhibits include both an electronic and a ''wet'' signature while others do not. It could be, for example, that the printed prescription was not accurate and that Applicant did not sign it for that reason. *See* Tr. 647; 21 CFR 1306.05(f) (stating that a secretary or agent may prepare a prescription for the practitioner's signature).

Although I find that the record contains substantial evidence addressing aspects of the controlled substance prescriptions in GX 87 and GX 88, such as what prescriptions were written, and circumstantial evidence, including the testimony of LPN, PLPN, and SLPN, concerning when Applicant may have signed them, I do not find substantial record evidence explicating the prescriptions in GX 87 and GX 88. Further, I find conflicts within the record evidence concerning the prescriptions comprising GX 87. For example, putting aside the record evidence concerning D.C., M.B., and Applicant's daughter, the record does not establish with substantial evidence Applicant's policy or process concerning controlled substance refill prescriptions. It is this policy or process, though, that appears to be at the heart of the Government's theory for the first OSC allegation.[57]

While there is also circumstantial record evidence addressing aspects of the prescriptions in GX 88, I do not find that GX 88 contributes substantial evidence to the establishment of a violation of the first OSC allegation. For example, the four pages of GX 88 consist of controlled substance prescriptions dated August 11, 2015, the date of the inspection, written for two different individuals. Given the date on the prescriptions, the time and location of their seizure could have occurred concurrently with the two individuals' medical visits. *See* Tr. 647 (LPN's testimony that SLPN would print prescriptions she typed into the computer, Applicant would make sure what printed is ''exactly what was in the computer and then he'd sign it and give it to the patient.''). In sum, the record evidence does not substantially illuminate these prescriptions.[58]

For the above reasons, I find insufficient evidence in the record to support my finding that the Government presented a *prima facie* case that Applicant violated 21 CFR 1306.05 or Ga. Code Ann. § 16–13–41(b). On the record before me, therefore, I find an insufficient evidentiary basis to support a founded violation of either of these two provisions.[59]

Regarding the third legal basis of the first OSC allegation, 21 CFR 1306.04(a), the Government's Posthearing Brief does not advocate for it to be sustained. Accordingly, it appears, from the Government's decision not to address this regulation in its Posthearing Brief, that the Government may have

[57] The inclusion of Schedule II controlled substance prescriptions in GX 87, however, might be evidence of a violation of the GA Pain Management Rule requiring physicians to monitor patients receiving Schedule II and Schedule III controlled substance prescriptions for compliance with the therapy, to note abnormal monitoring results, to respond to an abnormality, and to record the response in the patient's record. GX 4, at 2 (360–3-.06(2)(f)).

[58] DI testified that the controlled substance prescriptions gathered into GX 88 ''were the ones that were refills for the next day.'' Tr. 130. The record does not include a foundation for this testimony. As already discussed, all of the prescriptions in GX 88 are for controlled substances and are dated August 11, 2015. GX 88. GX 87, however, also contains several controlled substance prescriptions dated August 11, 2015, the date of the DEA inspection. *E.g.,* GX 87, at 119, 120, 201. The inclusion of those prescription in GX 87 appears to be inconsistent with this portion of DI's testimony. The record does not explicate these facts. The insufficient evidence in the record about these exhibits limits the weight I afford them.

[59] I acknowledge the RD's recommendations to the contrary. RD, at 90–92.

abandoned this theory. Regardless, there is extensive circumstantial evidence in the record supporting a violation of this regulation. While this evidence falls short of the substantial evidence needed to sustain the allegation, the evidence raises concerns about Applicant's office process and procedures regarding controlled substance prescription refills.

The testimony of LPN, PLPN, and SLPN about the process Applicant implemented in his office regarding controlled substance prescription refills raises concern about whether Applicant improperly delegated his controlled substances-related responsibilities to his licensed practical nursing staff. For example, the weight of the record evidence suggests that neither Applicant nor the Physician Assistant always analyzed, reviewed, or responded to the results of office-administered urine drug screen monitoring before the office LPN staff released a controlled substance refill prescription.[60] *Supra,* section III.E. Instead, based on the record evidence, Applicant apparently ceded to the LPN staff the analysis of urine drug screen samples. *Id.* Further, Applicant apparently delegated to the LPN staff the responsibility of determining who, after having submitted to a urine drug screen, receives and who does not receive a controlled substance refill prescription. *Id.* Indeed, Applicant's LPN staff testimony admitted to their handing out controlled substance refill prescriptions even when the in-office urine drug screen results were abnormal. *Id.* I note that there is no affirmation in the LPN staff testimony that their handing out a controlled substance refill prescription never occurred before Applicant or the Physician Assistant evaluated the urine drug screen sample results, responded to an abnormal urine drug screen result, and recorded in the medical record his response to the abnormal urine drug screen. *Id.; contra* 21 CFR 1306.12(b) (leaving it to individual practitioners' ''sound medical judgment and in accordance with established medical standards, whether it is appropriate to issue multiple [Schedule II] prescriptions and how often to see their patients when doing so'').[61] While these matters are troubling for their consistency with core CSA principles, they played no role in my decision to deny Applicant's request for a registration.

G. Recordkeeping Allegations

The OSC charges Applicant with violating federal and Georgia controlled substance recordkeeping requirements. OSC, at 2. Regarding this charge, the testimony of Applicant's licensed practical nursing staff and the testimony of GS are in conflict.[62] According to Applicant's licensed practical nursing staff, GS was shown the two pharmacy notebooks, RX 11I and RX 11J (Pharmacy Invoices for 2013 and 2014, respectively). Tr. 860–61 (PLPN testifying that, when a DEA agent asked for the invoices for the medications in the pharmacy on August 11, 2015, she showed him the two pharmacy notebooks); *see also id.* at 890–92 (PLPN testifying that she showed GS the pages consisting of RX 11I and RX 11J on August 11, 2015); and *id.* at 664–65 (LPN testifying that ''[w]e showed'' GS the pharmacy's notebooks containing medication bottle ''stickers'' and the ''patient's prescription''). According to both LPN and PLPN, the DEA agent looked at the two pharmacy notebooks and stated that ''he didn't need to see that right now.'' *Id.* at 665 (testimony of LPN); *see also id.* at 861 (PLPN testifying that she showed the DEA agent the two pharmacy notebooks and that he ''picked it up, he opened it, flipped a couple of pages, and said I don't need it right now and sat it down.'').

GS, on the other hand, testified that he asked PLPN if she had the ''records for any controlled substance that you might have on hand.'' *Id.* at 138, 140; *see also id.* at 141–42 (GS testifying that he specifically asked Applicant's office staff for ''any initial inventory, the bi-annual inventory, the purchasing records, the dispensing records, any type of destruction records''). GS explained that the controlled substance-related records that registrants are required by federal and Georgia law to maintain include an initial inventory, a bi-annual inventory, dispensing records, purchasing records, return records, and destruction records. *Id.* at 138–41. According to GS, Applicant's staff was not able to produce any of the records he requested. *Id.* at 142; *see also id.* (GS testifying that ''[t]hey never provided . . . [the bi-annual inventory]. They never said they had one. They never showed me one.''). GS also testified that ''at no point in time did anyone from . . . [Applicant's] staff nor . . . [Applicant] say that they maintain controlled substance records electronically . . . [n]or was I shown a data base that would indicate that they possibly maintained controlled substance records electronically.'' *Id.* at 144; *see also id.* at 143; *id.* at 169 (GS testifying that the computer PLPN showed him ''was in the nurse's station hallway . . . [and] was the electronic medical record.'').

As already discussed, GS testified that Applicant's office did not produce any of the controlled substance records that the law requires Applicant to maintain. *Id.* at 141 (required by federal and Georgia state law); *see also id.* at 168 (GS testifying that he ''[n]ever received one controlled substance record while we were on site.''). Further, GS enumerated Applicant's recordkeeping violations during his testimony. *Id.* at 155. He testified that Applicant had no bi-annual inventory, no purchasing records on site, no invoices, and no records showing the destruction of controlled substances. *Id.* at 155–56. GS explained that he would have accepted the required controlled substance records even the next day, had Applicant provided them at that time. *Id.* at 156 (''On site, even the next day, if they came to us and said hey, we found these records, was this what you were talking about? We probably would have been like, yes, that's what we're looking for. . . . But that all became a moot point, once it went to Surrender for Cause.'').

Regarding Applicant's hearing exhibits, GS testified that, had he been

[60] The weight of Applicant's testimonial evidence is that a urine drug screen was a prerequisite to receipt of a controlled substance refill prescription. *See, e.g.,* Tr. 826 (PLPN's testimony that release of a methadone refill prescription required a urine drug screen); *id.* at 832 (PLPN's testimony that a urine drug screen was administered before the release of a controlled substance refill prescription). The apparent exception, gleaned from the Government's testimony, is that a urine drug screen was not a prerequisite to the release of a controlled substance refill prescription when, for example, a family member picked up the refill. *Id.* at 131 (DI testimony).

[61] The location and contents of the plastic tub raise diversion concerns. The record testimony seems to place the plastic tub that held the prescriptions making up GX 87 at the prescription desk, the front desk, and the nurse's station. Tr. 831–32, *id.* at 903. Wherever its location actually was, PLPN answered ''no'' when asked if a patient ''could . . . reach around and grab a stack [of prescriptions from the plastic tub] and take off'', and if ''anybody, other than staff, . . . [had] access to the prescriptions.''1 *Id.* at 837. PLPN's testimony does not provide detail about these two ''no'' answers.

Further, regarding the risk of diversion due to the location of the plastic tub holding signed controlled substance (refill) prescriptions, PLPN answered ''no'' when asked whether, ''in the entire 17 years . . . [she was] there, ever have an issue with loss . . . [or] theft of prescriptions from this—from the storage'' [tub]. *Id.* She also testified that she would ''purge'' the plastic tub when she was not busy. *Id.* What the record evidence does not address is the meaning of PLPN's testimony and the bases for that testimony.

[62] Even if I were to credit the testimony that the DEA investigative team did not ask to see specific records during the inspection, my finding, *infra,* that Applicant never retrieved and provided to DEA any legally required controlled substance records even after Applicant knew from this proceeding which records DEA requires, renders irrelevant. *See, e.g.,* Applicant Posthearing, at 12.

shown RX 11F, ''Inventory,'' he would not have ''taken this anyway because of the dates.'' *Id.* at 163; *see also id.* at 166 (GS testifying about RX 11F that ''You see the problem is, Your Honor, . . . when I'm looking at them, there's clearly violations of the recordkeeping requirements.''); *id.* at 172 (GS testifying about RX 11F that ''[s]ome of the records appear to be non-control. Some were, you know, like in 2009. Some of those records were just on a piece of paper, that had no DEA number. No date it was taken. If that was a record that was provided to me, and they said this is the controlled substance binder, and the inventory required for the two-year timeframe . . . [w]e wouldn't have taken that, because it doesn't have . . . a DEA number on it. You don't know whose records these are for controlled substances. It doesn't have whether it was taken at the beginning of business or the close of business. . . . That was just some of the stuff I gleaned just from the short time that I had a chance to review those.''); *id.* at 167 (GS testifying about RX 11G, agreeing that ''Images Pharmacy Stickers/Records'' would be one form of recording exactly what got dispensed where ''[i]f it was within the timeframe.''); *id.* at 167–68 (GS testifying about RX 11I that ''I can't see what's behind it . . . [and] it's not controlled substances . . . so those wouldn't fall within our purview.''). When asked whether the evidence that Applicant submitted for the proceeding ''meet the federal recordkeeping requirements for controlled substances,'' GS responded that ''there were some in there that appeared, just from looking at it. But there were several in there that there was no quantity that was dispensed, no balance or anything like that. There was just a date and name on there. That was it.'' *Id.* at 172–73.

After testifying that the Georgia recordkeeping requirements ''almost mimic[ ] what federal regulations are,'' GS summarized his analysis that Applicant ''absolutely'' would still have been cited for recordkeeping violations if he had presented his hearing exhibits to GS on August 11, 2015, ''[b]ecause . . . [Applicant's hearing exhibits] are not in compliance with the federal regulations.'' *Id.* at 173. I credit the testimony of GS on this matter and, having reviewed Applicant's record evidence, agree with his assessment of Applicant's admitted exhibits. *See, e.g.,* RX 11I (Applicant's ''Pharmacy Invoices 2013'') and RX 11J (Applicant's ''Pharmacy Invoices 2014''). Both RX 11I and RX 11J are one page each. Three quarters of the exhibits' only page shows a large portion of a single piece of paper labeled ''invoice'' (RX 11J) or ''inv'' (RX 11I). This piece of paper includes an affixed hand-written label stating a month and year (''March 2013'' on RX 11I and ''Jan 2014'' on RX 11J). At the top quarter of the exhibits' only page are snippets of similarly looking affixed hand-written labels stating a month and year and paper on which ''invoice'' or some letters from that word appear. For both RX 11I and RX 11J, the lower three quarters of the exhibits' only page describes one or more medicines, such as ''Celexa'' (RX 11I) or ''Lexapro'' (RX 11J). All visible medicines are listed as non-scheduled substances. In other words, nothing visible on the one page of either RX 11I or RX 11J pertains to a controlled substance.

Further, I note that Applicant called CIO who, as described above, is the Chief Information Officer of the company whose electronic clinical dispensing software application Applicant chose for his practice. Tr. 671–720. I interpret CIO's testimony to state that Applicant's first use of this software was in about March of 2013, including a training period. *Id.* at 700. CIO testified that the company software was ''up and running in Applicant's practice on August 11 of 2015.'' *Id.* at 703. According to CIO, the company's software manages medication inventories and dispensing activities. *Id.* at 672. ''We track everything,'' CIO testified, and represented that the company software is capable of producing all of the controlled substance records required by federal and Georgia law. *Id.* at 672, 704–05.

The record does not address why Applicant or his staff did not contact CIO or his company for assistance with the requests of the DEA investigative team on August 11, 2015. *See id.* at 704–06 (CIO testifying that the company ''usually'' receives calls from customers seeking help in pulling information from the software when DEA is at the customer's site asking for required records and ''[w]e point them to run specific inventory reports or dispensing reports and be able to walk them through pulling up patient records and showing where that information is stored.''). Further, assuming the accuracy of CIO's testimony, the record leaves open the question of why Applicant did not offer into evidence, for incorporation into this proceeding's record, all of the required controlled substance records that the DEA investigative team sought on August 11, 2015.[63] Perhaps the conclusion I could reach that is most favorable to Applicant is that neither he nor his staff understood what records the DEA investigative team was requesting on August 11, 2015.[64] With or without this assumption, the record is clear: Applicant did not provide the legally required controlled substance records to DEA on, or after, August 11, 2015. *See also* RD, at 73–74, 94–95.

H. Allegation That Applicant Unlawfully Prescribed Controlled Substances

Having read and analyzed the record evidence, the parties' arguments, and the RD, I find that the record contains substantial evidence that Applicant prescribed controlled substances beneath the applicable standard of care and outside the usual course of professional practice in Georgia to M.B., D.C., and his daughter. *Supra* sections III.D. and III.E; *see also infra* section IV.B.3 (Applicant's Exceptions). My findings based on the record evidence include that Applicant failed to comply fully with the Georgia requirement to obtain the patient's history, to conduct a physical exam, and to obtain informed consent before prescribing controlled substances. *Id.* (*e.g.,* inadequate documentation of M.B.'s medical history, physical examination, and pain complaints; prescribing controlled substances for M.B. for about eleven

[63] I note that Applicant moved RX 11B, RX 11C, RX 11D, and RX 11E into evidence without objection. Tr. 678–84. While CIO and PLPN addressed these exhibits, neither testified that their contents are the required records that DEA requested on August 11, 2015. CIO testified, however, that ''reports could have been run by users at the practice'' and that his company's software is capable of producing all of the reports required by federal and Georgia authorities. *Id.* at 703, 705. Yet, neither Applicant's closing brief nor his exceptions argues that any of Applicant's exhibits consist of any of the records that DEA requested on August 11, 2015. *See also id.* at 693–95 (CIO's testimony that ''you can export your current inventory as of today, and that would give you a report of what you have on hand,'' ''[r]ight now you can't go back and do a point-in-time inventory,'' ''you can review all the changes . . . if you rolled back all the log entries and applied them to either your beginning inventory or the current inventory. You could work back or forward into it,'' ''[t]here's a screen that . . . gives you the current inventory. Again, you can filter it to show just controls, or you can do a biannual inventory for all medications,'' and there's ''one report that you can set the schedules to show schedule II, schedule III.''); *see, e.g., id.* at 695–701 (CIO's description of RX 11C as manual adjustments made to inventory in March 2015, CIO's description of RX 11D as an order summary report showing ''[b]asically every data point that's collected in the dispensing process,'' and CIO's description of RX 11B and RX 11E as showing all medications added through vendor shipments.).

[64] Both parties' exceptions address the RD's statements about certain witnesses' motivations to fabricate evidence. Applicant Exceptions, at 4; Government Exceptions, dated September 10, 2018 (hereinafter, Govt Exceptions), at 6; RD at 72–73. My findings are not premised on motivation to fabricate evidence, so I need not address these exceptions.

years without a diagnosis that should be treated with a controlled substance; prescribing controlled substances for DC without documentation of a physical examination of the parts of the body about which DC had complained; internal inconsistency in DC's medical records due to the listed diagnosis and the documented maladies). They include that Applicant did not re-evaluate patients, did not always document the changes he made to a patient's therapy, and did not always document the impact of a change in therapy. *Id.* (*e.g.,* failure to re-evaluate the efficacy of controlled substance therapy; failure to obtain a specialist's consult when therapy was ineffective). My findings also include that Applicant's medical records fall beneath the applicable standard of care and outside the usual course of professional practice. *Id.* (*e.g.,* incomplete documentation and explanation in medical records). They include that Applicant prescribed methadone for DC for addiction, not pain. *Id.* My findings include record evidence of dangerous controlled substance prescribing by Applicant that risked the lives of those for whom he wrote the prescriptions. *Id.* (*e.g.,* methadone prescriptions for DC; two short-term opioids prescribed for M.B.). My findings further include that Applicant did not comply with the applicable standard of care when he prescribed controlled substances despite signs of abusing, or being addicted to, controlled substances by the person for whom he wrote the prescription. *Id.* (*e.g.,* prescribing for M.B. despite her exhibiting signs of controlled substance abuse).

Regarding Applicant's daughter, I find that Applicant admitted he unlawfully prescribed controlled substances for her between August 2014 and June 2015. *Id.* I find insufficient evidence in the record to support a conclusion that Applicant's treatment of his daughter was always necessitated by an emergency. *Id.* I further find that Applicant also admitted he did not follow his urine drug screen-related office procedures when treating his daughter. *Id.; see also* RX 4, at 2 (ADD and ADHD patients take a urine drug screen at visits). ''I understand it is wrong in hindsight. And, you know, I'm sorry I did it,'' he stated. Tr. 1038. His testimony was that he understood the GCMB position on treating family members, ''but it's not a perfect world and it's my daughter.'' *Id.* When asked if he was willing to make a condition of being granted a registration that he ''not treat anybody under . . . what is ultimately a Georgia regulation'' about the treatment of family members, Applicant stated, ''Oh, yeah. I mean, I make amends.'' *Id.* at 1040.

I. Allegation That Applicant Did Not Exhibit Candor During DEA's Investigation

In its Supplemental Prehearing Statement, the Government ''gave notice'' that it ''elected to drop the lack of candor charges'' from the OSC. Govt Supp Prehearing dated May 8, 2018, at 1; *see also* Tr. 9–10. Accordingly, I do not address this allegation.[65]

IV. Discussion

A. The Controlled Substances Act and the Public Interest Factors

Pursuant to section 303(f) of the CSA, ''[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Section 303(f) further provides that an application for a practitioner's registration may be denied upon a determination that ''the issuance of such registration . . . would be inconsistent with the public interest.'' *Id.* In making the public interest determination, the CSA requires consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing . . . controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

These factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003). I ''may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether . . . an application for registration [should be] denied.'' *Id.* Moreover, while I am required to consider each factor, I '' 'need not make explicit findings as to each one,' '' and I '' 'can give each factor the weight . . . [I] determine[ ] is appropriate.' '' *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018), quoting *Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016); *see also MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011) (quoting *Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009) quoting *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005)). In other words, the public interest determination ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Peter A. Ahles, M.D.,* 71 FR 50,097, 50,098–99 (2006).

The Government has the burden of proof in this proceeding. 21 CFR 1301.44. Both parties submitted documentary evidence. The admitted documentary evidence implicates Factors Two and Four.[66] In this matter,

[65] Applicant's seventh exception concerns his cooperation with DEA and cites filings he submitted on the matter. Applicant Exceptions, at 7–8. The Government's withdrawal of the lack of candor OSC charge renders moot Applicant's seventh exception and obviates a need for me to address it.

[66] Regarding Factor One, ''[a]lthough statutory analysis [of the CSA] may not definitively settle . . . [the breadth of the cognizable state 'recommendation' referenced in Factor One], the most impartial and reasonable course of action is to continue to take into consideration all actions indicating a recommendation from an appropriate state.'' *John O. Dimowo, M.D.,* 85 FR 15,800, 15,810 (2020). Applicant's Second Motion for Leave to Supplement Evidence Post-Hearing dated February 7, 2020 (hereinafter, Second Supplement Evidence Motion), at 2, seeks to supplement the record with evidence that Applicant's Georgia and South Carolina medical licenses were renewed after the record was certified and transmitted to me. Second Supplement Evidence Motion, at 2. Without explication, Applicant cites 21 CFR 1316.57 as authority for his Motion. His reliance on this provision, however, is misplaced.

While the title of the regulation, ''Submission of documentary evidence and affidavits and identification of witnesses subsequent to prehearing conference,'' may suggest that it supports the Second Supplement Evidence Motion, the text of the regulation makes clear that it applies to evidence a movant had good cause not to identify or submit ''at the prehearing conference,'' when the movant is able to submit the evidence ''sufficiently in advance of the . . . hearing to avoid prejudice or surprise to the other parties.'' 21 CFR 1316.57. Due to this authority's irrelevance, I do not grant Applicant's Motion.

Nevertheless, if the record evidence were to have included the content of the Second Supplement Evidence Motion concerning Applicant's Georgia and South Carolina medical license renewals, I would consider those license renewals under Factor One. *John O. Dimowo, M.D.,* 85 FR 15,800, 15,810 (2020). Further, I would have afforded the evidence minimal weight because Applicant's submission includes no evidence that the Georgia and South Carolina medical licensing authorities were aware of the allegations being adjudicated in this proceeding, considered them, and determined that they would not be an impediment to the renewal of Applicant's medical licenses. *Id.*

As to Factor Three, there is no evidence in the record that Applicant has a ''conviction record under Federal or State laws relating to the

while I have considered all of the factors, the Government's evidence in support of its *prima facie* case is confined to Factors Two and Four. I find that the Government's evidence with respect to Factors Two and Four, as to the recordkeeping and unlawful controlled substance prescribing, satisfies its *prima facie* burden of showing that Applicant's having a registration would be ''inconsistent with the public interest.'' [67] 21 U.S.C. 823(f). I further find that Applicant failed to produce sufficient evidence to rebut the Government's *prima facie* case.

B. Factors Two and Four—Applicant's Experience Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

1. Allegation That Applicant Unlawfully Pre-Signed and Pre-Printed Controlled Substance Prescriptions

The OSC allegation that Applicant unlawfully pre-signed and pre-printed controlled substance prescriptions cites three authorities. As already discussed, the Government's Post Hearing brief does not address the first authority, 21 CFR 1306.04(a), and the Government, therefore, apparently has abandoned it.

The second cited federal regulation, 21 CFR 1306.05, states that all controlled substance prescriptions ''shall be dated as of, and signed on, the day when issued'' and lists the information they must ''bear.'' 21 CFR 1306.05(a). As already discussed, *supra* section III, I find that the record includes circumstantial, but not substantial, evidence that Applicant violated this regulation.

The cited provision of the Georgia criminal code, Ga. Code Ann. § 16–13–41(b), is similar to 21 CFR 1306.05 but only concerns prescriptions for Schedule II controlled substances. It states, in salient part, that such an order ''shall include the name and address of the person for whom it is prescribed, the kind and quantity of such Schedule II controlled substance, the directions for taking, the signature, and the name, address, telephone number, and DEA registration number of the prescribing practitioner.'' Ga. Code Ann. § 16–13–41(b). It further states that ''[s]uch prescription shall be signed and dated by the practitioner on the date when issued.'' *Id.*

The Georgia Supreme Court analyzed this statute, including the cited subsection, in *Raber* v. *State,* 285 Ga. 251 (2009). In that decision, the Georgia Supreme Court determined that, pursuant to Ga. Code Ann. § 16–13–41(b), a '' 'prescription' is 'issued' only when both the signature mandate and the other contemporaneous requirements are fulfilled.'' [68] 285 Ga. at 253. Based on the Georgia Supreme Court's interpretation of the OSC-cited subsection, I do not find substantial evidence in the record that Applicant violated Ga. Code Ann. § 16–13–41(b).[69]

For all of the above reasons, I find that the Government did not present a *prima facie* case that Applicant unlawfully pre-signed and pre-printed controlled substance prescriptions.[70]

2. Recordkeeping Allegations

The second allegation in the OSC, concerning recordkeeping, consists of two paragraphs. The first paragraph alleges that, ''when asked to produce the required records necessary to maintain controlled substances,'' Applicant was ''unable to produce any records.'' OSC, at 2. This paragraph does not cite a legal basis for its allegation against Applicant. *Id.* Applicant's Posthearing Brief, however, makes clear that he understood the requirement that ''records . . . be readily available'' and is aware of the authority for the requirement, 21 CFR 1304.04.[71] Applicant Posthearing Brief dated July 30, 2018, at 23. As such, I find that Applicant understood the basis of the second OSC allegation, had the opportunity to litigate it, and did, in fact, litigate it.[72] Accordingly, I need not address further whether the second OSC allegation was properly noticed.

The second paragraph of the second OSC allegation consists of five subparagraphs listing some of Applicant's alleged recordkeeping violations. OSC, at 2. The cited federal authorities list requirements that applied to Applicant when he was registered. *Id.; see, e.g.,* 21 CFR 1304.04(a) (stating that required inventories and records be kept for at least two years); 21 CFR 1304.04(g) (incorporating 21 CFR 1304.04(f)'s requirements stating that inventories and records of Schedule II controlled substances be maintained separately from other Schedules' records and that Schedule III, IV, and V controlled substance inventories and records be maintained separately or in a form that is readily retrievable); 21 CFR 1304.11 (inventory requirements); and 21 CFR 1304.21 (continuing records requirement). The listed state authorities parallel or incorporate federal recordkeeping requirements. OSC, at 2.

The CSA's recordkeeping requirements are an essential part of the statute's goal of preventing the diversion of controlled substances from legitimate to illicit purposes. *Howard N. Robinson, M.D.,* 79 FR 19,356, 19,370 (2014) (''There is no question that the maintenance of accurate records by registrants is key to the DEA's ability to fulfill its obligations to regulate controlled substances.''). The Supreme Court recognized statutory recordkeeping requirements as part of the ''closed regulatory system'' Congress devised to ''prevent the diversion of drugs from legitimate to illicit channels.'' *Gonzales* v. *Raich,* 545 U.S. 1, 13–14, 27 (2005). As recently as last year, the Eleventh Circuit affirmed that a recordkeeping violation, not having controlled substance prescriptions readily retrievable when DEA asked for them, is a violation of federal law. *Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x 724, 730 (2019). Further, the Eleventh Circuit determined that the violation of the ''readily retrievable'' recordkeeping

manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, as Agency decisions have noted, there are a number of reasons why a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay, M.D.,* 75 FR 49,956, 49,973 (2010), *pet. for rev. denied, MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808 (10th Cir. 2011). Agency decisions have therefore noted that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

[67] I already determined that the Government did not present a *prima facie* case as to the Unlawfully Pre-Signed and Pre-Printed Controlled Substance Prescriptions allegation due to insufficiently developed record evidence. *Supra* section III.F.

[68] While the Georgia Supreme Court further opined that Ga. Code Ann. ''§ 16–13–41(a) and (d)(1) may also imply that a written prescription is issued only when the 'ultimate user' or someone on his behalf has received it,'' the OSC only cites subsection (b) of Ga. Code Ann. § 16–13–41 as its state law basis. *Raber* v. *State,* 285 Ga. 251, 254 (2009). Ga. Code Ann. § 16–13–41(d) concerns Schedules III, IV, and V.

I note that DI's testimony is consistent with the Georgia Supreme Court's interpretation of the relevant subsection. Tr. 108.

[69] GX 87, page 183 of 314 is a prescription for Klonopin (Schedule IV). It shows Applicant's computer-generated and wet signatures. This appears on the address line: '',, GA.'' Even though this prescription does not include the ''address of the person for whom it is prescribed,'' it does not violate Ga. Code Ann. § 16–13–41(b) because it is not a prescription for a Schedule II controlled substance.

[70] In reaching this conclusion, I acknowledge and disagree with the RD's conflicting findings and recommendations. *E.g.,* RD, at 90–92. Given my findings, there is no need for me to address Applicant's fourth exception. Applicant Exceptions, at 5.

[71] This regulation is referenced in the second paragraph of the OSC's second allegation. OSC, at 2, subparagraphs 5.d. and 5.e.

[72] The RD reaches the same conclusion for different reasons. RD, at 94.

requirement was supported by substantial evidence and, thus, appropriately used by the Government to meet its *prima facie* burden to show that continued controlled substance registration would be inconsistent with the public interest. *Id.* at 729–30. Thus, the elements of this OSC's second allegation concerning recordkeeping requirements are essential to the CSA's anti-diversion purpose; they are far from mere administrative niceties. *See also Volkman* v. *Drug Enf't Admin.,* 567 F.3d 215, 224–25 (6th Cir. 2009) (''Volkman did not keep proper records for controlled substances that were ordered and dispensed under his registration. The . . . [CSA] requires all prescription-dispensing entities to conduct a biennial inventory of all of the controlled substances it has on hand and to 'maintain, on a current basis, a complete and accurate record of each [controlled] substance' that it has 'received, sold, delivered, or otherwise disposed of.' '').

As already discussed, I found that Applicant, on August 11, 2015, did not provide the DEA inspection team any of the records he was required to maintain as a registrant. I also found that Applicant did not produce those required records to the DEA inspection team at any time after August 11, 2015, including during this proceeding. Accordingly, I find that Applicant violated the controlled substance recordkeeping requirements of federal and Georgia law.[73] Further, I disagree with Applicant's suggestion that ''this issue is moot.'' [74] *See, e.g.,* Applicant Posthearing, at 6 n.2.

[73] Even if Applicant's required controlled substance records were readily retrievable and available, as CIO's testimony suggested, I already found that Applicant never retrieved or made any of them available to DEA. *Supra* section III.G.

[74] Applicant's argument about 21 CFR 1304.04, that the ''records need only be readily retrievable,'' suggesting that the records need not actually be provided, is without merit. Applicant's Posthearing, at 23. The regulatory definition of ''readily retrievable'' calls for locating the records ''in a reasonable time.'' 21 CFR 1300.01(b). Agency decisions state that ''what constitutes 'a reasonable time' necessarily depends on the circumstances.'' *Edmund Chein, M.D.,* 72 FR 6580, 6593 (2007), *pet. for rev. denied, Chein* v. *Drug Enf't Admin.,* 533 F.3d 828, 832 n.6 (D.C. Cir 2008), *cert. denied,* 555 U.S. 1139 (2009). According to that DEA decision, ''under normal circumstances if a practice is open for business, it should be capable of producing a complete set of records within several hours of the request.'' 72 FR at 6593. The decision explained that ''[t]o allow a registrant an even greater period of time to produce the records would create an incentive for those who are engaged in illegal activity to obstruct investigations by stalling for time in the hopes that DEA personnel would eventually give up and leave.'' *Id.* As such, there is no doubt that ''readily retrievable'' encompasses both timely retrieval and the production of the records to DEA.

3. Allegation That Applicant Unlawfully Prescribed Controlled Substances

According to the CSA's implementing regulations, a lawful prescription for controlled substances is one that is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' [75] 21 CFR 1306.04(a). The Supreme Court stated, in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, that ''the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon, supra,* 546 U.S. at 274. The Eleventh Circuit recently noted, in part, that, ''[u]nder the CSA, the responsibility for the proper prescribing and dispensing of controlled substances, which must be for 'a legitimate medical purpose,' is on the prescribing practitioner.'' *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d at 827.

As already discussed, I found that Applicant prescribed controlled substances beneath the applicable standard of care and outside the usual course of professional practice.[76] *Supra* sections III.D., III.E., and III.H.[77]

[75] The standard of care applicable in this adjudication is set out *supra* section II.

[76] After stating that ''[e]valuation of . . . [Factor Two, experience in dispensing controlled substances] is a mixed bag,'' the RD states, among other things, that the ''prior positive medical experience'' of Applicant ''apparently enjoys the confidence and esteem of his colleagues and the hierarchy of the medical community, as evidenced by the several character witnesses who testified.'' RD, at 109. It states that Applicant ''has recently been elected by his peers to Trustee of . . . a prestigious regional medical society'' and that ''[a]nother indication of his positive experience are the scores of letters of recommendation and of support from former patients.'' *Id.* Without citing any record evidence, the RD states that Applicant's ''experience in prescribing controlled substances is extensive, as reflected by his long career in treating patients and reported willingness to take on difficult and complex patients.'' *Id.* It also asserted, without citation to any record evidence, that Applicant ''has extensive experience in treating patients suffering from alcohol and drug addiction.'' *Id.* It also claimed, also without citation to record evidence, that Applicant had ''enacted various apparently effective policies and procedures to prevent drug diversion and drug abuse at his clinic.'' *Id.* at 109–10. I disagree with these portions of the RD.

Factor Two is the ''applicant's experience in dispensing . . . controlled substances.'' 21 U.S.C. 823(f)(2). As I indicated, *supra* section III.E., the public interest assessment that the CSA requires me to make does not contemplate my considering the character witness testimony and other forms of adulation that Applicant offered into the record. 21 U.S.C. 823(f). Instead, the CSA requires me to consider Applicant's controlled substance dispensing experience, among other things. 21 U.S.C. 823(f)(2). I find that the record evidence of multiple controlled substance dispensing-related violations is relevant to the public interest inquiry I am charged with undertaking and, therefore, outweighs all of the record evidence that Applicant was respected and may also have dispensed controlled substances in conformity with state and federal law.

[77] I note that there is record evidence suggesting situations when Applicant complied with the applicable standard of care. *See, e.g.,* RX 19, at 185–87 (medical record for M.B. concerning March 2015 stating that ''[w]e will not prescribe narcotic pain medicine unless pain management provides us with a formal letter, on their clinic letterhead and signed by the provider that conducted the patient's exam, stating what medicine, at what dose, and in what manner the medicine should be taken,'' that ''PT statd [sic] she found some pills tucked into a blanekt [sic] in the closet and she assumed that they were her Percocet. She states she had to hide her medicines from herself to keep from taking too much,'' and ''[n]on-compliance is grounds for dismissal from our care.'' Yet, the medical record for three visits later, in June 2015, states that ''PT had hydrocodone and valium in system. PT swears she did not take anthing [sic] other than what we give her. I told her that the mass spectrometry reading illustrates otherwise and that this is what we have to go by. I have instructed the patient t[o] ensure she take [sic] the correct meds, throw away all old meds, and only take what we authorize as we instruc[t] or she could be released from our care.'' *Id.* at 207. In other words, the medical records show that indications of Applicant's compliance with the applicable standard of care involve no follow-up and, therefore, non-compliance.

According to Dr. Kaufman, Applicant did not follow his own protocols. Tr. 312. Regarding M.B.'s medical records from 2013, Dr. Kaufman testified that M.B.'s request for early controlled substance refills ''is an ongoing problem, it hasn't been

Applicant engaged a skillful team and defended himself against all of the OSC's allegations. I read and analyzed every aspect of Applicant's defense.[78]

Applicant argued that Dr. Kaufman should have considered ''M.B.'s mental health issues in making his opinion'' and that, because he did not, he ''could not competently and intelligently analyze M.B.'' Applicant Exceptions, at 3–4. Applicant's argument did not cite any provision of federal or Georgia law that states, or even suggests, that there is a mental health exception to the requirement that controlled substance prescriptions be effective and legitimate. 21 CFR 1306.04(a). I looked for a mental health exception to the applicable standard of care in federal and Georgia law and in Agency decisions. I found none.[79] Accordingly, I reject Applicant's second exception.

Applicant labeled ''clearly erroneous'' the RD's conclusion that Applicant prescribed methadone for D.C. to treat addiction, not pain. Applicant Exceptions, at 5–6. Applicant argued that ''[b]ased purely on . . . [Applicant's] reduction of D.C.'s methadone from the 190 mg received through the methadone clinic to 10 mg immediate [sic] prior to the cessation of methadone by D.C. Kaufman lept to the conclusion that . . . [Applicant] was treating for addiction as opposed to pain.'' *Id.* at 6. Applicant also argued that D.C.'s ''debilitating cluster migraine (mini-seizure) headaches,'' knee osteoarthritis in both knees, and chronic lower back pain ''support'' the conclusion that Applicant was treating D.C. with methadone for pain, not addiction. *Id.* I disagree with Applicant's characterization of the record evidence and, as did the RD, I credit Dr. Kaufman's testimony on this matter and find that Applicant prescribed methadone for D.C. to treat addiction. *See also* RD, at 77–78.

First, the credible record evidence puts in doubt Applicant's diagnoses of pain in DC *E.g.,* Tr. 229–30 (Dr. Kaufman's testimony about Applicant's treatment of D.C.); *see also* RX 17, at 64–68 (Applicant's office notes for D.C.'s visit on June 25, 2013); Tr. 249–50 (Dr. Kaufman's testimony regarding Applicant's methadone prescribing for D.C. stating that ''there's no mention of a back examination. It's not even listed as a possibility. There's no mention of the knee examination. And on the next page, there's further examinations, where again, no back exam, no knee exam. . . . And then the next page is the list of diagnosis. And the first diagnosis is lumbago, which means back pain. And the medicine for that is Tylenol. And it says, 'opioid dependence, counseled patient on the condition, advise him to seek group or individual therapy, anxiety state, take the medicines as prescribed.' And another diagnosis is 'long term use of medications, with a urine drug screen having been performed.' . . . [The methadone is] not being used as a pain reliever, because it's not be[ing] given several times a day, what you notice is the methadone pain effect wears off, so they're going to tell you the pain is much worse at night, because it's worn off. It's not a pain medicine anymore. It will still work to prevent you from being an addict prevent the addictive behavior, but it's not going to work for the pain.'').

Second, as Applicant admitted, it is significant that D.C.'s 190 mg. of methadone was prescribed by a methadone clinic before Applicant took it over. Applicant Exceptions, at 6; Tr. 1009 (Applicant's testimony that a methadone clinic prescribed methadone to D.C.). The credible record evidence is, in Georgia, that methadone clinics treat addiction, they do not treat pain, and that only methadone clinics may prescribe methadone to treat addiction. Tr. 498 (Dr. Kaufman confirming that, in the state of Georgia, methadone treatment for addiction can only be given by a narcotic treatment clinic); *see id.* at 233–34 (''If you were to go to a methadone clinic and say, I have chronic knee pain. Could you give me methadone? They would turn you down. It's not their expertise. . . . So, anybody who is going to a methadone clinic is a person who has an addiction issue.''); *see also id.* at 605 (testimony of Applicant's expert, Dr. Downey, that, in Georgia, only specially licensed narcotic treatment programs are authorized to issue methadone for addiction). Thus, if a methadone clinic initially prescribed methadone for D.C., the prescription was clearly to treat addiction. When Applicant took it over, even when he reduced the amount over time, he was prescribing methadone to D.C. for addiction.

Third, Applicant's evidence, in the form of office policy, clearly states that Suboxone is prescribed for addiction, not pain. RX 3C, at 11. According to Applicant's own evidence, D.C.'s methadone prescription was being ''tapered down,'' so that it could be replaced by Suboxone. Consequently, it is clear that Applicant prescribed methadone for D.C. to treat addiction. Accordingly, I reject Applicant's fifth exception. Applicant Exceptions, at 6–7.

In sum, I carefully considered all of the record evidence relevant to Factors Two and Four and Applicant's position on that evidence. I applied my credibility assessments to that evidence. I conclude that the Government met its *prima facie* burden of showing that Applicant violated federal and Georgia recordkeeping requirements and prescribed controlled substances beneath the applicable standard of care and outside the usual course of professional practice. I further find that Applicant did not rebut the Government's *prima facie* case regarding these violations. Accordingly, I conclude that it would be ''inconsistent with the public interest'' for me to grant Applicant's application for a registration. 21 U.S.C. 823(f).

V. Sanction

Where, as here, the Government presented a *prima facie* case that it would be ''inconsistent with the public interest'' to grant Applicant's request for a registration, and Applicant did not rebut the Government's *prima facie* case, the ''burden of proof shifts'' to Applicant ''to show why . . . [he] can be trusted with a registration.'' *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d at 830; *see also Samuel Mintlow, M.D.,* 80 FR 3630,

resolved and . . . she's addicted to her medication.'' *Id.* at 294. He testified about how Applicant's handling of M.B. measured up against the applicable standard of care in Georgia, stating that ''the Medical Board simply states that when things like this happen, you should document that they've happened, and document what you're thinking. So, if there was a note which had some sort of rational explanation about why you're allowing this to continue, you might allow it to continue forever. I mean there's no set rules, but in this particular patient there's so many other things that are wrong. There's no documentation of a history that should be treated this way. There's no physical exam that justifies this. There were no x-rays or—I mean this is going on for so many years, this type of irresponsible—it's irresponsible. So, I mean, again there's no rules, but this is just not right.'' *Id.* at 296–97. Dr. Kaufman reiterated that Applicant's handling of the situation is outside the applicable standard of care. *Id.* at 297. Thus, I find that what initially appeared to be possible compliant and positive controlled substance dispensing experience turned out, upon examination, to be hollow statements with no compliant follow-up.

My finding does not mean that Applicant's controlled substance-related practice of medicine was always beneath the applicable standard of care and outside the usual course of professional practice. Based on the record evidence before me, I find that Applicant's violations of the applicable standard of care and the usual course of professional practice took place with more than one individual and in more than one context over a period of years and, therefore, were not isolated.

[78] My Decision and Order does not consider and is not based on the fact that PLPN was not registered when she dispensed controlled substance prescriptions from Applicant's in-office pharmacy. Applicant Exceptions, at 2–3 (First Exception).

[79] Consulting with a mental health provider about mental health and addiction issues is the standard of care in states in addition to Georgia. *E.g., Wesley Pope, M.D.,* 82 FR 14,944, 14,956, 14,972 (2017); *Bobby D. Reynolds, N.P., Tina L. Killebrew, N.P. and David R. Stout, N.P.,* 80 FR 28,643 (2015).

3652 (2015) (''sufficient mitigating evidence'' must be presented ''to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.''); *Cleveland J. Enmon Jr., M.D.,* 77 FR 57,116, 57,126 (2012) (same); *Robert M. Golden, M.D.,* 61 FR 24,808, 24,812 (1996) (same). Further, past performance is the best predictor of future performance and, when an applicant has ''failed to comply with . . . [his] responsibilities in the past, it makes sense for the agency to consider whether . . . [he] will change . . . [his] behavior in the future.'' *Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x, at 733 (citing *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d at 831 (citing *MacKay* v. *Drug Enf't Admin.,* 664 F.3d at 820 (''[T]hat consideration is vital to whether continued registration is in the public interest.'') and *Alra Labs., Inc.* v. *Drug Enf't Admin.,* 54 F.3d 450, 452 (7th Cir. 1995) (''An agency rationally may conclude that past performance is the best predictor of future performance.'')).

Circuit courts have also approved the Agency's acceptance of responsibility requirement. *Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x, at 732; *Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d at 830 (citing *MacKay* v. *Drug Enf't Admin.,* 664 F.3d at 820 (''The DEA may properly consider whether a physician admits fault in determining if the physician's registration should be revoked.''); *see also Jeffrey Stein, M.D.,* 84 FR 46,968, 46,972–73 (2019) (unequivocal acceptance of responsibility); *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009) (collecting cases). The Agency has decided that the egregiousness and extent of the misconduct are significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.,* 83 FR 18,882, 18,910 (2018) (collecting cases); *Samuel Mintlow, M.D.,* 80 FR at 3652 (''Obviously, the egregiousness and extent of a registrant's misconduct are significant factors in determining the appropriate sanction.''). The Agency has also considered the need to deter similar acts by Applicant and by the community of registrants. *Id.*

In terms of egregiousness, the violations that the record evidence shows Applicant committed go to the heart of the CSA—not complying with required controlled substance recordkeeping and not prescribing controlled substances in compliance with the applicable standard of care and in the usual course of professional practice. In addition, the record evidence indicates that Applicant, even though he was registered in the past, lacks familiarity with applicable controlled substance legal requirements. For example, as already discussed, perhaps the conclusion I could reach that is most favorable to Applicant is that neither he nor his staff understood what records the DEA agents were requesting on August 11, 2015. *Supra* section III.G.

Most remarkable, though, are the under-oath statements of Applicant himself during the hearing. The ALJ asked Applicant whether he had changed the way he does business as far as his practices and protocols in response to the OSC allegations and the ''suggestions or the accusations by Dr. Kaufman.'' Tr. 1066. Applicant started his response by stating that he was not going back into his ''ambulatory practice,'' but if he were, he ''would make changes.'' *Id.* He started again to say he was ''not,'' presumably not returning to his ambulatory practice, and then stated: ''I don't desire to not comply with the law. I don't like what I've been through in the last three years.'' *Id.* The ALJ's next question was whether Applicant intended ''to become fully compliant with all of the regulations.'' *Id.* at 1068. Applicant responded: ''Yes, sir.'' The ALJ then asked ''[w]hat about learning any of these regulations. You know, nobody knows them by heart, but you know, you're responsible for knowing . . . both the Georgia regulations as well . . . the DEA regulations if you're going [to] run a doctor's office.'' *Id.* Applicant answered: ''I'm—I'm always willing to learn anything. And I've already learned a lot. And, I think, the one thing, I don't think I left a lot of dead bodies laying around.'' *Id.* at 1069. Applicant's response was an admission of his lack of familiarity with both the applicable federal and Georgia regulations. Further, although Applicant stated that he is ''always willing to learn anything'' and that he's ''already learned a lot,'' his statement about ''dead bodies'' put into question the value he assigned to practicing medicine in compliance with the applicable standard of care, given his belief that his practice, up until this point, had not ''left a lot of dead bodies laying around'' without following that standard of care.

While Applicant took responsibility for unlawfully prescribing controlled substances to his daughter, he did not take responsibility, let alone unequivocal responsibility, for the other allegations I determined to be founded.[80] Indeed, Applicant testified, at the end of the hearing, that he ''still'' believed that his controlled substance prescribing for D.C. and M.B. was within the usual course of professional practice. *Id.* at 1051. He, thus, evidenced no understanding that his controlled substance prescribing fell short of legal requirements. Accordingly, it is not reasonable to believe that Applicant's future controlled substance prescribing will comply with legal requirements, when he was firm in his belief that he did nothing wrong.[81] *Id.*

Applicant's testimony and statements in his briefing that he intended to restrict his medical practice to elderly patients in institutional settings, such as nursing homes, assisted living, and hospice centers, in other words caring for vulnerable individuals who may be isolated from their loved ones, do not advance the approval of his application.[82] Applicant's Amended Response Brief Regarding the 21 U.S.C. 824(c)(3) Corrective Action Plan Provisions dated September 23, 2019, at 5. The recordkeeping and controlled substance prescribing requirements of the CSA and its implementing regulations also apply to practitioners treating the elderly and vulnerable in institutional settings. If I were to grant his application, I would be sending a message to the regulated community that I do not require registrants to know, and conform to, the provisions of the CSA and its implementing regulations. For all of these reasons, I find that it would be against the public interest for me to entrust Applicant with a registration and, therefore, I will deny his application.

Given my decision that it is not in the public interest for Applicant to have a registration at this time, I conclude that Applicant's proposed Corrective Action Plan provides no basis for me to discontinue or defer this proceeding.

Accordingly, I shall order the denial of Applicant's application.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C.

[80] Although it is not charged in the OSC, Applicant admitted that he also treated his wife. Tr. 1039.

[81] I do not consider remedial measures when an applicant does not unequivocally accept responsibility. Applicant's limited proposed remedial efforts, however, are unpersuasive given the egregiousness and breadth of his violations.

[82] I agree with my predecessors that community impact-type arguments are not persuasive. *Frank Joseph Stirlacci, M.D.,* 85 FR 45,229, 45,239 (2020); *see also Richard J. Settles, D.O.,* 81 FR 64,940, n.16 (2016). Accordingly, I reject Applicant's community impact-type arguments.

823(f), I hereby deny the application submitted by George Pursley, M.D., Control No. W15101573C, seeking registration in Georgia as a practitioner, and any other pending application submitted by George Pursley, M.D. for a DEA registration in the State of Georgia. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27236 Filed 12–10–20; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Poplar Grove Pharmacy Inc.;

Decision and Order

On November 20, 2019, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Poplar Grove Pharmacy Inc. (hereinafter, Registrant) of Baltimore, Maryland. OSC, at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. FP3109027. *Id.* It alleged that Registrant ''has no state authority to handle controlled substances.'' *Id.* (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that, ''[o]n April 15, 2019, the Maryland State Board of Pharmacy (hereinafter, MBP) . . . issued an Order for Summary Suspension, suspending . . . [Registrant's] Maryland pharmacy permit.'' OSC, at 2. The OSC alleged that ''[c]onsequently, the DEA must revoke . . . [Registrant's] DEA registration based on . . . [its] lack of authority to handle controlled substances in the State of Maryland.'' *Id.*

The OSC notified Registrant of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* (citing 21 CFR 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. OSC, at 3 (citing 21 U.S.C. 824(c)(2)(C)).

Adequacy of Service

In a sworn Declaration, dated May 22, 2020, a DEA Diversion Investigator assigned to the Baltimore District Office (hereinafter, DI) stated that he accomplished personal service of the OSC on Susan Nwoga, Registrant's registration contact, at the Maryland Correctional Institution for Women on December 10, 2019. Request for Final Agency Action (hereinafter, RFAA), EX 4 (DI Declaration), at 1. The DI stated that Ms. Nwoga took the OSC. *Id.*

Further evidence of the adequacy of the Government's service is Registrant's proposed Corrective Action Plan (hereinafter, CAP) dated December 16, 2019. RFAA EX 5 (CAP), at 1. Accordingly, based on the evidence in the RFAA and the Government's representations, I find that the Government's service of the OSC was adequate.

Registrant's Proposed CAP

As already discussed, Registrant timely submitted a proposed CAP. *Id.* In the CAP, Registrant asked that ''DEA begin an internal investigation on it's [sic] failure to provide . . . [Ms. Nwoga] with whistle blower protection and why when big retail pharmacies are met with fines, the DEA set out to entrap . . . [her], a black woman who is an American of Nigerian descent.'' *Id.* at 4. Ms. Nwoga ''denied all charges'' and stated that she is ''entitled to all privileges of a licensed pharmacist.'' [1] *Id.* In the CAP, Registrant did not address the status of its Maryland pharmacy permit, including whether the MBP suspended it.

I find that Registrant waived its right to a hearing and proposed a CAP. I find that the Assistant Administrator, Diversion Control Division, denied ''the request to discontinue or defer administrative proceedings.'' RFAA EX 6 (Letter Denying Proposed CAP), at 1. I also find that the Assistant Administrator concluded that ''there is no potential modification of . . . [the proposed CAP] that could or would alter . . . [his] decision in this regard.'' *Id.* I agree with the Assistant Administrator's CAP-related decisions.

The Government forwarded its RFAA, along with the evidentiary record, to my office on May 28, 2020. In its RFAA, the Government represented that ''Registrant currently lacks authority to handle controlled substances in the state of Maryland, the jurisdiction where it was licensed as a pharmacy and where it is registered with DEA.'' RFAA, at 3. The Government requested ''a Final Order revoking Registrant's DEA registration.'' *Id.* at 4.

I issue this Decision and Order based on the record submitted by the Government in its RFAA, which constitutes the entire record before me.[2] 21 CFR 1301.43(e).

Findings of Fact

Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. FP3109027 at the registered address of 709 Poplar Grove Street, Baltimore, MD 21216. RFAA, EX 1 (Certification of Registration), at 1. Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V for the business activity of retail pharmacy. *Id.* Registrant's registration ''is in a renewal pending status until the resolution of administrative proceedings.'' *Id.*

The Status of Registrant's State License and Registration

The Government submitted a certified copy of the ''Order for Summary Suspension'' concerning Registrant's pharmacy permit No. P05639 that the MBP issued on April 15, 2019. RFAA, EX 3 (hereinafter, Summary Suspension Order). According to the Summary Suspension Order, Registrant's pharmacist ''pleaded guilty . . . to approximately three hundred (300) counts that included possession with . . . [the] intent to distribute a controlled dangerous substance, Medicaid fraud, and theft.'' *Id.* at 5. The Summary Suspension Order stated that, ''[f]ollowing her conviction, Pharmacist A was ordered held in jail until the date of her sentencing.'' *Id.* It also stated that Registrant ''failed to request or submit to a closing inspection by the . . . [MBP], as required by . . . [MBP] regulations, to ensure the proper transfer of controlled and non-controlled drug inventory and confidential prescription records.'' *Id.* at 6.

After concluding that ''the public health, safety, or welfare imperatively requires emergency action,'' the MBP ''summarily suspended'' the permit issued to Registrant to operate as a pharmacy in Maryland. *Id.* The MBP thus prohibited Registrant from operating as a pharmacy in Maryland and ordered the immediate return of all pharmacy permits to the MBP. *Id.*

The Government also submitted a MBP website screen print showing that Registrant's pharmacy permit is

[1] Most of Registrant's CAP concerned Ms. Nwoga's allegations about ''the DEA's . . . failure to follow their own monitoring policy, thus, allowing the Baltimore city streets to become flooded with controlled narcotics.'' RFAA EX 5, at 2. The CAP stated that she ''satisfied all the requirements of whistle blower,'' but ''[r]ather than protect . . . [her] the DEA began an illegal under cover [sic] operation that spanned many years'' and entrapped her. *Id.* at 2–3. According to the CAP, ''[t]his case is wrought with very ugly racism, anti-feminism, and anti-immigrant overtones in the Baltimore City DEA. The criminal case is under appeal and when reviewed by legal experts, the experts say I will absolutely be released from prison.'' *Id.* at 3.

[2] The RFAA includes Registrant's proposed CAP.

''suspended.'' [3] RFAA, EX 7 (State of Maryland Board of Pharmacy website Screen Print), at 1.

As already discussed, Registrant's proposed CAP did not address the status of its Maryland pharmacy permit. As such, the Government's record evidence that Registrant's pharmacy permit was summarily suspended is not rebutted.

According to Maryland's online records, of which I take official notice, Registrant's pharmacy permit is still suspended today.[4] State of Maryland Board of Pharmacy Web Lookup/Verification, *https://mdbop.mylicense.com/Verification* (last visited date of signature of this Order).

In sum, there is no record evidence rebutting the evidence the Government submitted with its RFAA, EX 3 and EX 7, and the evidence from today's Maryland online records supports the Government's evidence. Accordingly, I find that Registrant's Maryland pharmacy permit is currently suspended.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the Agency has long stated that the possession of authority to dispense controlled substances under the laws of the state in which the practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.,* 76 FR 71,371 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.,* 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a pharmacy . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which . . . [it] practices . . . , to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the Agency has repeatedly stated that revocation of a practitioner's registration is the appropriate sanction whenever it is no longer authorized to dispense controlled substances under the laws of the state in which she practices. *See, e.g., James L. Hooper, M.D.,* 76 FR at 71,371–72; *Sheran Arden Yeates, M.D.,* 71 FR 39,130, 39,131 (2006); *Dominick A. Ricci, M.D.,* 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.,* 53 FR 11,919, 11,920 (1988); *Frederick Marsh Blanton, M.D.,* 43 FR at 27,617.

According to Maryland statute, ''a person shall be registered by the [Maryland] Department [of Health] before the person manufactures, distributes, or dispenses a controlled dangerous substance in the State.'' [5] Md. Code Ann., Crim. Law § 5–301(a)(1) (West, Westlaw current through all legislation from the 2020 Regular Session of the General Assembly). Also according to Maryland statute, a ''person shall hold a pharmacy permit issued by the (Maryland State) Board (of Pharmacy) before the person may establish or operate a pharmacy in this State.'' Md. Code Ann., Health. Occ. § 12–401(a) (West, Westlaw current through all legislation from the 2020 Regular Session of the General Assembly). Accordingly, holding a permit issued by the MBP is a prerequisite to operating a pharmacy and dispensing a controlled substance in Maryland.

Here, the undisputed evidence in the record is that Registrant's pharmacy permit is currently suspended. In Maryland, as already discussed, a pharmacy must hold a permit from the MBP to dispense a controlled substance lawfully. Md. Code Ann., Health. Occ. § 12–401(a); Md. Code Ann., Crim. Law § 5–301(a)(1). Registrant currently lacks a pharmacy permit in Maryland and, thus, it is not eligible to dispense controlled substances in Maryland. 21 U.S.C. 824(a)(3). Accordingly, I will order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. FP3109027 issued to Poplar Grove Pharmacy Inc. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27234 Filed 12–10–20; 8:45 am]

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[3] Although there is no date on RFAA EX 7, the Government represented in its RFAA that EX 7 shows Registrant's pharmacy permit ''continues to be suspended.'' RFAA, at 3.

[4] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Applicant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Applicant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response shall be filed and served by email on the other party at the email address the party submitted for receipt of communications related to this administrative proceeding, and on the Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.usdoj.gov.*

[5] ''Dispense,'' under Maryland statute, means ''to deliver to the ultimate user . . . by or in accordance with the lawful order of an authorized provider.'' Md. Code Ann., Crim. Law § 5–101(l)(1) (West, Westlaw current through all legislation from the 2020 Regular Session of the General Assembly).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Ernesto C. Torres, M.D.; Decision and Order

On July 20, 2020, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, Government or DEA), issued an Order to Show Cause (hereinafter, OSC) to Ernesto C. Torres, M.D., (hereinafter, Registrant), of Frederick, Maryland. Government's Request for Final Agency Action (hereinafter, RFAA) Exhibit (hereinafter RFAAX) 4 (OSC), at 1. The OSC proposed the revocation of Registrant's Certificate of Registration No. AT8751213. Id. It alleged that Registrant is without ''authority to handle controlled substances in Maryland, the state in which [Registrant is] registered with DEA.'' Id. at 2 (citing 21 U.S.C. § 824(a)(3)).

Specifically, the OSC alleged that ''[o]n January 6, 2020, the [Maryland Board of Physicians (hereinafter, MBP)] issued [a] Final Decision and Order on Order for Summary Suspension, whereby the MBP affirmed its May 2019 suspension ruling. Moreover, during the pendency of the above MBP suspension proceedings, [Registrant's] state medical license expired on September 30, 2019,

and has not been renewed.'' Id. at 2. The OSC further alleged that Registrant is not eligible to obtain or retain a DEA registration because he lacks state authority to handle controlled substances in Maryland. Id.

The OSC notified Registrant of the right to either request a hearing on the allegations or submit a written statement in lieu of exercising the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. Id. at 2–3 (citing 21 C.F.R. § 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan. Id. at 3 (citing 21 U.S.C. § 824(c)(2)(C)).

I.Adequacy of Service

A DEA Diversion Investigator (hereinafter, DI) provided details regarding DEA's ''multiple efforts'' to serve Registrant with the OSC, which were complicated by the fact that Registrant is currently at a Maryland Department of Health facility. RFAAX 11, at 3 (Declaration of Diversion Investigator, dated October 22, 2020). The DI stated that due to visitor restrictions at the facility, the DI arranged to email the OSC to Registrant's doctor, who confirmed via reply email that Registrant had received the OSC. Registrant's doctor attached a signed DEA Form 12, Receipt for Cash or Other Items, which demonstrated that Registrant received the OSC on September 17, 2020, and was signed by Registrant and witnessed by his doctor. Id. at 4; see also RFAAX 6, at 1 (signed DEA Form 12).

The Government forwarded its RFAA along with the evidentiary record, to this office on October 23, 2020. In its RFAA, the Government represents that Registrant has not requested a hearing nor '''otherwise corresponded or communicated with DEA regarding the... [OSC], including the filing of any written statement in lieu of a hearing' and therefore has waived his right to a hearing.'' RFAA, at 6 (quoting Warren B. Dailey. M.D., 82 Fed. Reg. 46,525–26 (2017); David D. Moon, D.O., 82 Fed. Reg. 19,385, 19,387 (2017)). The Government argued that ''grounds exist for the revocation of Registrant's DEA [registration] pursuant to 21 U.S.C. §§ 823(f) and 824(a)(3)'' and requests ''the issuance of a DEA Final Order for the revocation'' of Registrant's registration. Id. at 6, 7.

I find that more than thirty days have now passed since the Government accomplished service of the OSC. Further, based on the Government's written representations and Registrant's own statements, I find that neither Registrant, nor anyone purporting to represent Registrant, requested a hearing, submitted a written statement while waiving Registrant's right to a hearing, or submitted a corrective action plan. RFAA, at 6. Accordingly, I find that Registrant has waived the right to a hearing and the right to submit a written statement and corrective action plan. 21 C.F.R. § 1301.43(d) and 21 U.S.C. § 824(c)(2)(C). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 C.F.R. § 1301.46.

II. Findings of Fact

A. Registrant's DEA Registration

Registrant is the holder of DEA Certificate of Registration No. AT8751213 at the registered address of 188 Thomas Johnson Drive, Suite 202, Frederick, Maryland 21702. RFAAX 2 (Certification of Registration History). Pursuant to this registration, Registrant is authorized to dispense controlled substances in schedules II through V as a practitioner. Id. Registrant's registration expires on November 30, 2021. Id. The registration ''is in active pending status until the resolution of administrative proceedings.'' Id.

B.The Status of Registrant's State License

On May 28, 2019, the MBP issued an Order for Summary Suspension of License to Medicine against Registrant. RFAAX 3 (Final Decision and Order on Order for Summary Suspension (hereinafter, Suspension Order)), at 1. After a hearing, the MBP issued a Suspension Order affirming Registrant's suspension on January 6, 2020, in which it concluded that summary suspension of Registrant's medical license ''is imperatively required to protect the public health, safety, and welfare.'' Id. at 2. The MBP ordered that ''the summary suspension of [Registrant's] license to practice medicine in Maryland remains in effect.'' Id. at 3.

According to Maryland's online records, of which I take official notice, Registrant's medical license status and Controlled Dangerous Substances (CDS) registration are both ''expired.''[1] Maryland Board of Physicians Profile Search, available at https://www.mbp.state.md.us/bpqapp/ (last visited date of signature of this Order), and Maryland Office of Provider Engagement and Regulation (Oper) Controlled Dangerous Substances Registration Search, available at https://health.maryland.gov/ocsa/Pages/cdssearch.aspx (last visited date of signature of this Order).

Accordingly, I find that Registrant currently is neither licensed to engage in the practice of medicine nor registered to dispense controlled substances in Maryland, the state in which Registrant is registered with the DEA.

III. Discussion

Pursuant to 21 U.S.C. § 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the CSA ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, the DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. See, *e.g.* , James L. Hooper, M.D., 76 Fed. Reg. 71,371 (2011), pet. for rev. denied, 481 Fed. Appx. 826 (4th Cir. 2012); Frederick Marsh Blanton, M.D., 43 Fed. Reg. 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term ''practitioner'' to mean ''a physician... or other person licensed, registered, or otherwise permitted, by... the jurisdiction in which he practices..., to distribute, dispense,... [or] administer... a controlled substance in the course of professional practice.'' 21 U.S.C. § 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners... if the applicant is authorized to dispense... controlled substances under the laws of the State in which he practices.'' 21

[1] Under the Administrative Procedure Act, an agency ≥may take official notice of facts at any stage in a proceeding - even in the final decision.≥ United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. § 556(e), ≥[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.≥ Accordingly, Registrant may dispute my finding by filing a properly supported motion for reconsideration of finding of fact within fifteen calendar days of the date of this Order. Any such motion shall be filed with the Office of the Administrator and a copy shall be served on the Government. In the event Registrant files a motion, the Government shall have fifteen calendar days to file a response. Any such motion and response may be filed and served by e-mail (dea.addo.attorneys@dea.usdoj.gov).

U.S.C. § 823(f). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. See, *e.g.* , James L. Hooper, 76 Fed. Reg. at 71,371–72; Sheran Arden Yeates, M.D., 71 Fed. Reg. 39,130, 39,131 (2006); Dominick A. Ricci, M.D., 58 Fed. Reg. 51,104, 51,105 (1993); Bobby Watts, M.D., 53 Fed. Reg. 11,919, 11,920 (1988); Frederick Marsh Blanton, 43 Fed. Reg. at 27,617.

Pursuant to the Maryland Controlled Dangerous Substances Act, ''a person shall be registered by the Department before the person manufactures, distributes, or dispenses a controlled dangerous substance in the State or transports a controlled dangerous substance into the State.'' Md. Code Ann., Crim. Law § 5–301 (West 2020). Maryland law further defines ''dispense'' to ''mean[] to deliver to the ultimate user of the human research subject by or in accordance with the lawful order of an authorized provider'' and states that the term ''includes to prescribe, administer, package, label, or compound a substance for delivery.'' Id. at § 5–101(l)(1)&(2).

Here, the undisputed evidence in the record is that Registrant currently lacks authority to dispense controlled substances in Maryland, as his controlled substance license is ''expired.'' As already discussed, a practitioner must hold a valid controlled substance license to dispense a controlled substance in Maryland. Thus, because Registrant lacks authority to handle controlled substances in Maryland, Registrant is not eligible to maintain a DEA registration. Accordingly, I order that Registrant's DEA registration be revoked.

Order

Pursuant to 28 C.F.R. § 0.100(b) and the authority vested in me by 21 U.S.C. § 824(a), I hereby revoke DEA Certificate of Registration No. AT8751213 issued to Ernesto C. Torres, M.D. This Order is effective January 11, 2021.

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–27233 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Ionizing Radiation 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 January 11, 2021.

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.* 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.*

SUPPLEMENTARY INFORMATION: The purpose of the Ionizing Radiation Standard and its information collection requirements are to document that employers are providing their workers with protection from hazardous ionizing radiation exposure. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 29, 2020 (85 FR 38931).

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: Ionizing Radiation Standard.

OMB Control Number: 1218–0103.

Affected Public: Private Sector, Businesses or other for-profits.

Total Estimated Number of Respondents: 13,135.

Total Estimated Number of Responses: 337,279.

Total Estimated Annual Time Burden: 59,077 hours.

Total Estimated Annual Other Costs Burden: $ 8,892,917.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Crystal Rennie,

Acting Departmental Clearance Officer.

[FR Doc. 2020–27208 Filed 12–10–20; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2021–009]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of proposed extension request.

SUMMARY: NARA proposes to request an extension from the Office of Management and Budget (OMB) of approval to use forms by which we collect information from people requesting military records so that we can locate, identify, and provide the requested information. We invite you to comment on this proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: We must receive comments in writing on or before February 9, 2021.

ADDRESSES: Send comments by email to *tamee.fechhelm@nara.gov.* Because our buildings are temporarily closed during the COVID–19 restrictions, we are not able to receive comments by mail during this time.

FOR FURTHER INFORMATION CONTACT: Tamee Fechhelm, Paperwork Reduction Act Officer, by email at *tamee.fechhelm@nara.gov* or by telephone at 301.837.1694 with requests for additional information or copies of the proposed information collection and supporting statement.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we invite the public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for NARA to properly perform its functions; (b) our estimate of the burden of the proposed information collection and its accuracy; (c) ways we could enhance the quality, utility, and clarity of the information we collect; (d) ways we could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether this collection affects small businesses. We will summarize any comments you submit and include the summary in our request for OMB approval. All comments will become a matter of public record.

In this notice, we solicit comments concerning the following information collection:

Title: Request Pertaining to Military Records.

OMB number: 3095–0029.

Agency form number: SF 180 and NA Form 13176; online form in eVetRecs is an electronic equivalent to the SF 180.

Type of review: Regular.

Affected public: Individuals who request access to military records, military medical records, and medical records of military dependents.

Estimated number of respondents: 953,328.

Estimated time per response: 5 minutes.

Frequency of response: On occasion (when an individual wishes to request information from military records, military medical records, or medical records of military dependents).

Estimated total annual burden hours: 79,444 hours.

Abstract: The general purpose of this voluntary data collection is to determine what is being requested, where records are located, what information is releasable, and where to send the response. When third parties submit requests, the information collected and provided serves as records of disclosure, which are required by the Privacy Act. The information collected via the SF 180 and eVetRecs is vital to our National Personnel Records Center, which stores and handles these records. We need this information to locate and release information from requested records. It also significantly improves our ability to provide timely and accurate information to requesters.

Swarnali Haldar,

Executive for Information Services/CIO.

[FR Doc. 2020–27343 Filed 12–10–20; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0255]

Implementation of Aging Management Requirements for Spent Fuel Storage Renewals

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–3055, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals.'' This DG is a proposed new regulatory guide that would describes an approach that is acceptable to the staff of the NRC to meet the regulatory requirements for spent fuel storage renewals. It addresses requirements for the renewal of specific licenses for independent spent fuel storage installations (ISFSI) and certificates of compliance (CoC) for spent fuel storage cask designs pursuant to NRC requirements.

DATES: Submit comments by January 25, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

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–2020–0255. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *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 accessing information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Kristina Banovac, telephone: 301–415–7116, email: *Kristina.Banovac@nrc.gov,* or Harriet Karagiannis, telephone: 301–415–2493, email: *Harriet.Karagiannis@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0255 when contacting the NRC about the availability of information regarding 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–2020–0255.
- *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.*
- *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* 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–2020–0255 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 posts all comment submissions at *https://www.regulations.gov* as well as enters 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 submissions into ADAMS.

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

This DG, titled, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals,'' is temporarily identified by its task number, DG–3055 (ADAMS Accession No. ML20282A298). This draft guide is a proposed new regulatory guide (RG) 3.76. Regulatory Guide 3.76 describes an approach that is acceptable to the staff of the NRC by endorsing, with clarifications, the Nuclear Energy Institute (NEI) guidance in NEI 14–03, Revision 2, ''Format, Content and Implementation Guidance for Dry Cask Storage Operations-Based Aging Management,'' issued December 2016.

This new RG provides guidance to industry for complying with and implementing the requirements for spent fuel storage renewals in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste.'' This guidance addresses renewal of ISFSI specific licenses and CoCs for spent fuel storage cask designs in 10 CFR 72.42, ''Duration of license; renewal,'' and 10 CFR 72.240, ''Conditions for spent fuel storage cask renewal,'' respectively.

The guidance specifically addresses the format and content of spent fuel storage renewal applications and the implementation of aging management programs (AMPs). The guidance uses an operations-focused approach to aging management, in which operating experience is shared through an industry database and continually assessed to adjust AMPs, as needed and within regulatory limits, to ensure the effectiveness of aging management activities during the period of extended operation and the continued safe storage of spent fuel.

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML20282A299). The staff develops a regulatory analysis to assess the value of issuing this new regulatory guide as well as alternative courses of action.

III. Backfitting, Forward Fitting, and Issue Finality

This proposed regulatory guide, RG 3.76, proposes to endorse, with clarifications, NEI 14–03, which provides guidance on the format and content of spent fuel storage renewal applications and implementation of aging management programs under 10 CFR part 72. As explained in the proposed RG 3.76, licensees are not required to comply with the positions set forth in this regulatory guide. Therefore, proposed RG 3.76 does not constitute backfitting as defined in 10 CFR 72.62, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests;'' or constitute forward fitting as that term is defined and described in MD 8.4. If, in the future, the NRC were to impose a position in this proposed RG 3.76 in a manner that would constitute backfitting or forward fitting, then the NRC would address the backfitting provision in 10 CFR 72.62 or the forward fitting provision of MD 8.4, respectively.

Dated: December 8, 2020.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2020–27351 Filed 12–10–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–9075; NRC–2012–0277]

Updated Record of Decision for Powertech (USA) Inc.; Dewey-Burdock In Situ Uranium Recovery Facility

AGENCY: Nuclear Regulatory Commission.

ACTION: Record of Decision; update.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) staff has issued an updated Record of Decision (ROD) related to the license for Powertech (USA) Inc. (Powertech), Dewey-Burdock in situ uranium recovery (ISR) facility in Custer and Fall River Counties, South Dakota. Powertech's request for a source and byproduct materials license to construct and operate the Dewey-Burdock ISR facility was contested through the NRC's adjudicatory process. On October 8, 2020, the Commission denied a petition for review of the Atomic Safety and Licensing Board Panel's (ASLBP) Final Initial Decision issued on December 12, 2019, and two interlocutory orders, thus terminating the adjudicatory proceeding. The ROD has been updated to account for the ASLBP's decision and the Commission's ruling.

DATES: The ROD was updated on December 3, 2020.

ADDRESSES: Please refer to Docket ID NRC–2012–0277 when contacting the NRC about the availability of information regarding this document. You may access 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–2012–0277. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/*

adams.html. To begin the search, select ''Begin Web-based ADAMS Search.'' The updated ROD can be found by searching for ADAMS Accession No. ML20321A051. 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.*

• 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* 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: Diana Diaz-Toro, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC,

20555–0001; telephone: 301–415–0930; email: *Diana.Diaz-Toro@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC staff issued a license to Powertech for the construction and operation of its Dewey-Burdock ISR facility in Custer and Fall River Counties, in South Dakota in April 2014. Along with the issuance of the license, the NRC staff published a ROD in April 2014 that supported its decision to approve Powertech's license application for the Dewey-Burdock ISR facility.

During the NRC staff's licensing review, the NRC's ASLBP, an independent, trial-level adjudicatory body, granted a hearing request from the Oglala Sioux Tribe and Consolidated Intervenors (consisting of a group of individuals and organizations). The ASLBP held an evidentiary hearing in Rapid City, South Dakota, from August 19–21, 2014, on seven admitted contentions. On April 30, 2015, the ASLBP issued a Partial Initial Decision (LBP–15–16) resolving all but two of the admitted contentions in favor of the NRC staff: Contentions 1A and 1B, regarding historic and cultural resources, were resolved in favor of the Oglala Sioux Tribe and Consolidated Intervenors. Subsequently, on October 19, 2017, the ASLBP granted the NRC staff's motion for summary disposition of Contention 1B and determined that the NRC staff's efforts satisfied the National Historic Preservation Act (NHPA) requirement that the NRC staff consult with the Oglala Sioux Tribe. On April 29, 2019, the ASLBP granted the NRC staff's motion to set a schedule for an evidentiary hearing. The hearing was held on August 28 and 29, 2019, in Rapid City, South Dakota. On December 12, 2019, the ASLBP issued the Final Initial Decision (LBP–19–10) finding that the staff satisfied its National Environmental Policy Act (NEPA) obligation to take a reasonable hard look at potential impacts to cultural resources. The ASLBP also found that, consistent with the Council on Environmental Quality regulations at section 1502.22 of the title 40 of the *Code of Federal Regulations,* the information necessary to complete the NEPA review is effectively unavailable and that no further supplemental environmental impact statement is necessary in this case. The ASLBP also included a new condition to Powertech's license. It provides that, prior to appointing a Tribal Monitor pursuant to Stipulation 13(c) of the NHPA Programmatic Agreement, Powertech shall notify the NRC of the identity of the Monitor, and the NRC will in turn distribute that information to the signatories and consulting Tribes to the Programmatic Agreement for a 30-day review and comment period. On October 8, 2020, the Commission denied a petition for review (CLI–20–09) of the ASLBP's final initial decision in LBP–19–10 and two interlocutory ASLBP orders, which terminated the adjudicatory proceeding. The updated ROD accounts for the ASLBP's decisions and the Commission's ruling.

II. Availability of Documents

The documents identified in the following table are available to interested persons as indicated.

Document description	ADAMS Accession No.
Powertech Dewey-Burdock Application, February 28, 2009	ML091200014 (package).
Generic Environmental Impact Statement for In Situ Leach Uranium Milling Facilities, May 2009	ML091530075 (package).
Resubmission of Application, August 10, 2009	ML092870160 (package).
Response to Request for Additional Information, August 12, 2010	ML102380530 (package).
Revised Response to Request for Additional Information, June 28, 2011	ML112071064 (package).
Ground Water Model, February 27, 2012	ML120620195 (package).
Clarification of Oxidation-Reduction Potential Measurement, April 11, 2012	ML121030013.
Clarification of Regional Meteorological Data, June 13, 2012	ML12173A038.
Clarification of Response to Request for Additional Information, June 27, 2012	ML12179A534.
Supplemental Sampling Plan and Responses to Comments Regarding Draft License, October 19, 2012.	ML12305A056.
Comments on Draft Supplemental Environment Impact Statement, January 8, 2013	ML13022A386.
Supplemental Environmental Impact Statement for the Dewey-Burdock ISR Facility in Fall River and Custer Counties, South Dakota (NUREG-1910, Supplement 4, Volumes 1 and 2), January 31, 2014.	ML14024A477 ML14024A478.
NHPA Programmatic Agreement for Protection of Cultural Resources, Executed April 7, 2014	ML14066A344 (package).
NRC Safety Evaluation Report, April 8, 2014	ML14043A347 (package).
Source Materials License for Dewey-Burdock, April 8, 2014	ML14043A392.
NRC Record of Decision, April 8, 2014	ML14066A466.
NRC Updated Record of Decision, December 3, 2020	ML20321A051.

Dated: December 8, 2020.

For the Nuclear Regulatory Commission.

Jessie M. Quintero,

Chief, Environmental Review Materials Branch, Division of Rulemaking, Environmental and Financial Support, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2020–27296 Filed 12–10–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–41 and CP2021–42; Docket Nos. MC2021–42 and CP2021–43]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 15, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

1. *Docket No(s).:* MC2021–41 and CP2021–42; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 181 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 7, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 15, 2020.

2. *Docket No(s).:* MC2021–42 and CP2021–43; *Filing Title:* USPS Request to Add Parcel Select Contract 44 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 7, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 15, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–27329 Filed 12–10–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90584; File No. SR–NYSEAMER–2020–64]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Modify Rule 971.1NY Regarding Customer Best Execution Auctions to Provide Optional All-or-None Functionality for Larger-Sized Orders

December 7, 2020.

I. Introduction

On August 19, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify Rules 971.1NY and 971.2NY regarding the Exchange's Customer Best Execution auction (''CUBE Auction'' or ''Auction'') to provide optional all-or-none (''AON'') functionality for larger-sized orders. The proposed rule change was published for comment in the **Federal Register** on September 8, 2020.[3] On October 14, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to December 7, 2020.[5] The Commission has received no comments on the proposed rule change. On November 24, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

In Amendment No. 1, the Exchange proposes to expand its electronic crossing mechanism—the CUBE Auction—to provide optional AON[7]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89723 (September 1, 2020), 85 FR 55562 (September 8, 2020).

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 90178 (October 14, 2020), 85 FR 66645 (October 20, 2020).

[6] In Amendment No. 1, the Exchange modified the proposal with regard to the outcomes of the proposed new CUBE Auction functionality, as proposed for larger-sized orders, in certain situations where Customer interest at the stop price is resting on the Exchange's book before, or arrives during, the Auction. *See* infra notes 15–18 and accompanying text for a description of these outcomes under the proposal as amended. *See also* Exhibit 4 of Amendment No. 1 showing the changes made by the amendment to the text of Commentary .05 to Rule 971.1NY as originally proposed. In Amendment No. 1 the Exchange also deleted proposed new Commentary .04 to Rule 971.2NY, which would have provided for optional functionality for larger-sized orders in the Exchange's CUBE Auction for Complex Orders paralleling the similar functionality for Single-Leg CUBE Auctions proposed in new Commentary .05 to Rule 971.1NY, and made other, clarifying revisions in its discussion of the purpose of the proposal.

[7] An All-or-None Order or AON Order is a ''Market or Limit Order that is to be executed on

functionality for ATP Holders to execute larger-sized orders (*i.e.,* 500 or more contracts) in the Single-Leg CUBE Auction.[8] The Exchange seeks to expand the CUBE Auction functionality in a manner consistent with similar price-improvement mechanisms for larger-sized orders already available on other options exchanges.[9] As such, the Exchange believes that its proposal would allow it to compete with other options exchanges for such larger-sized orders and would benefit market participants who are already familiar with such price-improvement mechanisms.

According to the Exchange, the CUBE Auction operates seamlessly with the Consolidated Book—while still affording CUBE Orders an opportunity to receive price improvement.[10] The Exchange states that the proposal to expand the current CUBE Auction functionality by providing an additional (optional) method for market participants to effect larger-sized orders in the CUBE Auction would likewise operate seamlessly with the Consolidated Book. The Exchange believes that its proposal would encourage ATP Holders to compete vigorously to provide the opportunity for price improvement for larger-sized orders in a competitive auction process, which may lead to enhanced liquidity and tighter markets.

Proposed AON Single-Leg CUBE functionality

The Exchange proposes to add new Commentary .05 to Rule 971.1NY to provide that a CUBE Order of at least 500 contracts would execute in full at the single stop price against the Contra Order, except under specified circumstances (the ''AON CUBE Order'').[11] As further proposed, a Contra Order would not be permitted to guarantee an AON CUBE Order for auto-match or an auto-match limit, which features are otherwise available in a Single-Leg CUBE Auction.[12]

The initiating price and permissible range of executions for a proposed AON CUBE Order would be determined in the same manner as for a standard CUBE Order.[13] An AON CUBE Order Auction would also be subject to the same early end events as a Single-Leg CUBE Order.[14]

As proposed, an AON CUBE Order would not execute with the Contra Order if the entire AON CUBE Order could be satisfied in full by certain eligible contra-side interest. Specifically, the Exchange proposes that paragraph (a) to Commentary .05 to Rule 971.1NY would provide that:

(a) The Contra Order would not receive any allocation and will be cancelled if (i) RFR Responses to sell (buy) at prices lower (higher) than the stop price can satisfy the full quantity of the AON CUBE Order or (ii) there is Customer interest to sell (buy) at the stop price that on its own, or when aggregated with RFR Responses to sell (buy) at the stop price or prices lower (higher) than the stop price, can satisfy the full quantity of the AON CUBE Order. In either such case, the RFR Responses will be allocated as provided for in paragraphs (c)(5)(A) and (c)(5)(B)(i) of this Rule, as applicable.[15]

Thus, as noted by the Exchange, if there is price-improving contra-side interest that can satisfy the AON condition of the Auction, the AON CUBE Order would execute in full against those price-improving RFR Responses and the Contra Order would cancel. Or, absent such price-improving interest, if there is Customer interest equal to the stop price that on its own, or when combined with equal- or better-priced RFR Responses that can satisfy the AON condition of the Auction, the AON CUBE Order would execute in full against such interest and the Contra Order would cancel. Under either scenario, the AON CUBE Order would be allocated against contra-side interest at the best price(s) pursuant to the Exchange's priority rules.[16]

As further proposed, both the AON CUBE Order and Contra Order would be cancelled, *i.e.,* the Auction would be cancelled, if there is contra-side Customer interest at the stop price and such interest on its own or when combined with RFR Responses (at the stop price or better) is insufficient to satisfy the entire AON CUBE Order. To effect this result, the Exchange proposes that paragraph (b) to Commentary .05 to Rule 971.1NY would provide that:

(b) T he AON CUBE Order and Contra Order will both be cancelled if there is Customer interest to sell (buy) at the stop price and such interest, either on its own or when aggregated with RFR Responses to sell (buy) at the stop price or prices lower (higher) than the stop price, is insufficient to satisfy the full quantity of the AON CUBE Order.[17]

Thus, as proposed, if there is contra-side Customer interest at the stop price, but there is not enough size (considering the Customer interest and all RFR Responses at the stop price or better) to satisfy the entire AON CUBE Order, then both the AON CUBE Order and the Contra Order would be cancelled. The Exchange believes that this proposal is consistent with the terms of how AON orders function generally without violating the Exchange's general priority rules.[18] With respect to allocation, the Exchange notes that the proposed functionality differs from the allocation of a standard Single-Leg CUBE Order in that the Contra Order is not guaranteed

the Exchange in its entirety or not at all.'' *See* Rule 900.3NY(d)(4).

[8] *See* proposed Rules 971.1NY, Commentary .05. Capitalized terms have the same meaning as the defined terms in Rule 971.1NY.

[9] The Exchange cites as an example the Solicitation Auction Mechanism (''SAM'' or ''SAM Auction'') of the Cboe Exchange, Inc. (''Cboe''), governed by Cboe Rule 5.39, described by the Exchange as an electronic crossing mechanism for single-leg paired orders of 500 or more contracts, which the Cboe system automatically treats as All-Or-None, where the solicited contra order(s) trades entirely with the agency order at the stop price unless, in the aggregate, the agency order can be filled entirely by responses to the auction at improved prices or, if there are Priority Customer orders at the stop price, by such Priority Customer orders alone or in combination with responses to the auction at the stop price or improved prices. If there are Priority Customer orders at the stop price but insufficient size of such orders alone or when aggregated with responses at the stop price or better prices to fill the agency order, both the agency order and solicited contra order(s) will be cancelled. The Exchange notes that Cboe's affiliated exchanges similarly offer such auction mechanism for larger-sized orders. *See, e.g.,* Cboe EDGX Exchange, Inc. (''Cboe EDGX'') Rules 21.21 (SAM). The Exchange also notes that similar mechanisms are available on other options exchanges. *See, e.g.,* Nasdaq ISE LLC (''ISE''), Options 3, Section 11(d) (setting forth its Solicited Order Mechanism).

[10] *See* Rule 900.2NY(14) (defining Consolidated Book (or ''Book'') and providing that all quotes and orders ''that are entered into the Book will be ranked and maintained in accordance with the rules of priority as provided in Rule 964NY''). Rule 964NY (Display, Priority and Order Allocation—Trading Systems) dictates the priority of quotes and orders.

[11] *See* proposed Commentary .05, Rule 971.1NY. *See* Rule 971.1NY(c)(1)(A) (setting forth parameters for single stop price). An AON CUBE Order would be rejected for the same reasons as a CUBE Order (*see* Rule 971.1NY(b)(2)–(10)), except that the minimum size for an AON CUBE Order is 500 contracts, as opposed to one contract, as set forth in Rule 971.1NY(b)(8).

[12] *See* proposed Commentary .05, Rule 971.1NY. *See also* Rule 971.1NY(c)(1)(B)–(C) (regarding parameters for auto-match and auto-match limit price).

[13] An AON CUBE Order and its paired Contra Order would be rejected if it failed to meet the pricing parameters. *See* Rule 971.1NY(b) (regarding auction eligibility requirements).

[14] *See* Rule 971.1NY(c)(4) (setting forth the type of interest that causes the early end to a Single-Leg CUBE Auction).

[15] *See* proposed Commentary .05, Rule 971.1NY(a).

[16] *See* Rule 971.1NY (c)(5)(A) (providing Customer interest first priority to trade with the CUBE Order, pursuant to the size pro rata algorithm set forth in Rule 964NY(b)(3) at each price point) and (c)(5)(B)(i) (providing that, second to Customer interest, RFR Responses priced below (above) the stop price, beginning with the lowest (highest) price within the range of permissible executions will execute with the CUBE Order, pursuant to the size pro rata algorithm set forth in Rule 964NY(b)(3) at each price point).

[17] *See* proposed Commentary .05, Rule 971.1NY(b).

[18] *See* Rule 964NY (regarding order ranking and priority).

a minimum allocation at the stop price. Instead, given the AON nature of the functionality, the Contra Order either trades with the entire AON CUBE Order or not at all.[19] The Exchange's proposal also is consistent with the AON nature of similar mechanisms on other options exchanges.[20]

With the exception of differences to the minimum size and allocation described in proposed Commentary .05 to Rule 971.1NY, an AON CUBE Order would otherwise be subject to Rule 971.1NY with respect to all other aspects of the CUBE Auction functionality.[21]

Implementation

The Exchange states that it will announce the implementation date of the proposed rule change in a Trader Update following the approval of this proposed rule change.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges.[22] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,[23] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that approving the Exchange's proposal, as amended, to provide optional AON functionality for larger-sized orders may allow for greater flexibility in executing large-sized orders and could provide additional opportunities for such orders to receive price improvement over the NBBO, in the interest of perfecting the mechanism of free and open markets. The Commission further believes that the proposal, as amended, includes appropriate conditions to protect the priority of public customer orders on the Exchange, and is thereby consistent with the protection of investors and the public interest, because it assures that public customers who have taken the risk of placing limit orders on the Exchange have a fair opportunity to participate in transactions taking place on the Exchange. The Commission notes that the proposed rules providing this protection are similar to the rules of other exchanges with similar functionality and believes that they raise no novel issues.[24] Based on the foregoing, the Commission finds that the proposed rule change is consistent with the Act.

IV. Solicitation of Comments on Amendments No. 1

Interested persons are invited to submit written data, views, and arguments concerning whether Amendments No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2020–64 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–NYSEAMER–2020–64. 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 this filing will also 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–NYSEAMER–2020–64 and should be submitted on or before January 4, 2021.

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of Amendment No. 1 in the **Federal Register**. In Amendment No. 1, the Exchange modified the proposal with respect to the outcomes of AON CUBE Auctions for larger-sized orders in certain cases where there is Customer interest on the Exchange's book.[25] In doing so, the Exchange aligned the outcomes of the Auction with the outcomes of similar mechanisms on other exchanges, affording appropriate protections for the priority of Customer interest,[26] which the Commission has found to be consistent with the Act.[27] Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[28] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[29] that the proposed rule change SR–NYSEAMER–

[19] *See* Rule 971.1NY(c)(5)(B)(i)(b) (providing that, ''if there is sufficient size of the CUBE Order still available after executing at better prices or against Customer interest, the Contra Order shall receive additional contracts required to achieve an allocation of the greater of 40% of the original CUBE Order size or one contract (or the greater of 50% of the original CUBE Order size or one contract if there is only one RFR Response)'').

[20] *See supra* note 9 (regarding Cboe's SAM functionality for larger-sized paired orders designated as AON).

[21] *See* proposed Commentary .05, Rule 971.1NY.

[22] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[23] 17 U.S.C. 78f(b)(5).

[24] *See supra* note 9 and *see also* Rules of the Miami International Securities Exchange, LLC at Rule 515A(b).

[25] *See supra* note 6.

[26] *See supra* note 9

[27] In the other changes made by Amendment No. 1, the Exchange exercised its discretion not to propose an AON CUBE Auction for Complex Orders at this time, and enhanced the clarity of its proposal.

[28] 15 U.S.C. 78s(b)(2).

[29] 15 U.S.C. 78s(b)(2).

2020–64, as modified by Amendment No. 1 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27203 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34130; 811–22260]

RMR Mortgage Trust

December 7, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for deregistration under Section 8(f) of the Investment Company Act of 1940 (the ''Act'').

Summary of Application: RMR Mortgage Trust requests an order declaring that it has ceased to be an investment company.

Applicant: RMR Mortgage Trust.

Filing Dates: The application was filed on May 27, 2020 and was amended on August 17, 2020, November 18, 2020 and December 1, 2020.

Hearing or Notification of Hearing: An order granting the request will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicant with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on January 4, 2021 and should be accompanied by proof of service on Applicant, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing to the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: *jclark@rmrgroupadvisors.com.*

FOR FURTHER INFORMATION CONTACT: Marc Mehrespand, Senior Counsel; Trace Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicant's Representations:

1. Applicant is a Maryland statutory trust and is a non-diversified, closed-end management investment company registered under the Act. Prior to the Special Meeting (as defined below), Applicant was named ''RMR Real Estate Income Fund'' and its primary investment objective was to earn and pay to its common shareholders a high level of current income by investing in real estate companies. Capital appreciation was Applicant's secondary objective.

2. At a special meeting of Applicant's shareholders on April 16, 2020 (''the Special Meeting''), Applicant's shareholders approved a proposal (the ''Business Change Proposal'') to change Applicant's business from a registered investment company to a commercial mortgage real estate investment trust (''REIT'') that focuses primarily on originating and investing in first mortgage whole loans secured by middle market and transitional commercial real estate (''CRE''). Notably, the proxy statement in connection with the Business Change Proposal stated that, if approved, Applicant would realign its portfolio so that it will not be considered an investment company under the Act and apply to the Commission for an order declaring that Applicant has ceased to be an investment company. Applicant represents that it has operated during its 2020 taxable year so that it may qualify for taxation as a REIT for federal tax purposes.

3. Applicant states that, following the Special Meeting, it has taken various steps to implement the Business Proposal, including changing its name to ''RMR Mortgage Trust,'' divesting legacy portfolio assets and reorienting its portfolio to originating and investing in first mortgage whole loans secured by middle market and transitional CRE. Applicant states that it also holds itself out in its periodic reports to shareholders, press releases and website as a company that focuses primarily on originating and investing in first mortgage whole loans secured by middle market and transitional CRE.

4. Applicant's investment advisory agreement (''IAA'') with RMR Advisors LLC (the ''Adviser''), Applicant's investment adviser, remains in effect but Applicant anticipates that, if Applicant receives the order, the IAA would be terminated and Applicant would enter into a new management agreement with the Adviser, or an affiliate of the Adviser. Applicant represents that its officers devote significant time to Applicant's new business strategy, including in connection with the formation of business objectives, plans and strategies and sourcing of mortgage origination opportunities. In addition, the Adviser has established an investment committee (the ''Investment Committee'') responsible for evaluating mortgage loan origination opportunities and making determinations as to whether or not to fund such loan opportunities, in each case, taking into account Applicant's investment guidelines and considerations, subject to any required approvals by Applicant's Board of Trustees (''Board''). Two of Applicant's Board members serve as members of the Investment Committee.

5. Applicant states that it currently originates commercial mortgage loans through a wholly-owned subsidiary, RMTG Lender LLC (the ''Real Estate Subsidiary''). As of November 30, 2020, 100% of the assets of the Real Estate Subsidiary consisted of commercial mortgage loans fully secured by real estate. Applicant represents that it may establish other wholly-owned subsidiaries to carry out specific activities, consistent with Applicant's business of originating and investing in first mortgage whole loans secured by middle market and transitional CRE.

6. Applicant represents that the Real Estate Subsidiary is excluded from the definition of ''investment company'' by section 3(c)(5)(C) of the Act and, therefore, securities issued by the Real Estate Subsidiary are not ''investment securities'' as defined in section 3(a)(2) of the Act. Applicant states that, as of November 30, 2020, the value of investment securities owned by Applicant represents approximately 35.1% of Applicant's total assets, exclusive of Government securities and cash items, on an unconsolidated basis (''Adjusted Total Assets'').

7. For the nine months ended September 30, 2020, Applicant states that it derived approximately 100% of its gross income from securities (other than investments that qualify as ''mortgages and other liens on and interests in real estate'' for purposes of section 3(c)(5)(C) of the Act (''Qualifying Real Estate Assets'')) and approximately 0% of its gross income from Qualifying Real Estate Assets, and for the period from October 1, 2020 through November

[30] 17 CFR 200.30–3(a)(12).

30, 2020, Applicant derived approximately 82% of its gross income from securities (other than Qualifying Real Estate Assets) and approximately 18% of its gross income from Qualifying Real Estate Assets. Applicant expects its income from securities (other than Qualifying Real Estate Assets and other assets that are not Qualifying Real Estate Assets but which are real estate-related assets (''Real Estate-Related Assets'') to continue to decrease, and its income from Qualifying Real Estate Assets and Real Estate-Related Assets to continue to increase, as it continues to divest its legacy portfolio assets and reinvest in Qualifying Real Estate Assets and Real-Estate Related Assets. Applicant represents that currently it derives no material portion of its gross income from securities that are not Qualifying Real Estate Assets or Real Estate-Related Assets.

8. Upon deregistering as an investment company, which will be the final step in implementing the Business Change Proposal, Applicant represents that it will issue a press release to shareholders indicating that it is no longer a registered investment company and will cease indicating in its financial statements that it is a registered investment company.

9. Applicant states that it is not currently a party to any litigation or administrative proceeding and has timely complied with its obligations to file annual and other reports with the Commission.

10. Applicant represents that, if the requested order is granted, its common shares will continue to be traded on The Nasdaq Stock Market LLC.

Applicant's Legal Analysis:

1. Section 8(f) of the Act provides that whenever the Commission, upon application or its own motion, finds that a registered investment company has ceased to be an investment company, the Commission shall so declare by order and upon the taking effect of such order, the registration of such company shall cease to be in effect.

2. Section 3(a)(1)(A) of the Act defines an ''investment company'' as any issuer which ''is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities.'' Section 3(a)(1)(B) of the Act defines an ''investment company'' as any issuer which ''is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding.''

3. Section 3(a)(1)(C) of the Act defines an ''investment company'' as any issuer which ''is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.'' Section 3(a)(2) of the Act defines ''investment securities'' as ''all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c).''

4. Applicant states that it is no longer an investment company as defined in section 3(a)(1)(A), 3(a)(1)(B) or section 3(a)(1)(C). With regard to section 3(a)(1)(A), Applicant represents that it now operates as a commercial mortgage REIT, and argues that its historical development, its public representations, the activities of its directors and officers, the nature of its present assets and the sources of its present income support this assertion.

5. With regard to section 3(a)(1)(B), Applicant represents that it is not engaged, and does not propose to engage, in the business of issuing face-amount certificates of the installment type, has not been engaged in such business and does not have any such certificate outstanding.

6. With regard to section 3(a)(1)(C), Applicant represents that, as discussed in greater detail below, the Real Estate Subsidiary is excluded from the definition of investment company by virtue of section 3(c)(5)(C) of the Act and that, as a result, securities issued by the Real Estate Subsidiary are not ''investment securities'' within the meaning of section 3(a)(2) of the Act. Because the value of Applicant's interest in the Real Estate Subsidiary exceeds 60% of the value of Applicant's Adjusted Total Assets, the value of any ''investment securities'' owned by Applicant is less than 40% of the value of Applicant's Adjusted Total Assets. Applicant, therefore, states that it is not an investment company within the meaning of section 3(a)(1)(C) of the Act.

7. Section 3(c)(5)(C) of the Act excludes from the definition of an investment company ''any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: . . . (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.''

8. Applicant represents that, as of November 30, 2020, the only assets of the Real Estate Subsidiary were mortgage loans fully secured by real estate and, as a result, the Real Estate Subsidiary meets the exclusion from the definition of investment company in section 3(c)(5)(C).

9. Applicant states that it is thus qualified for an order of the Commission pursuant to section 8(f) of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27206 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90579; File No. SR–PEARL–2020–28]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2611, Odd and Mixed Lots

December 7, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 23, 2020, MIAX PEARL, LLC (''MIAX PEARL'' 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 is filing a proposal to amend Exchange Rule 2611 regarding the handling of odd lot sized orders.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 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 purpose of the proposed rule change is to amend Exchange Rule 2611 to provide that odd lot orders [3] would no longer be processed differently than orders that are a round lot or greater in size.[4] Exchange Rule 2611 sets forth the requirements relating to odd and mixed lot trading of equity securities on the Exchange's equity trading platform (referred to herein as ''MIAX PEARL Equities''). Exchange Rule 2611(b) further provides that round lot, mixed lot, and odd lot orders are treated in the same manner on the Exchange, provided that, the working and display price of a displayable odd lot order will be adjusted both on arrival and when resting on the MIAX PEARL Equities Book.[5]

Currently, Exchange Rule 2611(b)(1) and subparagraphs (A)–(C) describe how the working and displayed price of odd lot orders are adjusted in relation to the contra-side Protected Best Bid (''PBB'') or Protected Best Offer (''PBO'', collectively with PBB, the ''PBBO''). In short, working and displayed prices of odd lot orders are bound by either the PBBO of an away trading center or of the Exchange, which means resting odd lot orders can be re-priced if the PBBO changes or becomes locked or crossed.

Specifically, current Exchange Rule 2611(b)(1)(A) reflects standard behavior and provides that if the limit price of an odd lot order to buy (sell) is below (above) the PBO (PBB) of an away Trading Center, it will have a working and display price equal to the limit price. Current Exchange Rule 2611(b)(1)(B) provides that if the limit price of an odd lot order to buy (sell) is at or above (below) the PBO (PBB) of an away Trading Center, it will have a working price equal to the PBO (PBB). The display price will also be adjusted to one minimum price variation lower (higher) than the PBO (PBB). Current Exchange Rule 2611(b)(1)(C) provides that if the PBBO is locked or crossed and the limit price of an odd lot order to buy (sell) resting on the MIAX PEARL Equities Book is above (below) the PBO (PBB) of an away Trading Center, it will have a working and display price equal to the PBB (PBO) of the Exchange. Current Exchange Rule 2611(b)(1)(C) further provides that the working and display price of such odd lot order will be adjusted again pursuant to paragraphs (A) and (B) of Exchange Rule 2611(b)(1) should the PBBO unlock or uncross.

As proposed, odd lot sized orders would be handled in the same manner as orders of a round lot size or higher, and if they are designated displayed, they would stand their ground if locked or crossed by the PBBO of an away trading center.[6] The proposal would, therefore, result in fewer orders being re-priced, thereby allowing those orders to retain their priority on the MIAX PEARL Equites Book. To effect this change, the Exchange proposes to delete Exchange Rule 2611(b)(1) and sub-paragraphs (A)–(C) in their entirety. As a result of these changes, Exchange Rule 2611(b) would provide, without any qualifiers, that ''[r]ound lot, mixed lot and odd lot orders are treated in the same manner on the Exchange.'' The Exchange proposes an additional non-substantive change to renumber current Exchange Rule 2611(b)(2) as Exchange Rule 2611(c).

Implementation

Due to the technological changes associated with this proposed change, the Exchange will issue a trading alert publicly announcing the implementation date of this proposed rule change. The Exchange anticipates that the implementation date will be in the first half of 2021.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5),[8] 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 mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that processing odd lot sized orders in the same manner as round and mixed lot sized orders would remove impediments to and perfect the mechanism of a free and open market because the same principle applies: an order of any size that has been displayed has priority at that price if an away Trading Center subsequently locks or crosses that price. In addition, the Exchange believes that processing odd lot orders the same as round-lot sized orders is not novel as it is consistent with the rules of other exchanges.[9]

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. In fact, the Exchange believes that the proposal may have a positive effect on competition because it is designed to conform how the Exchange processes odd lot orders to the functionality available on other exchanges. The Exchange believes that the proposed change would promote competition because fewer orders would need to be repriced on the Exchange and therefore liquidity providers seeking for their orders to retain priority may route additional orders to the Exchange. Likewise, liquidity takers may be more likely to route orders to the Exchange if

[3] Exchange Rule 2610 provides that the unit of trading in stocks is one (1) share. 100 shares constitutes a ''round lot,'' unless specified by the primary listing market to be fewer than 100 shares. Any amount less than a round lot shall constitute an ''odd lot,'' and any amount greater than a round lot that is not a multiple of a round lot shall constitute a ''mixed lot.''

[4] The proposed rule change is substantially similar to a recent rule amendment by the New York Stock Exchange LLC (''NYSE''). *See* Securities Exchange Act Nos. 88362 (March 12, 2020), 85 FR 15538 (March 18, 2020) (SR–NYSE–2020–13); *and* 88793 (May 1, 2020), 85 FR 27259 (May 7, 2020) (SR–NYSE–2020–13) (''NYSE Approval Order''). *See also* NYSE Rule 7.38.

[5] *See* Exchange Rule 1901 defining the term ''MIAX PEARL Equities Book''.

[6] Like round and mixed lot sized orders, odd lot sized orders would be subject to the Exchange price sliding processes under Exchange Rule 2614(g).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] *See* the NYSE Approval Order, *supra* note 5. *See* NYSE Rule 7.38. *See also* Nasdaq Rules 4703(b)(3) (defining the term ''odd lot'' as an order attribute) and 4702 (describing which order attributes are available for orders on Nasdaq, without any discussion of odd lot sized orders being priced differently than round-lot sized orders). *See also* BZX Rules 11.10 (defining the term ''odd lot'') and 11.9 (describing BZX Orders and Modifiers, without any discussion of odd lot sized orders being priced differently than round-lot sized orders).

they have greater determinism regarding the price at which their orders would be executed.

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 [10] and Rule 19b-4(f)(6) [11] 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.* Please include File Number SR–PEARL–2020–28 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–PEARL–2020–28. 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–PEARL–2020–28, and should be submitted on or before January 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27201 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 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.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90577; File No. SR–NASDAQ–2020–079]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate Its Equity and General Rules From Its Current Rulebook Into Its New Rulebook Shell

December 7, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on November 23, 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 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 relocate its equity and general rules from its current Rulebook into its new Rulebook shell.

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 this rule change is to relocate Nasdaq equity and general rules from the current Rulebook into the new Rulebook shell.[3] The Exchange also proposes a number of minor, non-substantive changes to the Rulebook shell as described below. The relocation and harmonization of these rules is part of the Exchange's continued effort to promote efficiency and conformity of its processes with those of its affiliated exchanges. The Exchange believes that the placement of these rules into their new location in the Rulebook shell will

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Previously, the Exchange filed to relocate other rules within its Rulebook. *See* Securities Exchange Act Release No. 87778 (December 17, 2019), 84 FR 70590 (December 23, 2019) (SR–NASDAQ–2019–098).

facilitate the use of the Rulebook by members.

Universal Changes

The Exchange proposes to update all cross-references within the Rulebook shell to the new relocated rule cites. The Exchange proposes to replace internal rule references to simply state ''this Rule'' where the rule is citing itself without a more specific cite included in the Rule. For example, if Nasdaq Rule 4619 refers currently to ''Rule 4619'' or ''this Rule 4619'' the Exchange will amend the phrase to simply ''this Rule.'' Except where the Exchange specifies below that it will retain the current rule numbering, the Exchange also proposes to conform the paragraph numbering and lettering to that used in the Rulebook shell for greater consistency, and to correct punctuation. Furthermore, the Exchange proposes to delete any empty reserved rules and already deleted rules in the current Rulebook other than in relocated Equity 11. Lastly, the Exchange will delete the following rule numbers from the current Rulebook, but will relocate the substance of these rules into the new Rulebook shell: Conduct Rules (2000–3000), 3300, 4000, 4100, 4600, 4610, 4700, 4750, 6000, and 6100.

General 1

The Exchange proposes to amend the section heading from General 1, General 1 to General 1, Section 1. The Exchange also proposes to retitle General 1, Section 1 from ''General Provisions'' to ''Definitions.'' Lastly, the Exchange proposes a non-substantive change in paragraph (b)(15) to delete ''Exchange'' immediately before ''Options 3, Section 4.''

General 2

The Exchange proposes to relocate Rule 4615 (Sponsored Participants) to General 2, Section 22, which is currently reserved, to harmonize the Exchange's rule numbering to that of Nasdaq PHLX LLC (''Phlx'') General 2, Section 22, which currently sets forth the same rule on Phlx.

General 3

The Exchange proposes to relocate the membership rules 1001, 1002, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018 and 1019 into General 3 (Membership and Access). The Exchange proposes to retain the current rule numbers which closely align with FINRA rules. The Exchange will delete current Rule 1031 as this Rule presently has no substantive rule text. The Exchange also proposes to update a number of obsolete cross-references in the relocated membership rules that presently refer to rules that were already moved to the Rulebook shell under SR–NASDAQ–2019–098.[4]

General 4

The Exchange proposes to remove the ''1.'' from the rule numbering within General 4. The Exchange also proposes to replace ''General 4, Section 1.'' with ''General 4, Rule'' throughout General 4. The proposed changes are intended to better align General 4's rule numbering with FINRA rules. The Exchange also proposes to make corresponding changes in other places throughout the Rulebook shell outside of General 4 to replace all instances of ''General 4, Section 1.'' with ''General 4, Rule'' for greater consistency.[5]

General 5

In General 5, IM–9216, the Exchange proposes to add chapter headers before the cross-cites to Rules 1013, 8211, and 11870 for greater consistency within this Rule. As amended, the cross-cites would be General 3, Rule 1013; General 5, Rule 8211; and Equity 11, Rule 11870.

General 9

The Exchange proposes to relocate Rule 2170 (Disruptive Quoting and Trading Activity Prohibited) to General 9, Section 53, and to reserve General 9, Section 52. The proposed rule numbering is to ensure that the Exchange's General 9 rules mirror its affiliated exchanges' General 9 rules as closely as practicable. In particular, relocating this Rule to General 9, Section 53 will harmonize the Exchange's rule numbering to that of Phlx General 9, Section 53, which currently sets forth the same rule prohibiting disruptive quoting and trading activity on Phlx. Because this Rule is being added to General 9, which applies to both the Exchange's equities and options markets, the Exchange proposes to delete a duplicate rule in Options 9, Section 4, which applies only to the options market.

The Exchange also proposes to relocate Rule 4570 (Custodian of Books and Records) to General 9, Section 71, and to reserve Sections 54—70 to harmonize its General rule numbering with that of Phlx's General 9.

The Exchange further proposes to update several obsolete cross-references throughout General 9 that presently refer to rules that were already moved to the Rulebook shell under SR–NASDAQ–2019–098.[6] The Exchange will also update the cross-references to Rule 2310A (within General 9, Section 12(b)) and Rule 2810A (within General 9, Section 18(c)(1)(C)(iv)) to relocated Equity 10, Section 1. Rule 2810A does not exist within the current Rulebook, but the Exchange is updating this cite to relocated Equity 10, Section 1 as this rule governs direct participation programs. Lastly, the Exchange proposes to fix a formatting error in General 9, Section 20(d)(1).

Equity 1

The Exchange proposes to amend the section header from Equity 1, Equity 1 to Equity 1, Section 1. The Exchange also proposes to add ''(a)'' before the phrase ''When used in the Equity Rules. . .'' to conform to the paragraph lettering of the Rulebook shell. Lastly, the Exchange proposes to relocate the defined terms currently within Rule 4701(a)—(l) into Equity 1, Section 1(a)(3)—(14).

Equity 2

The Exchange proposes to relocate the following rules into Equity 2:

Shell rule	Current rule
Section 1	4601. Scope.
Section 2	4200. Definitions.
Section 3	4611. Nasdaq Market Center Participant Registration.
Section 4	4612. Registration as a Nasdaq Market Maker.
Section 5	4613. Market Maker Obligations.
Section 6	4614. Stabilizing Bids.

[4] Specifically, the Exchange will update obsolete cross-references in Rule 1002(d)(2), the introductory paragraph to Rule 1011, Rule 1011(o)(3), and Rule 1013(a)(1)(N).

[5] Specifically, the Exchange will make corresponding changes to the following rules in the proposed Rulebook shell outside of General 4: General 3, Rule 1001; General 3, Rule 1011; General 5, IM–9216; General 5, Rule 9630; and General 9, Section 20(b).

[6] Specifically, the Exchange will update obsolete cross-references in General 9, Section 1(b), Section 10(b)(1) and Section 14(a).

Shell rule	Current rule
Section 7	4616. Reports.
Section 8	4617. Normal Business Hours.
Section 9	4618. Clearance and Settlement.
Section 10	4619. Withdrawal of Quotations and Passive Market Making.
Section 11	4620. Voluntary Termination of Registration.
Section 12	4621. Suspension and Termination of Quotations.
Section 13	4622. Termination of Nasdaq Service.
Section 14	4623. Alternative Trading Systems.
Section 15	4624. Penalty Bids and Syndicate Covering Transactions.
Section 16	4625. Obligation to Provide Information.[7]
Section 17	4626. Limitation of Liability.
Section 18	4627. Obligation to Honor System Trades.
Section 19	4628. Compliance with Rules and Registration Requirements.
Section 20	4631. Customer Disclosures.

Equity 3

The Exchange proposes to reserve Equity 3, currently titled ''Equity Trading Rules.''

Equity 4

The Exchange proposes to re-title Equity 4, currently ''Limit Up Limit Down,'' to ''Equity Trading Rules.'' The Exchange proposes to relocate Rules 4110, 4120, 4121, 4370, 4702, 4703, 4752, 4753, 4754, 4756, 4757, 4758, 4759, 4760, 4761, 4762, 4763, and 4770 into Equity 4 and retain the current rule numbers. In relocated Rule 4110, the Exchange also proposes to update an obsolete cross-reference to the Rule 4300 and 4400 Series to the Rule 5000 Series.[8]

Equity 5

The Exchange proposes to update an obsolete cross-reference in Equity 5, Section 6 that presently refers to Rule 2010A (Standards of Commercial Honor and Principles of Trade), which was already moved to General 9, Section 1 in the Rulebook shell under SR–NASDAQ–2019–098.

Equity 6

The Exchange proposes to title Equity 6, which is currently reserved, to ''Nasdaq Risk Management Service; Other Systems and Programs,'' and to relocate the following rules into Equity 6:

Shell rule	Current rule
Section 1	6110. Definitions.
Section 2	6120. System Functions.
Section 3	6130. Nasdaq Kill Switch.
Section 4	6200. Exchange Sharing of Participant Risk Settings.
Section 5	IM–6200–1. Risk Settings.
Section 6	6300. Nasdaq Equity Value Indicator Cross.

The Exchange will also correct a typographical error in Equity 6, Section 3(e) where the Exchange inadvertently capitalized ''When'' in the first sentence.

Equity 8

The Exchange proposes to re-title Equity 8, currently ''Uniform Practice Code,'' to ''Trading of Non-Convertible Bonds Listed on Nasdaq.'' The Exchange proposes to relocate Rule 4000B (Trading of Non-Convertible Bonds Listed on Nasdaq) into Equity 8, Section 1.

Equity 9

The Exchange proposes to re-title Equity 9, currently ''Supplementary Conduct Rules,'' to ''Business Conduct,'' and to relocate the following rules into Equity 9:

Shell rule	Current rule
Section 1	3220. Adjustment of Open Orders.
Section 2	3230. Clearing Agreements.
Section 3	3310. Publication of Transactions and Quotations.
Section 4	IM–3310. Manipulative and Deceptive Quotations.
Section 5	3320. Offers at Stated Prices.
Section 6	3340. Prohibition on Transactions, Publication of Quotations, or Publication of Indications of Interest During Trading Halts.
Section 7	3350. Suspension of Trading.
Section 8	3351. Trading Practices.
Section 9	3360. Short-Interest Reporting.
Section 10	3370. Prompt Receipt and Delivery of Securities.
Section 11	3380. Order Entry and Execution Practices.
Section 12	3381. SEC Rule 19c–1—Governing Certain Off-Board Agency Transactions by Members of National Securities Exchanges.
Section 13	*3385. SEC Rule 19c–3 — Governing Off-Board Trading by Members of National Securities Exchanges.*
Section 14	3390. SEC Rule 604—Display of Customer Limit Orders.

[7] The Exchange will not port over the reference to IM–4120–1 into the Rulebook shell as this Rule does not currently exist in the Nasdaq Rulebook.

[8] The Exchange previously relocated the Nasdaq listing standards within the Rule 4300 and 4400 Series to the Rule 5000 Series. *See* Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR–NASDAQ–2009–018).

The Exchange also proposes to update two obsolete cross-references in Equity 9, Section 4 (Manipulative and Deceptive Quotations) that currently point to Rules 2110 and 2120. Rule 2110 (Standards of Commercial Honor and Principles of Trade) was previously renumbered as Nasdaq Rule 2010A, which the Exchange then relocated to General 9, Section 1 of the Rulebook shell under SR–NASDAQ–2020–098.[9] Rule 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices) was likewise relocated to General 9, Section 1 of the Rulebook shell under SR–NASDAQ–2019–098.

Equity 10

The Exchange proposes to title Equity 10, which is currently reserved, to ''Other Products and Securities,'' and to relocate the following rules into Equity 10:

Shell rule	Current rule
Section 1	2310A. Direct Participation Programs.
Section 2	2830. Investment Company Securities.
Section 3	2840. Trading in Index Warrants, Currency Index Warrants, and Currency Warrants.
	2841. General.
	2842. Definitions.
Section 4	2850. Position Limits.
Section 5	2851. Exercise Limits.
Section 6	2852. Reporting Requirements.
Section 7	2853. Liquidation of Index Warrant Positions.
Section 8	4630. Trading in Commodity-Related Securities.

Equity 11: Uniform Practice Code

The Exchange proposes to add new Equity 11, titled ''Uniform Practice Code,'' and relocate the current Rule 11000 Series into new Equity 11 without renumbering them.

The Exchange also proposes to update an obsolete cross-reference in IM–11720 (Obligations of Members Who Discover Securities in Their Possession to Which They Are Not Entitled) that currently points to Rule 2110. Rule 2110 (Standards of Commercial Honor and Principles of Trade) was previously renumbered as Nasdaq Rule 2010A, which the Exchange then relocated to General 9, Section 1 of the Rulebook shell under SR–NASDAQ–2020–098.[10]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by bringing greater transparency to its rules by relocating the equity and general rules into the new Rulebook shell together with other rules which have already been relocated.[13] The Exchange's proposal is consistent with the Act and will protect investors and the public interest by harmonizing its rules, where applicable, across Nasdaq markets so that members can readily locate rules which cover similar topics. The relocation and harmonization of the Nasdaq Rules is part of the Exchange's continued effort to promote efficiency and conformity of its processes with those of its affiliated exchanges. The Exchange believes that the placement of the Nasdaq equity and general rules into their new location in the shell will facilitate the use of the Rulebook by members. Specifically, the Exchange believes that market participants that are members of more than one Nasdaq market will benefit from the ability to compare Rulebooks.

The Exchange is not substantively amending rule text. The renumbering, re-lettering, deleting reserved and already deleted rules, amending cross-references and other minor technical changes will bring greater transparency to Nasdaq's Rules. The Exchange's affiliates intend to file similar rule changes to relocate their respective equity and general rules into the same location in each Rulebook for ease of reference. The Exchange believes its proposal will benefit investors and the general public by increasing the transparency of its Rulebook and promoting easy comparisons among the various Nasdaq affiliated exchanges' Rulebooks.

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. The Exchange believes that the proposed amendments do not impose an undue burden on competition because the amendments to relocate the equity and general rules are non-substantive. This rule change is intended to bring greater clarity to the Exchange's Rules and to promote easy comparisons among the various Nasdaq affiliated exchanges' Rulebooks. Renumbering, re-lettering, deleting reserved rules and amending cross-references will bring greater transparency to Nasdaq's Rules.

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.

[9] *See* Securities Exchange Act Release No. 68153 (November 5, 2012), 77 FR 67409 (November 9, 2012) (SR–NASDAQ–2012–124).

[10] *Id.*

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] *See supra* note 3.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] 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. Waiver of the operative delay would allow the Exchange to immediately relocate its rules and continue to file other rules that are affected by this relocation in a timely manner. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov. Please include File Number SR–NASDAQ–2020–079 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–2020–079. 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–2020–079 and should be submitted on or before January 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27200 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90575; File No. SR–NYSEArca–2020–46]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend NYSE Arca Rule 5.2–E(j)(6) Relating to Options-Linked Securities

December 7, 2020.

On June 10, 2020, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 5.2–E(j)(6) to accommodate Exchange listing and trading of Options-Linked Securities. The proposed rule change was published for comment in the **Federal Register** on June 22, 2020.[3] On July 28, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On September 16, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.[7] The Commission has received no

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89073 (June 16, 2020), 85 FR 37488 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89412, 85 FR 46744 (August 3, 2020).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 89898, 85 FR 59572 (September 22, 2020). Specifically, the Commission instituted proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' *See id.* at 59573 (citing 15 U.S.C. 78f(b)(5)).

comment letters on the proposed rule change.

Section 19(b)(2) of the Act[8] 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 date of publication of notice of filing of the proposed rule change was June 22, 2020. December 19, 2020, is 180 days from that date, and February 17, 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 this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[9] designates February 17, 2021, as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSEArca–2020–46).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27199 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90583; File No. SR–CBOE–2020–112]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Adopt Temporary Rules To Extend the Time by Which Trading Permit Holders must Complete Their Office Inspections for the Calendar Year 2020 and To Provide Temporary Remote Inspection Relief for Their Office Inspections for Calendar Years 2020 and 2021

December 7, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 30, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to adopt temporary Rules to extend the time by which Trading Permit Holders must complete their office inspections for the calendar year 2020 and to provide temporary remote inspection relief for their office inspections for calendar years 2020 and 2021. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In light of the operational challenges that Trading Permit Holders are facing due to the outbreak of the coronavirus disease (COVID–19), the Exchange proposes to extend the time by which Trading Permit Holders must complete their calendar year 2020 inspection obligations under Rule 8.6(f) (Office Inspections) and Rule 9.2(d) (Annual Branch Inspections) to March 31, 2021,[5] and to provide Trading Permit Holders with the option to complete their calendar year 2020 and calendar year 2021 inspection obligations under Rules 8.16(f) and 9.2(d) remotely, without an on-site visit to the office or location.[6]

The Exchange has observed the impact of the COVID–19 pandemic on its Trading Permit Holders, investors, and the industry generally and recognizes that Trading Permit Holders are experiencing operational challenges with much of their personnel working from home due to stay-at-home orders, restrictions on businesses and social activity imposed in various states, and adherence to other social distancing guidelines consistent with the recommendations of public health officials.[7] In response, like many employers across the United States, Trading Permit Holder organizations

[8] 15 U.S.C. 78s(b)(2).

[9] *Id.*

[10] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] The proposed rule change will automatically sunset on March 31, 2021. If the Exchange seeks to provide additional temporary relief from the rule requirement identified in this proposal beyond March 31, 2021, it will submit a separate rule filing to further extend the temporary extension of time.

[6] The proposed rule change will automatically sunset on December 31, 2021. If the Exchange seeks to extend the duration of the temporary proposed rule beyond December 31, 2021, it will submit a separate rule filing to further renew the temporary relief. The Exchange notes that SEC staff has stated in guidance that inspections must include a physical, on-site review component. *See* SEC National Examination Risk Alert, Volume I, Issue 2 (November 30, 2011); SEC Division of Market Regulation, Staff Legal Bulletin No. 17: Remote Office Supervision (March 19, 2004) (stating, in part, that broker-dealers that conduct business through geographically dispersed offices have not adequately discharged their supervisory obligations where there are no on-site routine or ''for cause'' inspections of those offices).

[7] *See* Centers for Disease Control and Prevention (''CDC''), International Classification of Diseases, Tenth Revision, Clinical Modification, *https://www.cdc.gov/nchs/data/icd/Announcement-New-ICD-code-forcoronavirus-3-18-2020.pdf;* WHO Director-General, Opening Remarks at the Media Briefing on COVID–19 (March 11, 2020), *https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarksat-the-media-briefing-on-covid-19-11-march-2020; and* Centers for Disease Control and Prevention, How to Protect Yourself & Others (last visited November 12, 2020) *https://www.cdc.gov/coronavirus/2019-ncov/prevent-gettingsick/prevention.html.*

closed their offices to the public, transitioned their employees to telework arrangements to comply with stay-at-home orders, and implemented other restrictive measures in an effort to slow the spread of COVID–19, such as curtailing or eliminating non-essential business travel and significantly limiting or canceling in-person activities.[8]

Exchange Rules require Trading Permit Holders [9] to conduct branch [10] and non-branch office and location inspections pursuant to certain annual cycles. Specifically, pursuant to Rule 8.16(f), each Trading Permit Holder shall inspect every office or location of the Trading Permit Holder at least once every three calendar years, the cycle of which is contingent on the nature and complexity of the securities activities for which the office or location is responsible, the volume of business done, and the number of associated persons at each office or location. The examination schedule and an explanation of the factors considered in determining the frequency of the examinations in the cycle shall be set forth in the Trading Permit Holder's written supervisory procedures. Such inspection shall be reasonably designed to assist in preventing and detecting violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable Exchange rules, and each Trading Permit Holder shall retain a written record of the dates upon which each inspection is conducted, the participants in the inspection, and the results thereof. Pursuant to Rule 9.2(d), each branch office that supervises one or more non-branch locations must be inspected no less often than once each calendar year, unless it qualifies for certain exemptions.[11] Every branch office, without exception, must be inspected at least once every three calendar-years. Trading Permit Holders must maintain written reports of such inspections.

As a result of the compelling health and welfare concerns stemming from the COVID–19 pandemic, Trading Permit Holders are facing potentially significant disruptions to their normal business operations that include staff absenteeism, the increased use of remote offices or telework arrangements, travel or transportation limitations, and technology interruptions or slowdowns. Pandemic-related operational changes have made it impracticable for Trading Permit Holders to conduct the on-site inspections pursuant to Rules 8.16(f) and 9.2(d) at many or most locations for calendar year 2020 because this compliance function requires firm employees to travel to geographically dispersed branch and non-branch office locations. Such travel not only has been restricted by government orders,[12] but also puts the health and safety of employees at great risk of contracting and spreading COVID–19.[13] By mid-year, with many restrictive measures still in place, and in some instances additional quarantine requirements imposed on interstate travel, on-site inspections of Trading Permit Holder offices or locations scheduled for calendar year 2020 remain pending. The acute health and safety concerns related to COVID–19 persist, with the number of confirmed cases of COVID–19 in the U.S. continuing to rise through the fall of 2020.[14] While Trading Permit Holders have continued to supervise all offices and locations by, among other things, implementing remote supervisory practices through novel uses of technology as well as existing methods of supervision (*e.g.,* supervisory checklists, surveillance tools, incident trackers, email review, and trade exception reports),[15] they are still experiencing logistical challenges related to conducting the onsite portion of their inspections due to continuing business and governmental restrictions and public health concerns.[16] As a result, the Exchange understands that Trading Permit Holders have not yet been able to conduct on-site inspections scheduled for calendar year 2020, and, with no certainty as to when pandemic-related health concerns will subside and restrictions recently re-implemented in light of the resurgence of cases during the fall of 2020,[17] Trading Permit Holders may have a considerable backlog of 2020 inspections that may be difficult, if not impossible, to overcome on or before calendar year 2020 ends. Additionally, the Exchange recognizes that planning on-site inspections for calendar year 2021 for Trading Permit Holder branch and non-branch offices and locations in the current environment may be impacted as well. In light of pandemic-related developments and the approaching end of calendar year 2020, the Exchange believes it is appropriate to provide tailored temporary relief for Trading Permit Holders to meet their inspection obligations under Rule 8.16(f) and Rule 9.2(d) for calendar years 2020 and 2021.

Specifically, the Exchange proposes to adopt temporary language in Rule 8.16(f), and to adopt temporary Rule 9.2(d)(4), to provide that each Trading Permit Holder obligated to complete an office inspection pursuant to Rule 8.16(f) and Rule 9.2(d), respectively, in calendar year 2020 will be deemed to have satisfied such obligation if the applicable inspection is completed on or before March 31, 2021. The Exchange believes that this proposed temporary extension of time is tailored to address the needs and constraints on a Trading Permit Holder's operations during the COVID–19 pandemic, without significantly compromising critical investor protection, as potential risks that may arise from providing firms additional time to comply with their inspection obligations due in calendar year 2020 are mitigated by their ongoing supervisory obligations, off-site monitoring, and the temporary nature of the extension. The proposed extension will provide Trading Permit Holders with an opportunity to better manage the operational challenges resulting from the COVID–19 pandemic and the

[8] *See e.g.,* FINRA Regulatory Notice 20–16 (May 2020) (''Notice 20–16'') (describing practices implemented by small, mid-sized and large firms to transition to, and supervise in, remote work environment during the COVID–19 pandemic).

[9] The Exchange notes that the term Trading Permit Holder includes Trading Permit Holder organizations. *See* Eleventh Amended and Restated Bylaws of Cboe Exchange, Inc., Section 1.1(f).

[10] The Exchange notes that any location that is responsible for supervising the activities of persons associated with a Trading Permit Holder or TPH organization at one or more non-branch locations of such Trading Permit Holder or TPH organization is considered to be a branch office. *See* Rule 3.40(c).

[11] A Trading Permit Holder may demonstrate to the satisfaction of the Exchange that because of proximity, special reporting or supervisory practice, other arrangements may satisfy this Rule's requirements for a particular branch office, or that, based upon the written policies and procedures of such Trading Permit Holder organization providing for a systematic risk-based surveillance system, the Trading Permit Holder organization submits a proposal to the Exchange and receives, in writing, an exemption from the requirement in 9.2(d), pursuant to Rule 9.2(e).

[12] *See e.g.,* City of Chicago, Emergency Travel Order (November 10, 2020) *https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html* (announcing certain travel restrictions applicable to different states based on the status of the outbreak in the states and how the data compares to the situation in Chicago); New York Department of Health, Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel (November 3, 2020).

[13] *See* CDC, Travel During the COVID–19 Pandemic (updated October 21, 2020) *https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html* (stating, in part, ''[t]ravel increases your chance of getting and spreading COVID–19. Staying home is the best way to protect yourself and others from COVID–19'').

[14] *See* CDC, COVIDView, Key Updates for Week 44, ending October 31, 2020 (November 5, 2020) *https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/covidview-11-06-2020.pdf* (stating that surveillance indicators tracking levels of SARS-CoV–2 virus circulation and associated illnesses have been increasing since September).

[15] *See supra* note 8.

[16] *See supra* note 12.

[17] *See supra* note 14.

resources needed to fulfill these supervisory obligations during the pandemic.

In addition to this, the Exchange proposes to extend temporary remote inspection relief for calendar year 2020 and 2021. In particular, the Exchange proposes to adopt temporary Rule 9.2(d)(5), which provides that each Trading Permit Holder obligated to conduct an inspection of a branch office or non-branch location in calendar year 2020 and calendar year 2021 pursuant to Rule 8.16(f) [18] and Rule 9.2(d), as applicable, may, subject to the requirements of this Rule 9.2.(d)(5), satisfy such obligation by conducting the applicable inspection remotely, without an on-site visit to the office or location. In accordance with Rules 8.16(f) and 9.2(d)(4), inspections for calendar year 2020 must be completed on or before March 31, 2021. Inspections for calendar year 2021 must be completed on or before December 31, 2021. Notwithstanding proposed Rule 9.2(d)(5), a Trading Permit Holder remains subject to the other requirements of Rules 8.16(f) and 9.2(d).

The proposed rule change also adopts written supervisory procedures for remote inspections in proposed Rule 9.2(d)(5)(A), which provides that, consistent with a Trading Permit Holder's obligations under Rule 8.16(f) and Rule 9.2(d), a Trading Permit Holder that elects to conduct each of its calendar year 2020 or calendar year 2021 inspections remotely must amend or supplement its written supervisory procedures to provide for remote inspections that are reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations, and with applicable Exchange Rules. Reasonably designed procedures for conducting remote inspections of offices or locations should include, among other things: (i) A description of the methodology, including technologies permitted by the Trading Permit Holder, that may be used to conduct remote inspections; and (ii) the use of other risk-based systems employed generally by the Trading Permit Holder to identify and prioritize for review those areas that pose the greatest risk of potential violations of applicable securities laws and regulations, and of applicable Exchange Rules. The Exchange believes the proposed rule change is consistent with a Trading Permit Holder's existing supervisory obligations to establish and maintain written supervisory procedures for branch office reviews [19] and reviews of non-branch offices and locations.[20]

Proposed temporary Rule 9.2(d)(5)(B) provides that the requirement to conduct inspections of offices and locations is one part of a Trading Permit Holder's overall obligation to have an effective supervisory system and, therefore, a Trading Permit Holder must continue with its ongoing review of the activities and functions occurring at all offices and locations, whether or not the Trading Permit Holder conducts inspections remotely. A Trading Permit Holder's use of a remote inspection of an office or location will be held to the same standards for review as set forth under Rule 8.16(f) and Rule 9.2(d). Where a Trading Permit Holder's remote inspection of an office or location identifies any indicators of irregularities or misconduct (*i.e.,* ''red flags''), [21] the Trading Permit Holder may need to impose additional supervisory procedures for that office or location or may need to provide for more frequent monitoring or oversight of that office or location, or both, including potentially a subsequent physical, on-site visit on an announced or unannounced basis when the Trading Permit Holder's operational difficulties associated with COVID–19 abate, nationally or locally as relevant, and the challenges a Trading Permit Holder is facing in light of the public health and safety concerns make such on-site visits feasible using reasonable best efforts. The temporary relief provided by this Rule 9.2(d)(5) does not extend to a Trading Permit Holder's inspection requirements beyond calendar year 2021 and such inspections must be conducted in compliance with Rule 9.2(d)(1) through (3). The Exchange believes that the proposed rule is consistent with a Trading Permit Holder's existing supervisory obligations to maintain policies and procedures, and a system for applying such procedures, reasonably designed to achieve compliance with, as well as assist in preventing and detecting violations of, applicable securities laws and regulations and Exchange Rules.[22]

Finally, proposed temporary Rule 9.2(d)(5)(C) provides for a documentation requirement and specifically provides that a Trading Permit Holder must maintain and preserve a centralized record for each of calendar year 2020 and calendar year 2021 that separately identifies: (i) All offices or locations that had inspections that were conducted remotely; and (ii) any offices or locations for which the Trading Permit Holder determined to impose additional supervisory procedures or more frequent monitoring, as provided in Rule 9.2(d)(5)(B) above. A Trading Permit Holder's documentation of the results of a remote inspection for an office or location must identify any additional supervisory procedures or more frequent monitoring for that office or location that were imposed as a result of the remote inspection. The Exchange believes that this documentation requirement would help readily distinguish the offices and locations that underwent remote inspections and their attendant supervisory procedures, and their more frequent monitoring, as applicable.

As noted above, even in the current environment, Trading Permit Holders have an ongoing obligation to establish and maintain a system to supervise the activities of their associated persons that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable Exchange Rules. The proposed amendments to Rule 8.16(f) and proposed Rule 9.2(d)(4) and (d)(5) are not intended to lessen the supervisory obligations prescribed under the Exchange Rules. The Exchange believes that the proposed temporary rule changes, which address the needs and constraints on a Trading Permit Holder's operations during the COVID–19 pandemic by extending the time to conduct inspections for calendar year 2020 and permitting firms to remotely inspect, subject to specified requirements described above, their

[18] The proposed rule change adds language to Rule 8.16(f), which provides that the temporary remote inspection relief provided in Rule 9.2(d)(5) will apply to each Trading Permit Holder obligated to complete an office inspection pursuant to Rule 8.16(f) in calendar year 2020 or calendar year 2021.

[19] *See* Rule 3.40(f).

[20] *See* Rule 8.16(e).

[21] Red flags that suggest the increased risk or occurrence of violations may include, among other events: customer complaints; an unexplained increase or change in the types of investments or trading concentration that a representative is recommending or trading; an unexpected improvement in a representative's production, lifestyle, or wealth; questionable or frequent transfers of cash or securities between customer or third party accounts, or to or from the representative; a representative that serves as a power of attorney, trustee or in a similar capacity for a customer or has discretionary control over a customer's account(s); representative with disciplinary records; customer investments in one or a few securities or class of securities that is inconsistent with firm policies related to such investments; churning; trading that is inconsistent with customer objectives; numerous trade corrections, extensions, liquidations; or significant switching activity of mutual funds or variable products held for short time periods. *See generally* SEC Division of Market Regulation, Staff Legal Bulletin 17: Remote Office Supervision (March 19, 2004).

[22] *See generally* Rule 8.16; *and see* Rule 9.2(g)(5)(A).

offices and locations for calendar years 2020 and 2021, would provide Trading Permit Holders a way to comply with Rules 8.16(f) and 9.2(d) that would not materially diminish, and is reasonably designed to achieve, the investor protection objectives of the inspection requirements under these unique circumstances. The Exchange notes that potential risks that may arise from providing Trading Permit Holders extended time to conduct their 2020 inspections and the option to conduct their inspections remotely are mitigated by their use of technology to meet their supervisory obligations on an ongoing basis, the unique circumstances under which they are operating, and the temporary nature of the proposed rules, which would expire on March 31, 2021 and December 31, 2021, respectively.[23]

The Exchange notes that the proposed temporary rules are substantively identical to the temporary inspection extension and remote relief rules recently filed by the Financial Industry Regulatory Authority (''FINRA'').[24] The Exchange notes too that it will continue to monitor the situation and engage with Trading Permit Holders, other financial regulators, and governmental authorities to determine whether further regulatory relief or guidance related to Rules 8.16 and 9.2 may be appropriate.

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.[25] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[26] 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)[27] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that, in light of the impact of COVID–19 on the performance of on-site office and location inspections pursuant to Rules 8.16(f) and 9.2(d), the proposed temporary rule changes are intended to provide Trading Permit Holders additional time to comply with their Rule 8.16(f) and 9.2(d) inspection obligations due in calendar year 2020 and a temporary regulatory option to conduct inspections of offices and locations remotely for calendar years 2020 and 2021. The proposed temporary rule changes do not relieve firms from meeting their existing regulatory obligations to establish and maintain a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable Exchange Rules, which directly serve investor protection. In a time when faced with unique challenges resulting from the COVID–19 pandemic, the Exchange believes that the proposed temporary rule changes provide appropriately tailored relief that will afford Trading Permit Holders the ability to observe the recommendations of public health officials to provide for the health and safety of their personnel, while continuing to serve and promote the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed temporary rule changes will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the Act, because the extension for inspections and the remote inspection relief will apply equally to all Trading Permit Holders required to conduct office and location inspections in calendar year 2020 and 2021. The Exchange further does not believe that the proposed temporary rule changes will impose any burden on intermarket competition because it relates only to the extension of time for 2020 inspections and the manner in which inspections for 2020 and 2021 may be conducted. Additionally, and as stated above, FINRA has recently submitted filings to adopt substantively identical temporary inspection relief rules for its members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[28] and Rule 19b–4(f)(6)[29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–112 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-2020–112. This file

[23] *See supra* notes 5 and 6.

[24] *See* FINRA Rule 3110.16; Securities and Exchange Act Release No. 89188 (June 30, 2020), 85 FR 40713 (July 7, 2020) (SR–FINRA–2020–019); *and* SR–FINRA–2020–040 (filed November 6, 2020) available at *https://www.finra.org/sites/default/files/2020-11/SR-FINRA-2020-040.pdf.*

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] *Id.*

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f)(6).

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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE-2020–112 and should be submitted on or before January 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27202 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 16805 and # 16806; North Carolina Disaster Number NC–00120]

Administrative Declaration of a Disaster for the State of North Carolina

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of North Carolina dated 12/4/2020.

Incident: Tropical Storm Eta.

Incident Period: 11/12/2020.

DATES: Issued on 12/04/2020.

Physical Loan Application Deadline Date: 02/02/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 09/07/2021.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT:

A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations. The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Alexander

Contiguous Counties:

North Carolina: Caldwell, Catawba, Iredell, Wilkes

The Interest Rates are:

	Percednt
For Physical Damage:	
Homeowners With Credit Available Elsewhere	2.250
Homeowners Without Credit Available Elsewhere	1.125
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	3.000
Non-Profit Organizations With Credit Available Elsewhere	2.000
Non-Profit Organizations Without Credit Available Elsewhere	2.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	3.000
Non-Profit Organizations Without Credit Available Elsewhere	2.000

The number assigned to this disaster for physical damage is 16805 8 and for economic injury is 16806 0.

The State which received an EIDL Declaration # is North Carolina.

(Catalog of Federal Domestic Assistance Number 59008)

Jovita Carranza,

Administrator.

[FR Doc. 2020–27196 Filed 12–10–20; 8:45 am]

BILLING CODE 8026–03–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2018–0012]

Privacy Act of 1974; System of Records

AGENCY: Office of Analytics, Review, and Oversight, Social Security Administration (SSA).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act, we are issuing public notice of our intent to modify an existing system of records entitled, Anti-Fraud Enterprise Solution (AFES) (60–0388), last published on May 3, 2018. This notice publishes details of the modified system as set forth under the caption, **SUPPLEMENTARY INFORMATION**.

DATES: The system of records notice (SORN) is applicable upon its publication in today's **Federal Register**. We invite public comment on the routine uses or other aspects of this SORN. In accordance with 5 U.S.C. 552a(e)(4) and (e)(11), the public is given a 30-day period in which to submit comments. Therefore, please submit any comments by January 11, 2021.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress may comment on this publication by writing to the Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, or through the Federal e-Rulemaking Portal at *http://www.regulations.gov.* Please reference docket number SSA–2018–0012. All comments we receive will be available for public inspection at the above address and we will post them to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Neil Etter, Government Information Specialist, Privacy Implementation Division, Office of Privacy and Disclosure, Office of the General Counsel, SSA, Room G–401 West High Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, telephone: (410) 966–5855, email: *Neil.Etter@ssa.gov.*

SUPPLEMENTARY INFORMATION: We are modifying the system of records name from ''Anti-Fraud Enterprise Solution'' to ''Anti-Fraud (AF) System'' to reflect the system accurately. The AF System is an agency-wide and overarching system that we use to detect, prevent, and mitigate fraud in SSA's programs. The AF System collects and maintains personally identifiable information (PII)

[30] 17 CFR 200.30–3(a)(12).

to assist in identifying suspicious or potentially fraudulent activities performed by individuals across our programs and service delivery methods.

We are claiming that the AF System is exempt from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Some information in the AF System relates to our efforts to mitigate, detect, and investigate fraud in Social Security's programs and systems and to collaborate with the Office of the Inspector General in fraud investigations and prosecutions. Therefore, we need these exemptions to protect information from public access. The exemptions are required to avoid disclosure of screening techniques; to protect the identities and physical safety of confidential informants; to ensure our ability to obtain information from third parties and other sources; and to protect the privacy of third parties. Allowing an individual to access the information in AF System could permit the individual to avoid detection or apprehension.

In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of the AF System and the overall law enforcement process, we may, at our discretion, grant notification of or access to a record in the AF System. If an individual is denied any right, privilege, or benefit to which he or she is otherwise entitled under Federal law due to the maintenance of material in the AF System, we will provide such material to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to us under an express promise that the identity of the source would be held in confidence.

SSA claims exemption from Privacy Act subsection (c)(3) (Accounting and Disclosure); subsection (d) (Access and Amendment to Records); subsection (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements); and subsection (f) (Agency Rules) for this system of records. We claim exemption from these Privacy Act subsections for the AF System because release of the accounting of disclosures, access to the records, and notice to individuals with respect to existence of records could alert the individual whom might be a subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation. Disclosures of accounting would therefore present a serious impediment to law enforcement efforts. These Privacy Act subsections would permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses, or evidence, and to avoid detection or apprehension, which would undermine the investigative process. Thereby, these Privacy Act subsections would undermine SSA investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

The AF System supports our goal of enhancing SSA's fraud prevention and detection activities by protecting the public's data, providing secure online services, and increasing payment accuracy. The AF System provides us with access to a single repository of data that currently resides across many different SSA systems of records. We use the PII in the AF System to employ advanced data analytics solutions to identify patterns indicative of fraud, improve the functionality of data-driven fraud activations, conduct real-time risk analysis, and integrate developing technology into our anti-fraud business processes. This solution also provides true business intelligence to agency leadership with assistance in data-driven anti-fraud decision-making. We use the records in the AF System to detect indications of fraud in all our programs and operations initiated by individuals outside of SSA or internal to SSA (*e.g.,* SSA employees).

In accordance with 5 U.S.C. 552a(r), we provided a report to OMB and Congress on this modified system of records. Concurrently, in today's edition of the **Federal Register**, we are publishing a Notice of Proposed Rulemaking (NPRM), in which we propose the addition of this system of records to the list of systems exempted under the Privacy Act.[1]

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

SYSTEM NAME AND NUMBER:

Anti-Fraud (AF) System, 60–0388

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION: SOCIAL SECURITY ADMINISTRATION, OFFICE OF ANALYTICS, REVIEW, AND OVERSIGHT, OFFICE OF ANTI-FRAUD PROGRAMS, ROBERT M. BALL BUILDING, 6401 SECURITY BOULEVARD, BALTIMORE, MD 21235.

SYSTEM MANAGER(S):

Social Security Administration, Office of Analytics, Review, and Oversight, Office of Anti-Fraud Programs, Robert M. Ball Building, 6401 Security Boulevard, Baltimore, MD 21235, *DCARO.OAFP.Controls@ssa.gov.*

[1] The public may access the NPRM at *www.regulations.gov* and searching under the common docket folder, ''SSA–2018–00012''.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 205(a) and 702(a)(5) of the Social Security Act, as amended, and the Fraud Reduction and Data Analytics Act of 2015 (Pub. L. 114–186).

PURPOSE(S) OF THE SYSTEM:

The records maintained in the AF System are necessary to detect, prevent, mitigate, and track the likelihood of fraudulent activity in SSA's programs and operations. We will use information in this system to identify patterns of fraud and to improve data-driven fraud activations and real-time analysis. We may use the results of these data analysis activities, including fraud leads and vulnerabilities, in our fraud investigations and other activities to support program and operational improvements.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains information about individuals who are relevant to suspicious or potentially fraudulent activities connected with Social Security programs and operations, including but not limited to, the subjects of an investigation, Social Security applicants and beneficiaries, recipients, Supplemental Security income applicants and recipients, representative payees, appointed representatives, complainants, key witnesses, and current or former employees, contractors, or agents.

CATEGORIES OF RECORDS IN THE SYSTEM:

We will collect and maintain information in connection with our review of all suspicious or potentially fraudulent activities in Social Security programs and operations. We will also collect and maintain SSA and non-SSA breach information, including data generated internally or received from businesses with whom SSA has a relationship or government entities or partners.

The AF System includes records on individuals that it obtains from other SSA systems of records and will maintain information such as:

Enumeration Information: This information may include name, Social Security number (SSN), date of birth, parent name(s), address, and place of birth.

Earnings Information: This information may include yearly earnings and quarters of coverage information.

Social Security Benefit Information: This information may include disability status, benefit payment amount, data relating to the computation, appointed representative, and representative payee.

Supplemental Security Income payment information: This information may include may include disability status, benefit payment amount, data relating to the computation, appointed representative, and representative payee.

Representative Payee Information: This information may include names, SSNs, and addresses of representative payees and relationship with the beneficiary.

Persons Conducting Business with Us Through Electronic Services: This information may include name, address, date of birth, SSN, knowledge-based authentication data, and blocked accounts.

Employee Information: This information may include a personal identification number (PIN), employee name, job title, SSN about our employees, contractors, or agents.

RECORD SOURCE CATEGORIES:

We obtain information in this system from individuals (*i.e.,* the public and SSA staff), other Government agencies, and private entities. The largest record sources for the AF System is information the agency collects and maintains for purposes related to other business processes that have established systems of records, such as the Master Files of SSN Holders and SSN Applications (60–0058), the Claims Folders System (60–0089), the Master Beneficiary Record (60–0090), the Supplemental Security Income Record and Special Veterans Benefits (60–0103), the Personal Identification Number File (60–0214), the Master Representative Payee File (60–0222), and the Central Repository of Electronic Authentication Data Master File (60–0373). The AF System may pull any relevant information from any SSA system of records. For a full listing of our system of records notices that could provide information to the AF System, please see the Privacy Program section of SSA's website.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

We will disclose records pursuant to the following routine uses; however, we will not disclose any information defined as ''return or return information'' under 26 U.S.C. 6103 of the Internal Revenue Code (IRC), unless authorized by statute, the Internal Revenue Service (IRS), or IRS regulations.

1. To any agency, person, or entity in the course of an SSA investigation to the extent necessary to obtain or to verify information pertinent to an SSA fraud investigation.

2. To a congressional office in response to an inquiry from that office made on behalf of, and at the request of, the subject of the record or a third party acting on the subject's behalf.

3. To the Office of the President in response to an inquiry received from that office made on behalf of, and at the request of, the subject of record or a third party acting on the subject's behalf.

4. To the Department of Justice (DOJ), a court or other tribunal, or another party before such court or tribunal, when:

(a) SSA, or any component thereof; or

(b) any SSA employee in his or her official capacity; or:

(c) any SSA employee in his or her individual capacity where DOJ (or SSA where it is authorized to do so) has agreed to represent the employee; or

(d) the United States or any agency thereof where SSA determines the litigation is likely to SSA or any of its components, is a party to the litigation or has an interest in such litigation, and we determine that the use of such records by DOJ, a court or other tribunal, or another party before the tribunal, is relevant and necessary to the litigation, provided, however, that in each case, we determine that such disclosure is compatible with the purpose for which the records were collected.

5. To contractors and other Federal agencies, as necessary, for the purpose of assisting us in the efficient administration of its programs. We will disclose information under this routine use only in situations in which we may enter into a contractual or similar agreement to obtain assistance in accomplishing an SSA function relating to this system of records.

6. To student volunteers, individuals working under a personal services contract, and other workers who technically do not have the status of Federal employees, when they are performing work for SSA, as authorized by law, and they need access to PII in our records in order to perform their assigned agency functions.

7. To Federal, State, and local law enforcement agencies and private security contractors, as appropriate, if necessary:

(a) to enable them to protect the safety of SSA employees and customers, the security of the SSA workplace, and the operation of our facilities, or

(b) to assist investigations or prosecutions with respect to activities that affect such safety and security, or activities that disrupt the operation of our facilities.

8. To the National Archives and Records Administration (NARA) under 44 U.S.C. 2904 and 2906.

9. To appropriate agencies, entities, and persons when:

(a) SSA suspects or has confirmed that there has been a breach of the system of records;

(b) SSA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, SSA (including its information systems, programs, and operations), the Federal Government, or national security; and

(c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with SSA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

10. To another Federal agency or Federal entity, when we determine that information from this system of records is reasonably necessary to assist the recipient agency or entity in:

(a) responding to suspected or confirmed breach; or

(b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

11. To the Equal Employment Opportunity Commission, when requested in connection with investigations into alleged or possible discriminatory practices in the Federal sector, examination of Federal affirmative employment programs, compliance by Federal agencies with the Uniform Guidelines on Employee Selection Procedures, or other functions vested in the Commission.

12. To the Office of Personnel Management, Merit Systems Protection Board, or the Office of Special Counsel in connection with appeals, special studies of the civil service and other merit systems, review of rules and regulations, investigations of alleged or possible prohibited personnel practices, and other such functions promulgated in 5 U.S.C. Chapter 12, or as may be required by law.

13. To the Federal Labor Relations Authority, the Office of the Special Counsel, the Federal Mediation and Conciliation Service, the Federal Service Impasses Panel, or an arbitrator requesting information in connection with the investigations of allegations of unfair practices, matters before an arbitrator or the Federal Service Impasses Panel.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

We maintain records in this system in paper and electronic form.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

We will retrieve records by the individual's name, SSN, as well as internal transaction identifiers (*e.g.,* transaction identification for the internet Claim application, transaction identification for an electronic online Direct Deposit change, etc.). Information from these retrieved records that matches across other agency systems of records will also create a linkage to retrieve those records, because the system is able to show key connections or overlaps based on similar information stored in different data sources at the agency.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

These records are currently unscheduled. We retain the records in accordance with NARA approved records schedules. In accordance with NARA rules codified at 36 CFR 1225.16, we maintain unscheduled records until NARA approves an agency-specific records schedule or publishes a corresponding General Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

We retain electronic and paper files containing personal identifiers in secure storage areas accessible only by our authorized employees who have a need for the information when performing their official duties. Security measures include, but are not limited to, the use of codes and profiles, personal identification number and password, and personal identification verification cards. We restrict access to specific correspondence within the system based on assigned roles and authorized users. We maintain electronic files with personal identifiers in secure storage areas. We will use audit mechanisms to record sensitive transactions as an additional measure to protect information from unauthorized disclosure or modification. We keep paper records in cabinets within secure areas, with access limited to only those employees who have an official need for access in order to perform their duties.

We annually provide our employees and contractors with appropriate security awareness training that includes reminders about the need to protect PII and the criminal penalties that apply to unauthorized access to, or disclosure of PII. *See* 5 U.S.C. 552a(i)(1). Furthermore, employees and contractors with access to databases maintaining PII must annually sign a sanction document that acknowledges their accountability for inappropriately accessing or disclosing such information.

RECORD ACCESS PROCEDURES:

This system of records is exempt from the Privacy Act's access, contesting, and notification provisions stated below. However, individuals may submit requests for information about whether this system contains a record about them by submitting a written request to the system manager at the above address, which includes their name, SSN, or other information that may be in this system of records that will identify them. Individuals requesting notification of, or access to, a record by mail must include (1) a notarized statement to us to verify their identity or (2) must certify in the request that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

Individuals requesting notification of or access to, records in person must provide their name, SSN, or other information that may be in this system of records that will identify them, as well as provide an identity document, preferably with a photograph, such as a driver's license. Individuals lacking identification documents sufficient to establish their identity must certify in writing that they are the individual they claim to be and that they understand that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

CONTESTING RECORD PROCEDURES:

Same as record access procedures. Individuals should also reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is incomplete, untimely, inaccurate, or irrelevant. These procedures are in accordance with our regulations at 20 CFR 401.65(a).

NOTIFICATION PROCEDURES:

Same as record access procedures. These procedures are in accordance with our regulations at 20 CFR 401.40 and 401.45.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

This system of records is exempt from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c), and (e) and have been published in today's **Federal Register**.

HISTORY:

Anti-Fraud Enterprise Solution (AFES), 83 FR 19588.

[FR Doc. 2020–26753 Filed 12–10–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 11226]

Notice of Department of State Sanctions Actions Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria

SUMMARY: The Secretary of State has imposed sanctions on four individuals, Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria.

DATES: The Secretary of State's determination and selection of certain sanctions to be imposed upon the four individuals identified in the **SUPPLEMENTARY INFORMATION** section were effective on August 20, 2020.

FOR FURTHER INFORMATION CONTACT: Taylor Ruggles, Director, Office of Economic Sanctions Policy and Implementation, Bureau of Economic and Business Affairs, Department of State, Washington, DC 20520, tel.: (202) 647 7677, email: *RugglesTV@state.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2(a) of E.O. 13894 of October 14, 2019, the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Homeland Security, and the United States Trade Representative, and with the President of the Export-Import Bank, the Chairman of the Board of Governors of the Federal Reserve System, and other agencies and officials as appropriate, is authorized to impose on a person any of the sanctions described in section 2(c) of E.O. 13894 upon determining that the person met any criteria set forth in section 2(a)(i)(A) or section 2(a)(i)(D) of E.O. 13894.

The Secretary of State has determined, pursuant to Section 2(a)(i)(A) of E.O. 13894, that Fadi Saqr, Ghaith Dalah, and Samer Ismail are responsible for or complicit in, have directly or indirectly engaged in, attempted to engage in, or financed, the

obstruction, disruption, or prevention of a ceasefire in northern Syria.

The Secretary of State has determined, pursuant to Section 2(a)(i)(D) of E.O. 13894, that Yasser Ibrahim is responsible for or complicit in, has directly or indirectly engaged in, attempted to engage in, or financed, the obstruction, disruption, or prevention of efforts to promote a political solution to the conflict in Syria.

Pursuant to Sections 2(b) and 2(c) of E.O. 13894, the Secretary of State has selected the following sanctions to be imposed upon Fadi Saqr, Ghaith Dalah, Samer Ismail, and Yasser Ibrahim:

- Block all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of Fadi Saqr, Ghaith Dalah, Samer Ismail, or Yasser Ibrahim, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in (Section 2(c)(iv) of E.O. 13894).

Peter D. Haas,

Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2020–27122 Filed 12–10–20; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice: 11253]

Notice of Department of State Sanctions Actions Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria

SUMMARY: The Secretary of State has imposed sanctions on three individuals Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Syria.

DATES: The Secretary of State's determination and selection of certain sanctions to be imposed upon the three individuals identified in the **SUPPLEMENTARY INFORMATION** section were effective on September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Taylor Ruggles, Director, Office of Economic Sanctions Policy and Implementation, Bureau of Economic and Business Affairs, Department of State, Washington, DC 20520, tel.: (202) 647 7677, email: *RugglesTV@state.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2(a) of E.O. 13894 of October 14, 2019, the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Homeland Security, and the United States Trade Representative, and with the President of the Export-Import Bank, the Chairman of the Board of Governors of the Federal Reserve System, and other agencies and officials as appropriate, is authorized to impose on a person any of the sanctions described in section 2(c) of E.O. 13894 upon determining that the person met any criteria set forth in section 2(a)(i)(A) or section 2(a)(ii) of E.O. 13894.

The Secretary of State has determined, pursuant to Section 2(a)(i)(A) of E.O. 13894, that Milad Jedid is responsible for or complicit in, has directly or indirectly engaged in, attempted to engage in, or financed, the obstruction, disruption, or prevention of a ceasefire in northern Syria.

The Secretary of State has determined, pursuant to Section 2(a)(ii) of E.O. 13894, that Nasreen Ibrahim and Rana Ibrahim are adult family members of a person designated under subsection (a)(i) of E.O. 13894.

Pursuant to Sections 2(b) and 2(c) of E.O. 13894, the Secretary of State has selected the following sanctions to be imposed upon Milad Jedid, Nasreen Ibrahim, and Rana Ibrahim:

- Block all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of Milad Jedid, Nasreen Ibrahim, or Rana Ibrahim, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in (Section 2(c)(iv) of E.O. 13894).

Peter D. Haas,

Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2020–27118 Filed 12–10–20; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice of Surplus Property Release; Spokane International Airport, Spokane, Washington

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release surplus property.

SUMMARY: Notice is being given that the FAA is considering a request from the City of Spokane, Washington and the County of Spokane, Washington, to waive the surplus property requirements for approximately 1.07 acres of airport property located at Spokane International Airport, in Spokane, Washington. The subject property is located away from the aeronautical area and currently vacant. The property will remain vacant of any structures, as it will be utilized for public road improvements creating a roundabout for access to the Interstate 90 freeway. This release will allow the City and County to sell 1 parcel of airport property to WSDOT interested in accommodating increased traffic and access to the business park. There will be proceeds generated from the proposed release of this property for public road improvements. The City and County will receive not less than fair market value for the property and the revenue generated from the sale will be used for airport purposes. It has been determined through study that the subject parcel will not be needed for aeronautical purposes.

DATES: Comments are due within 30 days of the date of the publication of this notice in the **Federal Register**. Written comments can be provided to Ms. Mandi M. Lesauis, Program Specialist, Seattle Airports District Office, 2200 S. 216th Street, Des Moines, Washington, 98198, (206) 231–4140.

FOR FURTHER INFORMATION CONTACT: Comments on this application may be mailed or delivered to the FAA at the following address:

Ms. Mandi Lesauis, Compliance Specialist, at the Federal Aviation Administration, 2200 S. 216th St., Des Moines, Washington 98198.

(Authority: 49 U.S.C. 47153(c))

Issued in Des Moines, Washington, on December 7, 2020.

William C. Garrison,

Acting Manager,Seattle Airports District Office.

[FR Doc. 2020–27230 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No 2020–0260]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Verification of Authenticity of Foreign License, Rating, and Medical Certification; Extension of Comment Period

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice; extension of comment period.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on 4/15/2020. The collection involves information used to identify foreign airmen in order to allow the agency to verify their foreign license when used to qualify for a U.S. certificate. Respondents are holders of foreign licenses wishing to obtain U.S. Certificates.

DATES: Written comments should be submitted by January 11, 2021.

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.* 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: Margaret A Hawkins by email at: *Margaret.A.Hawkins@faa.gov;* phone: 1–405–954–7045.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0724.

Title: Verification of Foreign License, Rating and Medical Certification.

Form Numbers: Form 8060–71.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on 04/15/2020 (85 FR 21061). The information collected is used to properly identify airmen to allow the agency to verify their foreign license being used to qualify for a U.S. certificate. The respondents are holders of a foreign license wishing to obtain a U.S. certificate. A person who is applying for a U.S. pilot certificate or rating on the basis of a foreign pilot license must apply for verification of that license at least 90 days before arriving at the designated FAA FSDO where the applicant intends to receive the U.S. pilot certificate.

Respondents: Approximately 8,700 foreign applicants for U.S. certificates annually.

Frequency: On occasion.

Estimated Average Burden per Response: 10 minutes.

Estimated Total Annual Burden: 1,450 Hours.

Issued in Oklahoma City, OK on November 19, 2020.

Margaret A Hawkins,

Compliance Specialist, Forms Manager, Airmen Certification Branch, AFB–720.

[FR Doc. 2020–26004 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Collin County, Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), Department of Transportation.

ACTION: Federal notice of intent to prepare an environmental impact statement (EIS).

SUMMARY: FHWA, on behalf of TxDOT, is issuing this notice to advise the public that an EIS will be prepared for a proposed transportation project to construct an eight-lane freeway along the United States (US) Highway 380 corridor from Coit Road in Prosper (west of McKinney) to Farm-to-Market Road (FM) 1827 (east of McKinney), in Collin County, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Endres, Project Manager, TxDOT Dallas District, 4777 E. US Highway 80, Mesquite, Texas 75150; Phone (214) 320–4469 or email: at *Stephen.Endres@txdot.gov.* TxDOT's normal business hours are 8:00 a.m.-5:00 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

The purpose of the proposed project is to manage congestion and improve east-west connectivity and safety across the project area. The project is needed due to regional population growth, increasing traffic congestion, and crash rates higher than the statewide average. Project alternatives include improvement of the existing US 380 alignment (a distance of approximately 12 miles) and new location alternatives ranging in length from approximately 14.8 miles to 16.3 miles that would pass through the communities of Prosper, McKinney, and New Hope, and unincorporated areas of Collin County. The proposed project would provide an access-controlled freeway with one-way frontage roads on each side within an anticipated right-of-way width of 330 to 400 feet. The typical freeway section would consist of four 12-foot (ft.) travel lanes in each direction and 10 ft. inside and outside shoulders. Grade-separated interchanges would include 14 ft. ramps with 2 ft. inside shoulders and 6 ft. outside shoulders, with curb and gutter. Bridges and overpasses along the main lanes would have a desired vertical clearance of 18.5 ft with vertical clearance over railroads desired at 23.5 ft.

In April 2020, TxDOT completed the US 380 Feasibility Study for Collin County, which recommended an alignment for an improved US 380 across Collin County. The Coit Road to FM 1827 section of the Recommended Alignment from the Feasibility Study is the basis for development of the alternatives to be considered in the EIS. The EIS will evaluate a range of build alternatives and a no-build alternative. Possible build alternatives include improvement of the existing US 380 alignment, the Recommended Alignment between Coit Road and FM 1827 from the 2020 US 380 Feasibility Study, and three additional new location alternatives that consider optional alignments through the Town of Prosper within the western portion of the project area and along the East Fork of the Trinity River within the eastern portion of the project area. The following 5 segments combine to form the new location build alternatives under consideration.

Segment A connects Coit Road on the west and the future Ridge Road and Bloomdale Road intersection on the east. This segment follows existing US 380 from Coit Road to near the approximate alignment of future Ridge Road where it turns north and connects to Bloomdale Road. Segment A was a component of the Feasibility Study Recommended Alignment.

Segment B also connects Coit Road on the west and the future Ridge Road and Bloomdale Road intersection to the east.

This segment follows existing US 380 from Coit Road to west of Custer Road (FM 2478) where it turns northeast to intersect with Custer Road and East First Street, then continues northeast to connect to Bloomdale Road at the future extension of Ridge Road.

Segment C begins at State Highway (SH) 5 extending in a southeasterly direction across the Dallas Area Rapid Transit (DART) rail line and the East Fork of the Trinity River, then shifts to a more southerly direction east of and parallel to the East Fork of the Trinity River to connect to existing US 380 near FM 1827.

Segment D also begins at SH 5 extending in a southerly direction across the DART rail line and the East Fork of the Trinity River and continues in a southerly direction west of and parallel to the East Fork of the Trinity River connecting to US 380 near Airport Drive, and following existing US 380 to the east to FM 1827. Segment D was a component of the Feasibility Study Recommended Alignment.

Segment E extends roughly along the alignment of existing Bloomdale Road through north McKinney beginning at the proposed intersection of Ridge Road and Bloomdale Road on the west and SH 5 on the east. This segment includes a new interchange connection with US 75 and SH 5. The location of Segment E is constrained by existing development and existing and proposed utilities along Bloomdale Road. Segment E was a component of the Feasibility Study Recommended Alignment and is a common segment in all the new location build alternatives.

These segments, when linked end-to-end between Coit Road and FM 1827, result in the Purple, Blue, Brown, and Gold Alternatives described below. The Green Alternative to improve the existing US 380 alignment is composed of one segment (Segment F) extending from Coit Road to FM 1827 along existing US 380.

The Purple Alternative is composed of Segments A, E, and D and is approximately 15.8 miles long. It represents the section of the Recommended Alignment from the 2020 Feasibility Study between Coit Road and FM 1827. The Purple Alternative begins at the intersection of Coit Road and US 380 in the Town of Prosper and travels around the north side of McKinney turning south near US 75 and SH 5 to extend along the west side of the East Fork of the Trinity River to connect back to existing US 380 and FM 1827. Grade-separated interchanges would be considered at US 380/Coit Road, the alignment's departure from existing US 380 at future Ridge Road, Wilmeth Road, Ridge Road (McKinney city limits/Collin County line), Lake Forest Drive, County Road (CR) 1006, future Hardin Road (McKinney city limits), Laud Howell development, US 75 (multi-level), SH 5, McIntyre Road, and at its connection back to US 380 near Airport Drive west of FM 1827. Additional interchange locations may be studied.

The Blue Alternative is composed of Segments A, E, and C and is approximately 15.6 miles long. The Blue Alternative differs from the Purple Alternative between US 75/SH 5 and existing US 380 east of McKinney where the alignment follows that of Segment C parallel to and east of the East Fork of the Trinity River. The alignment would connect back to existing US 380 near FM 1827. Grade-separated interchanges would be considered at US 380/Coit Road, the alignment's departure from existing US 380 at future Ridge Road, Wilmeth Road, Ridge Road (McKinney city limits/Collin County line), Lake Forest Drive, CR 1006, future Hardin Road (McKinney city limits), Laud Howell development, US 75 (multi-level), SH 5, CR 338, CR 2933, and at its connection back to US 380 near FM 1827. Additional interchange locations may be studied.

The Brown Alternative, approximately 14.8 miles long, is composed of Segments B, E, and C. It begins at Coit Road and existing US 380 and follows the existing US 380 alignment to west of Custer Road where it turns north and east to travel around the north side of McKinney, connect to US 75/SH 5, and then follows the alignment east of and parallel to the East Fork of the Trinity River to connect to existing US 380 near FM 1827. The Brown Alternative differs from the Blue Alternative in the alignment from Coit Road to the future intersection of Ridge Road and Bloomdale Road (Segment B). Grade-separated interchanges would be considered at the alignment's departure from existing US 380 west of Custer Road, at Custer Road/First St., future Wilmeth Road, future N. Stonebridge Drive, Ridge Road (McKinney city limits/Collin County line), Lake Forest Drive, CR 1006, future Hardin Road (McKinney city limits), Laud Howell development, US 75 (multi-level), SH 5, CR 338, CR 2933, and at its connection back to US 380 near FM 1827. Additional interchange locations may be studied.

The Gold Alternative, composed of Segments B, D, and E, is approximately 16.3 miles long and matches the Brown Alternative between Coit Road and US 75/SH 5 where it turns south along the west side of the East Fork of the Trinity River to connect to existing US 380 near Airport Drive and then follows the exiting US 380 alignment east to FM 1827. Grade-separated interchanges would be considered at the alignment's departure from existing US 380 west of Custer Road, at Custer Road/First St., future Wilmeth Road, future N. Stonebridge Drive, Ridge Road (McKinney city limits/Collin County line), Lake Forest Drive, CR 1006, future Hardin Road (McKinney city limits), Laud Howell development, US 75 (multi-level), SH 5, McIntyre Road, and at its connection back to US 380 near Airport Drive west of FM 1827. Additional interchange locations may be studied.

The Green Alternative (Segment F) would widen the existing US 380 corridor from Coit Road to FM 1827. Grade-separated interchanges would be provided at Coit Road, Custer Road, Stonebridge Drive, Grassmere Lane, Ridge Road, Lake Forest Road, Hardin Road, Community Ave., US 75, SH 5, Airport Drive, and FM 1827.

The new location build alternatives share some common alignments, with potential impacts to wetlands and waters of the US, floodplain/floodway encroachment and need for compensatory storage, conversion of farmland to transportation use, residential and business displacements, cultural resources, wildlife/habitat, air quality, traffic noise, the visual environment, induced growth, and cumulative effects. The Green Alternative would result in potential residential and business displacements, including low-income and minority residents, and impacts to potential historic properties, community facilities, public parks (Section 4(f)), air quality, traffic noise, property access, the visual environment, and cumulative effects.

The proposed action may require issuance of an Individual or Nationwide Permit under Section 404 of the Clean Water Act, Section 401 Water Quality Certification, Section 402/Texas Pollution Discharge Elimination System Permit; conformance with Executive Orders on Environmental Justice (12898), Limited English Proficiency (13166), Wetlands (11990), Floodplain Management (11988), Invasive Species (13112); and compliance with Section 106 of the National Historic Preservation Act, Section 7 of the Endangered Species Act, the Migratory Bird Treaty Act, Section 4(f) of the DOT Act (49 U.S.C. 303), Section 6(f) of the Land and Water Conservation Act (16 U.S.C. 4601), Title VI of the Civil Rights Act, and other applicable Federal and State regulations.

TxDOT anticipates completing the study process for this proposed action by December 2022.

TxDOT will issue a single Final Environmental Impact Statement and Record of Decision document pursuant to 23 U.S.C. 139(n)(2), unless TxDOT determines statutory criteria or practicability considerations preclude issuance of a combined document.

In accordance with 23 U.S.C. 139, cooperating agencies, participating agencies, and the public will be given an opportunity for continued input on project development. A virtual public scoping meeting is planned to be held on January 19, 2021. The meeting materials will be posted on *http://www.drive380.com* starting January 19, 2021, and will remain available through February 2, 2021, which is the date the comment period ends. The meeting will be hosted online and provide an opportunity for the public to review and comment on the draft coordination plan and schedule, the project purpose and need, the range of alternatives, and methodologies and level of detail for analyzing alternatives. It will also allow the public an opportunity to provide input on any expected environmental impacts, anticipated permits or other authorizations, and any significant issues that should be analyzed in depth in the EIS. In addition to the public scoping meeting, a public meeting will be held during development of the draft EIS, and a public hearing will be held after the draft EIS is prepared. Public notice will be given of the time and place of the meeting and hearing.

The public scoping meeting, public meeting, and public hearing will be conducted in English. If you need an interpreter or document translator because English is not your primary language or you have difficulty communicating effectively in English, one will be provided to you. If you have a disability and need assistance, special arrangements can be made to accommodate most needs. If you need interpretation or translation services or you are a person with a disability who requires an accommodation to participate in the public scoping meeting, please contact Mr. Patrick Clarke, Public Information Officer, Dallas District at (214) 320–4483 no later than 4 p.m. (central time), on January 14, 2021. Please be aware that advance notice is required as some services and accommodations may require time for the Texas Department of Transportation to arrange.

The public is requested to identify in writing potential alternatives, information, and analyses relevant to this proposed project. Such information may be provided by email to Mr. Stephen Endres, TxDOT Project Manager at *Stephen.Endres@txdot.gov,* or by mail to the TxDOT Dallas District, 4777 E. US Highway 80, Mesquite, Texas 75150. Such information must be received by February 2, 2021.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2020–27275 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2013–0444; FMCSA–2014–0212; FMCSA–2015–0320; FMCSA–2015–0323; FMCSA–2016–0007; FMCSA–2018–0054]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for nine individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on November 15, 2020. The exemptions expire on November 15, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *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 or submitting material to 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.* Insert the docket number, FMCSA–2013–0444, FMCSA–2014–0212, FMCSA–2015–0320, FMCSA–2015–0323, FMCSA–2016–0007, or FMCSA–2018–0054, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting 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.

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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

On October 28, 2020, FMCSA published a notice announcing its decision to renew exemptions for nine individuals from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (85 FR 68405). The public comment period ended on November 27, 2020, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the nine renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of November and are discussed below.

As of November 15, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following nine individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (85 FR 68405):

Kevin Beamon (NY)
Joshua Cirilo (MN)
Peter DellaRocca, Jr. (PA)
Marvin Fender (CO)
Donald Horst (MD)
Chad T. Knott (MD)
Louis Lerch (IA)
Kyle Loney (WA)
Curtis J. Palubicki (MN)

The drivers were included in docket number FMCSA–2013–0444, FMCSA–2014–0212, FMCSA–2015–0320, FMCSA–2015–0323, FMCSA–2016–0007, and FMCSA–2018–0054. Their exemptions were applicable as of November 15, 2020, and will expire on November 15, 2022.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–27213 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–EX–P

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, 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.*

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0136]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 10 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions are applicable on December 16, 2020. The exemptions expire on December 16, 2022. Comments must be received on or before January 11, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2018–0136 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2018-0136.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *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 or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2018–0136), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2018-0136.* 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.

B. 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-2018-0136* 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.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

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 physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The 10 individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 10 applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The 10 drivers in this notice remain in good standing with the Agency. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

As of December 16, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 10 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Joshua Cogan (MD)
Ronald Cottrell (OR)
Heath Focken (NE)
Ahmed Gabr (NC)
Daniel Hanson (PA)
Arnold Hatton (DE)
Donte Mason (TN)
Taryn Peterson (IA)
Greivin Salazar (CA)
Eric Woods (MD)

The drivers were included in docket number FMCSA–2018–0136. Their exemptions are applicable as of December 16, 2020, and will expire on December 16, 2022.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in § 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 10 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41(b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for two years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–27212 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0012]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt five individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. They are unable to meet the vision requirement in one eye for various reasons. The exemptions enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: The exemptions were applicable on December 3, 2020. The exemptions expire on December 3, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *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 or submitting material to 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-2020-0012* 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.

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,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

On November 2, 2020, FMCSA published a notice announcing receipt of applications from five individuals requesting an exemption from the vision requirement in 49 CFR 391.41(b)(10) and requested comments from the public (85 FR 69382). The public comment period ended on December 2, 2020, and one comment was received.

FMCSA has evaluated the eligibility of these applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received one comment in this proceeding. Tracy Ibinger submitted a comment stating that the Minnesota Department of Public Safety has no objections to the Agency's decision to grant an exemption to Wesley D. Enkers.

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 medical reports about the applicants' vision, as well as their driving records and experience driving with the vision deficiency. The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the November 2, 2020, **Federal Register** notice (85 FR 69382) and will not be repeated here.

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The five exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, chorioretinal scarring, optic neuropathy, and prosthesis. In most cases, their eye conditions did not develop recently. Three of the applicants were either born with their vision impairments or have had them since childhood. The two individuals that developed their vision conditions as adults have had them for a range of 8 to 11 years. Although each applicant has one eye that does not meet the vision requirement in § 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV.

Doctors' opinions are supported by the applicants' possession of a valid license to operate a CMV. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV with their limited vision in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions.

The applicants in this notice have driven CMVs with their limited vision in careers ranging for 8 to 50 years. In the past 3 years, no drivers were involved in crashes, and no drivers were convicted of moving violations in CMVs. All the applicants achieved a record of safety while driving with their vision impairment that demonstrates the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

Consequently, FMCSA finds that in each case exempting these applicants from the vision requirement in § 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and includes the following: (1) Each driver must be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision

in the better eye continues to meet the standard in § 391.41(b)(10) and (b) by a certified medical examiner (ME) who attests that the individual is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the five exemption applications, FMCSA exempts the following drivers from the vision requirement, § 391.41(b)(10), subject to the requirements cited above:

Wesley D. Enkers (MN)

Michael J. Jewell (CO)

Anthony G. Offutt (OR)

Joseph Sottile (IL)

Michael Westervelt (MT)

In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–27215 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0052]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from three individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 11, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2020–0052 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2020-0052.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0052), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0052.* 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.

B. 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-2020-0052* 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.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.*

II. Background

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 three individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The criteria states that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the ME in consultation with the treating physician. Before certification is considered, it is suggested that a 6-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver has had a seizure or an episode of loss of consciousness that resulted from a known medical condition (*e.g.,* drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5-year period or more.

As a result of MEs misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified ME based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a Notice of Final Disposition titled, ''Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders,'' (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' Since that time, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in § 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (78 FR 3069).

III. Qualifications of Applicants

Dylan C. Hill

Mr. Hill is a 25-year old Commercial Learner's Permit holder in Kansas. He has a history of epilepsy, and has been seizure free since 2008. He takes anti-seizure medication with the dosage and frequency remaining the same since 2013. His physician states that he is supportive of Mr. Hill receiving an exemption.

James R. Satterlee

Mr. Satterlee is a 58-year old Enhanced Chauffer License holder in Michigan. He has a history of seizures, and has been seizure free since 2001. He takes anti-seizure medication with the dosage and frequency remaining the same since 2001. His physician states that she is supportive of Mr. Satterlee receiving an exemption.

Robert G. Schauer, III

Mr. Schauer is a 36-year old Class C driver license holder in Iowa. He has a history of seizures, and has been seizure free since August 2012. He takes anti-seizure medication with the dosage and frequency remaining the same since 2017. His physician states that he is supportive of Mr. Schauer receiving an exemption.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–27214 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–EX–P

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, 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.*

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0092]

Petition for Waiver of Compliance

Under part 211 of title 49 of the Code of Federal Regulations (CFR), this document provides the public notice that on November 12, 2020, the Southeastern Pennsylvania Transportation Authority (SEPTA) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 238, Passenger Equipment Safety Standards. FRA

assigned the petition Docket Number FRA–2020–0092.

Specifically, SEPTA requests relief from 49 CFR 238.131, *Exterior side door safety systems—new passenger cars and locomotives used in passenger service,* and 49 CFR 238.133, *Exterior side door safety systems—all passenger cars and locomotives used in a passenger service,* as they pertain to the exterior side door safety system interface with the Siemens ACS–64 ''Sprinter'' electric locomotives. SEPTA notes the ACS–64 ''Sprinter'' locomotive uses similar operating controls and software to the SC–44 ''Charger'' diesel-electric locomotives, for which FRA granted relief in Docket Number FRA–2018–0029.

SEPTA proposes installing similar software in the ACS–64 locomotives, as that developed for the SC–44, to allow such locomotives to be operated in ''Yard Mode.'' When ''Yard Mode'' is activated, it allows low speed operation of the locomotive without activating the door by-pass device. The ''Yard Mode'' software monitors the door summary circuit trainline, along with other trainlines and locomotive operating parameters, determining whether the locomotive is operating in a lite consist (locomotives only) or a passenger car consist. This solution involves multi-step software verification along with multiple deliberate acts and confirmations by an operator to enable ''Yard Mode.'' When ''Yard Mode'' is active, the locomotive may not be operated above 10 miles per hour.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave., SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 25, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–27270 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0091]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Under part 235 of title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that on November 19, 2020, the National Railroad Passenger Corporation (Amtrak) petitioned the Federal Railroad Administration (FRA) seeking approval to discontinue or modify a signal system. FRA assigned the petition Docket Number FRA–2020–0091.

Applicant: National Railroad Passenger Corporation, Nicholas J. Croce III, PE, Deputy Chief Engineer, C&S, 2995 Market Street, Philadelphia, PA 19104

Specifically, Amtrak requests permission to convert approximately 6 miles of its cab signal and fixed automatic block signal system to a signal system having cab signals without fixed automatic block signals, operated under NORAC Rule 562, on Amtrak's Mid-Atlantic Division, Main Line Philadelphia to Washington, Northeast Corridor, between Landover interlocking located at milepost (MP) 128.8, Landover, Maryland, and CP Avenue located at MP 134.6, Washington, DC. Amtrak is the owner and operator of this line. Maryland Area Regional Commuter Train Service, Norfolk Southern Railway, and CSX Transportation operate on portions of this line as tenants with trackage rights. All tenants have concurred with the application.

The changes proposed are to remove the wayside signals on Tracks No. 2 and No. 3 at automatic block points 1298, 1307, 1323/1324, and 1338/1339. All locations will remain in service as a block point without wayside signals.

The reason for removal of the signals is to eliminate maintenance and operation of unnecessary hardware and to reduce delays to trains caused by failures of the signals.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 25, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the

name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–27269 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0090]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Under part 235 of title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that on November 19, 2020, the National Railroad Passenger Corporation (Amtrak) petitioned the Federal Railroad Administration (FRA) seeking approval to discontinue or modify a signal system. FRA assigned the petition Docket Number FRA–2020–0090.

Applicant: National Railroad Passenger Corporation, Nicholas J. Croce III, PE, Deputy Chief Engineer, C&S, 2995 Market Street, Philadelphia, PA 19104.

Specifically, Amtrak requests permission to convert approximately 3 miles of its cab signal and fixed automatic block signal system to a signal system having cab signals without fixed automatic block signals, operated under NORAC Rule 562, on Amtrak's Mid-Atlantic Division, Main Line Philadelphia to Washington, Northeast Corridor, between Bush interlocking located at milepost (MP) 71.6, in Perryman, Maryland, and Wood interlocking located at MP 75.3, in Edgewood, Maryland. Amtrak is the owner and operator of this line. Maryland Area Regional Commuter Train Service and Norfolk Southern Railway operate on portions of this line as tenants with trackage rights. Both have concurred with the application.

The changes proposed are to remove the wayside signals on Tracks No. 2 and No. 3 at automatic block points 733 and 744. Both locations will remain in service as a block point without wayside signals.

The reason for removal of the signals is to eliminate maintenance and operation of unnecessary hardware and to reduce delays to trains caused by failures of the signals.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website*: *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax*: 202–493–2251.
- *Mail*: Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 25, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov*.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety,Chief Safety Officer.

[FR Doc. 2020–27268 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0091; Notice 1]

Mercedes-Benz USA, LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Mercedes-Benz AG (''MBAG'') and Mercedes-Benz USA, LLC, (''MBUSA'') (collectively, ''Mercedes-Benz'') have determined that certain model year (MY) 2019–2021 Mercedes-Benz motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 135, *Light Vehicle Brake Systems.* Mercedes-Benz filed a noncompliance report dated August 14, 2020. Mercedes-Benz subsequently petitioned NHTSA on September 4, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of Mercedes-Benz's petition.

DATES: Send comments on or before January 11, 2021.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed 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.
- *Hand Delivery:* Deliver comments by hand 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. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the

Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.

• Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

SUPPLEMENTARY INFORMATION: I. Overview: Mercedes-Benz has determined that certain MY 2019–2021 Mercedes-Benz A-Class, CLA-Class, GLA-Class, and GLB-Class motor vehicles do not fully comply with the requirements of paragraph S5.1.2 of FMVSS No. 135, *Light Vehicle Brake Systems* (49 CFR 571.135). Mercedes-Benz filed a noncompliance report dated August 14, 2020, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Mercedes-Benz subsequently petitioned NHTSA on September 4, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Mercedes-Benz's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

II. *Vehicles Involved:* Approximately 56,223 of the following MY 2019–2021 Mercedes-Benz A-Class, CLA-Class, GLA-Class, and GLB-Class motor vehicles, manufactured between October 8, 2018, and July 27, 2020, are potentially involved:

- 2020 Mercedes-Benz A35 AMG
- 2020 Mercedes-Benz CLA45 AMG
- 2021 Mercedes-Benz GLA250
- 2019–2020 Mercedes-Benz A220
- 2020–2021 Mercedes-Benz CLA250
- 2020 Mercedes-Benz CLA35 AMG
- 2021 Mercedes-Benz GLA45 AMG
- 2021 Mercedes-Benz GLA35 AMG
- 2020 Mercedes-Benz GLB250

III. *Noncompliance:* Mercedes-Benz explains that the noncompliance is that the subject vehicles are not equipped with an acoustic or optical device that warns the driver when the rear brake lining requires replacement, and therefore, does not meet the requirements specified in paragraph S5.1.2 of FMVSS No. 135. Specifically, the subject vehicles do not have an electrical sensor to measure the thickness of the rear brake pads.

IV. *Rule Requirements:* Paragraph S5.1.2 of FMVSS No. 135 includes the requirements relevant to this petition. The wear condition of all service brakes shall be indicated by either acoustic or optical devices warning the driver at his or her driving position when lining replacement is necessary or by way of visually checking the degree of brake lining wear, from the outside or underside of the vehicle, utilizing only the tools or equipment normally supplied with the vehicle. The removal of wheels is permitted for this purpose.

V. *Summary of Mercedes-Benz's Petition:* The following views and arguments presented in this section, ''V. Summary of Mercedes-Benz's Petition'', are the views and arguments provided by Mercedes-Benz. They have not been evaluated by the Agency and do not reflect the views of the Agency. Mercedes-Benz described the subject noncompliance and stated their belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, Mercedes-Benz submitted the following reasoning:

1. In the affected vehicles, the front service brakes use an electrical brake pad sensor to monitor the thickness of the front brake pads. Once the front brakes reach a thickness of ⅛ inch or 3 mm, a warning lamp will automatically display in the instrument cluster and will remain permanently illuminated until the vehicle is serviced. In addition, the message appears in the instrument cluster and communicates the brake pad wear status to the driver.

2. The brake warning indicator and in-vehicle message will display at each ignition cycle until the brake pads are replaced. The warning lamp cannot be extinguished unless new brake pads are installed. While the driver could manually extinguish the warning message, it will automatically reappear at each ignition cycle.

3. Depending on the vehicle platform, the brake force distribution is in a range of 71.9%–75.5% (front)/28.1%–24.5% (rear). This means that between nearly 72% to more than 75% of the vehicle's braking force is generated by the front brake pads. Because of the brake force distribution, the front brake pads will always initially wear out faster than the brake pads on the rear wheels. Indeed, the front brake pads will then continue to wear out at a faster pace than the rear brake pads, approximately 1 ½ to 2 times more frequently depending on the operator's driving style.

4. Once the front brake pads reach a thickness of approximately 3 mm, both the warning lamp and the warning message are automatically triggered, and the consumer is advised to visit the workshop to have the front brake pads replaced. Any time one set of brake pads is inspected at a Mercedes-Benz workshop, the standard work instructions direct the technician to also inspect and evaluate the status of all other sets of brake pads. (This inspection is carried out visually with the tire and wheel on the vehicle. In exceptional circumstances, the technician may need to remove the wheel to conduct the inspection and measurement. The technician does not use the gauge tool discussed in this petition in either scenario.) The workshop instructions provide that the technician is to assess the remaining braking distance for each axle based on the thickness of the brake pad that is most heavily worn. If the remaining thickness of the brake pads is not sufficient to make it to the next service interval, the customer will be advised to replace the brake pads. However, if the wear limit has already been reached, the technician will automatically replace the brake pads. Thus, at every Mercedes-Benz workshop visit, all four sets of brake pads will be inspected for wear. The customer will be advised of the remaining thickness and individual brake pads are replaced automatically if needed. Because the front brakes wear faster than the rear due to the brake force distribution, the vehicle's rear brakes will be inspected by a trained professional technician a number of times before they ever need to be replaced.

5. Even if the vehicle were taken to an independent repair facility that did not follow Mercedes-Benz's comprehensive brake

pad inspection protocols, there is not an increased safety risk due to the vehicle being operated with worn rear brake pads. In the worst case, if a vehicle with fully worn brake pads on the rear axle continued to operate, given the brake force distribution and the performance of the rear brakes, the vehicle would continue to meet the braking distance requirement of FMVSS No. 135. Furthermore, the brakes on the rear axle will continue to operate, even with completely worn rear brake pads, the driver will hear the unmistakable sound of metal being pressed against the brake discs. Moreover, the ABS and ESC functionality is not affected by worn rear brake pads and will continue to function normally, as needed.

6. Mercedes-Benz is not aware of any reports or complaints about the issue from the field and it has corrected the condition in production.

Mercedes-Benz concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Mercedes-Benz no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Mercedes-Benz notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2020–27258 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Renewal; Comment Request; Renewal Without Change of Administrative Rulings Regulations

AGENCY: Financial Crimes Enforcement Network, Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, FinCEN invites comments on the proposed renewal, without change, of a currently approved information collection found in existing Bank Secrecy Act (BSA) regulations. Specifically, the regulations provide procedures for requestors to seek, and for FinCEN to issue, administrative rulings. This request for comments is made pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments are welcome and must be received on or before February 9, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2020–0017 and the specific Office of Management and Budget (OMB) control number 1506–0050.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2020–0017 and OMB control number 1506–0050.

Please submit comments by one method only. Comments will also be incorporated into FinCEN's review of existing regulations, as provided by Treasury's 2011 Plan for Retrospective Analysis of Existing Rules. All comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: The FinCEN Regulatory Support Section at 1–800–767–2825 or electronically at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

The legislative framework generally referred to as the Bank Secrecy Act (BSA) consists of the Currency and Financial Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) (Pub. L. 107–56) and other legislation. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto, with implementing regulations at 31 CFR Chapter X.

The BSA authorizes the Secretary of the Treasury, *inter alia,* to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement anti-money laundering (AML) programs and compliance procedures.[1] Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.[2]

A FinCEN administrative ruling is a written ruling interpreting the relationship between the regulations implementing the BSA at 31 CFR Chapter X and each situation for which such a ruling has been requested in conformity with the regulatory requirements.[3] The regulations implementing the procedures for requestors to submit, and for FinCEN to issue, administrative rulings appear in Part 1010, Subpart G—Administrative Rulings. Specifically, the regulations address the following: (a) How to submit a request for an administrative ruling (31 CFR 1010.711); (b) treatment of non-conforming requests (31 CFR 1010.712); (c) treatment of oral communications (31 CFR 1010.713); (d) withdrawal of administrative ruling requests (31 CFR 1010.714); (e) issuance of administrative rulings (31 CFR 1010.715); (e) modification and rescission of administrative rulings (31 CFR 1010.716); and (f) disclosure of administrative ruling (31 CFR 1010.717). An administrative ruling has precedential value, and may be relied upon by others similarly situated, only if FinCEN makes them available to the public through publication on the FinCEN website or other appropriate forum.[4]

[1] Section 358 of the USA PATRIOT Act added language expanding the scope of the BSA to intelligence or counter-intelligence activities to protect against international terrorism.

[2] Treasury Order 180–01 (re-affirmed Jan. 14, 2020).

[3] *See* 31 CFR 1010.715.

[4] *Id.* FinCEN's administrative rulings are collected on the FinCEN website at the following address:

Continued

II. Paperwork Reduction Act of 1995 (PRA) [5]

Title: Administrative rulings regulations (Subpart G—31 CFR 1010.710 through 31 CFR 1010.717).

OMB Control Number: 1506–0050.

Report Number: Not applicable.

Abstract: FinCEN is issuing this notice to renew the OMB control number for the administrative rulings regulations.

Affected Public: Businesses or other for-profit institutions, non-profit institutions, and individuals.

Type of Review: Renewal without change of a currently approved information collection.

Frequency: As required.

Estimated Number of Requests Annually: 33 requests.[6]

Estimated Recordkeeping Burden: FinCEN receives approximately 33 administrative ruling requests per year. FinCEN continues to estimate that it takes a requestor approximately two hours to draft and submit an administrative rule request to FinCEN.[7] This results in an estimated total annual burden of 66 hours (33 administrative ruling requests multiplied by two hours per request).

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. Records required to be retained under the BSA must be retained for five years.

III. General Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (i) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) the accuracy of the agency's estimate of the burden of the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information to be collected; (iv) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Michael G. Mosier,

Deputy Director, Financial Crimes Enforcement Network.

[FR Doc. 2020–27370 Filed 12–10–20; 8:45 am]

BILLING CODE 4810–02–P

https://www.fincen.gov/resources/statutes-regulations/administrative-rulings.

[5] Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

[6] In 2018, 2019, and 2020, FinCEN received a total of 98 administrative ruling requests.

[7] When this OMB control number was last renewed in 2017, FinCEN estimated the total burden per requestor to draft and submit an administrative ruling request was two hours per requestor.

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0715]

Agency Information Collection Activity: Servicer's Staff Appraisal Reviewer (SAR) Application

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 9, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov* Please refer to ''OMB Control No. 2900–0715'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, (202) 421–1354 or email *Danny.Green2@va.gov*. Please refer to ''OMB Control No. 2900–0715'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: VA FORM 26–0829 Servicer's Staff Appraisal Reviewer (SAR) Application.

OMB Control Number: 2900–0715.

Type of Review: Extension of a currently approved collection.

Abstract: Title 38 U.S.C. 3702(d) authorizes the Department of Veterans Affairs (VA) to establish standards for Servicers making automatically guaranteed loans and 38 U.S.C. 3731(f) authorizes VA to establish, in regulation, standards and procedures to authorize a lender to determine the reasonable value of property. VA has implemented this authority through its Servicer Appraisal Processing Program (SAPP), codified in 38 CFR 36.4348.

Affected Public: Individuals (employees of servicers making applications).

Estimated Annual Burden: 2 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 20 per year.

By direction of the Secretary.

Danny S. Green,

VA PRA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–27346 Filed 12–10–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0658]

Agency Information Collection Activity: Lender's Staff Appraisal Reviewer (SAR) Application

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 9, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0658'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, (202) 421–1354 or email *Danny.Green2@va.gov.* Please refer to ''OMB Control No. 2900–0658'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (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 or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Lender's Staff Appraisal Reviewer (SAR) Application (VA Form 26–0785)

OMB Control Number: 2900–0658.

Type of Review: Extension of a currently approved collection.

Abstract: Title 38 U.S.C. 3702(d) authorizes the Department of Veterans Affairs (VA) to establish standards for lenders making automatically guaranteed loans and 38 U.S.C. 3731(f) authorizes VA to establish, in regulation, standards and procedures to authorize a lender to determine the reasonable value of property. VA has implemented this authority through its Lender Appraisal Processing Program (LAPP), codified in 38 CFR 36.4347.

Affected Public: Individuals (employees of lenders making applications).

Estimated Annual Burden: 200 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,400 per year.

By direction of the Secretary:

Danny S. Green,

VA PRA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–27313 Filed 12–10–20; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Solicitation of Nominations for Appointment to the Advisory Committee on Structural Safety of Department of Veterans Affairs (VA) Facilities

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA), Office of Construction and Facilities Management, is seeking nominations of qualified candidates to be considered for appointment to the Advisory Committee on Structural Safety of Department Facilities (''the Committee'').

DATES: Nominations for membership on the Committee must be received no later than 5:00 p.m. EST on December 31, 2020.

ADDRESSES: All nominations should be submitted to Mr. Juan Archilla by email at *juan.archilla@va.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Juan Archilla, Office of Construction & Facilities Management (CFM), Department of Veterans Affairs, via email at *juan.archilla@va.gov,* or via telephone at (202) 632–5967. A copy of the Committee charter and list of the current membership can be obtained by contacting Mr. Archilla or by accessing the website: *http://www.va.gov/ADVISORY/Advisory_Committee_on_Structural_Safety_of_Department_of_Veterans_Affairs_facilities_Statutory.asp.*

SUPPLEMENTARY INFORMATION: In carrying out the duties set forth, the Committee responsibilities include:

(1) Providing advice to the Secretary of VA on all matters of structural safety in the construction and altering of medical facilities and recommending standards for use by VA in the construction and alteration of facilities.

(2) Reviewing of appropriate State and local laws, ordinances, building codes, climatic and seismic conditions, relevant existing information, and current research.

(3) Recommending changes to the current VA standards for structural safety, on a state or regional basis.

(4) Recommending the engagement of the services of other experts or consultants to assist in preparing reports on present knowledge in specific technical areas.

(5) Reviewing of questions regarding the application of codes and standards and making recommendations regarding new and existing facilities when requested to do so by VA.

Authority: The Committee was established in accordance with 38 U.S.C. 8105, to provide advice to the Secretary on all matters of structural safety in the construction and altering of medical facilities and recommends standards for use by VA in the construction and alteration of facilities. Nominations of qualified candidates are being sought to fill current and upcoming vacancies on the Committee.

Membership Criteria and Professional Qualifications: CFM is requesting nominations for current and upcoming vacancies on the Committee. The Committee is composed of five members, in addition to ex-officio members. The Committee is required to include at least one architect and one structural engineer who are experts in structural resistance to fire, earthquake, and other natural disasters and who are not employees of the Federal Government. To satisfy this requirement and ensure the Committee has the expertise to fulfill its statutory objectives, VA seeks nominees from the following professions at this time:

(1) *Architect:* Candidate must be a licensed Architect experienced in the design requirements of health care facilities. Expert knowledge in codes and standards for health care and life safety is required;

(2) *Practicing Structural Engineer:* Candidate must have experience in both

new building seismic analysis and design and strengthening of existing buildings in high seismic regions. Expert knowledge of building codes and standards, with a focus on seismic safety, is required. Experience designing for structural resistance to other natural disasters is desired. A licensed Structural Engineer or Professional Engineer with a focus on structural engineering is required;

(3) *Research Structural Engineer:* Candidate must have experience leading experimental and/or computational research in the field of structural engineering to advance building structural performance and/or design methods against natural disasters, such as earthquakes, fire, hurricanes, tornados, etc.;

Prior experience serving on nationally recognized professional and technical committees is also desired.

Requirements for Nomination Submission: Nominations should be type written (one nomination per nominator). Nomination package should include: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.* specific attributes which qualify the nominee for service in this capacity), and a statement from the nominee indicating a willingness to serve as a member of the Committee; (2) the nominee's contact information, including name, mailing address, telephone numbers, and email address; (3) the nominee's curriculum vitae, and (4) a summary of the nominee's experience and qualification relative to the *professional qualifications* criteria listed above.

Membership Terms: Individuals selected for appointment to the Committee shall be invited to serve a two-year term. At the Secretary's discretion, members may be reappointed to serve an additional term. All members will receive travel expenses and a per diem allowance in accordance with the Federal Travel Regulation for any travel made in connection with their duties as members of the Committee. The Department makes every effort to ensure that the membership of its Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that a broad representation of geographic areas, gender, racial and ethnic minority groups, and the disabled are given consideration for membership. Appointment to this Committee shall be made without discrimination because of a person's race, color, religion, sex (including gender identity, transgender status, sexual orientation, and pregnancy), national origin, age, disability, or genetic information. Nominations must state that the nominee is willing to serve as a member of the Committee and appears to have no conflict of interest that would preclude membership. An ethics review is conducted for each selected nominee.

Dated: December 8, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–27257 Filed 12–10–20; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 85 Friday,
No. 239 December 11, 2020

Part II

Securities and Exchange Commission

17 CFR Parts 229, 230, and 239
Modernization of Rules and Forms for Compensatory Securities Offerings and Sales; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, and 239

[Release No. 33–10891; File No. S7–18–20]

RIN 3235–AM38

Modernization of Rules and Forms for Compensatory Securities Offerings and Sales

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing for public comment amendments to Rule 701 under the Securities Act of 1933 (the ''Securities Act''), which provides an exemption from registration for securities issued by non-reporting issuers pursuant to compensatory arrangements, and Form S–8, the Securities Act registration statement for compensatory offerings by reporting issuers. The amendments are designed to modernize the exemption and registration statement in light of the significant evolution in compensatory offerings since the Commission last substantively amended these regulations, consistent with investor protection.

DATES: Comments should be received on or before February 9, 2021.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/proposed.shtml*).

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–18–20. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and copying in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda, or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Anne M. Krauskopf, Senior Special Counsel, or Lisa Krestynick, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 551–3500.

SUPPLEMENTARY INFORMATION: We are proposing to amend 17 CFR 230.405 (''Rule 405''), 17 CFR 230.413 (''Rule 413''), 17 CFR 230.416 (''Rule 416''), 17 CFR 230.456 (''Rule 456''), 17 CFR 230.457 (''Rule 457''), 17 CFR 230.701 (''Rule 701''), and 17 CFR 239.16b (''Form S–8'') under the Securities Act of 1933 [1] (the ''Securities Act''), and 17 CFR 229.601 (''Item 601'') of Regulation S–K.

Table of Contents

I. Overview

We are proposing amendments to Rule 701 and Form S–8 to modernize the two principal means by which issuers grant securities to employees in compensatory transactions.[2] Every offer

[1] 15 U.S.C. 77a *et seq.*

[2] Rule 701 is available for compensatory transactions with employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. Offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors are exempted from registration by the rule subject to specified conditions. Form S–8 is available for compensatory transactions with ''employees,'' with the form defining ''employee'' as any employee, director, general partner, trustee (where the registrant is a business trust), or officer. ''Employee'' also includes consultants and advisors, former employees,

and sale of securities must be registered, or rely on an exemption from the registration requirements of Section 5 of the Securities Act.[3] The Commission has long recognized that offers and sales of securities as compensation present different issues than offers and sales of securities by issuers that seek to raise capital.[4] Among other considerations, the Commission has recognized that the relationship between the issuer and recipient of securities is often different in a compensatory, rather than capital raising, transaction. The Commission has thus provided a limited exemption from registration—Rule 701—for certain compensatory securities transactions by non-reporting issuers [5] and a specialized form—Form S–8—for registering certain compensatory securities transactions by reporting issuers. The proposed amendments reflect changes in compensatory practices, including the types of securities offered, and are intended to modernize and simplify administrative requirements.

In July 2018, in connection with amending Rule 701,[6] as mandated by the Economic Growth, Regulatory Relief, and Consumer Protection Act,[7] the Commission sought comment on ways to modernize the Rule 701 exemption from registration, the Form S–8 registration statement, and the relationship between these two regulations, consistent with investor protection.[8] In doing so, the Commission noted that significant evolution has taken place in both the types of compensatory offerings issuers make and the composition of the workforce since it last substantively amended these regulations and sought to determine whether and, if so, how the rules should be amended to address these developments. The Concept Release stated that the Commission's evaluation of any potential changes would focus on retaining the compensatory purpose of Rule 701 and Form S–8 and preventing them from being used for capital-raising purposes, consistent with the Commission's investor protection mandate. The Concept Release also solicited comment on how any possible rule or form amendments may affect an issuer's decision to become a reporting issuer. The Commission received many comment letters in response to the Concept Release.[9]

Among the Rule 701 topics covered by the Concept Release were the Rule 701(d) exemptive conditions, including the 12-month sales caps, and the Rule 701(e) disclosure requirements, including the timing and manner of disclosure, and how those disclosure requirements apply to derivative securities. Form S–8 topics covered by the Concept Release included ways to reduce administrative burdens, such as by permitting multiple plans to be registered on a single Form S–8, permitting fee payment on a ''pay-as-you-go'' basis, and registering tax-qualified plans based on a dollar amount rather than the number of shares issued. The comments received on those topics and the Commission's related proposed rule amendments are discussed in this release.

Based, in part, on the consideration of feedback from commenters, with respect to Rule 701 we propose to:[10]

- Revise the additional disclosure requirements for Rule 701 exempt transactions exceeding $10 million, including how the disclosure threshold applies, the type of financial disclosure required, and the frequency with which it must be updated;
- Revise the time at which such disclosure is required to be delivered for derivative securities that do not involve a decision by the recipient to exercise or convert in specified circumstances where such derivative securities are granted to new hires;
- Raise two of the three alternative regulatory ceilings that cap the overall amount of securities that a non-reporting issuer may sell pursuant to the exemption during any consecutive 12-month period; and
- Make the exemption available for offers and sales of securities under a written compensatory benefit plan (or written compensation contract) established by the issuer's subsidiaries, whether or not majority-owned.

With respect to Form S–8, we propose to:

- Implement improvements and clarifications to simplify registration on the form, including:
  - Clarifying the ability to add multiple plans to a single Form S–8;
  - Clarifying the ability to allocate securities among multiple incentive plans on a single Form S–8;
  - Permitting the addition of securities or classes of securities by automatically effective post-effective amendment;
- Implement improvements to simplify share counting and fee payments on the form, including:
  - Requiring the registration of an aggregate offering amount of securities for defined contribution plans;
  - Implementing a new fee payment method for registration of offers and

executors, administrators or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the estate or assets of former employees, subject to specified conditions. For purposes of both Rule 701 and Form S–8, ''employee'' includes insurance agents who are exclusive agents of the issuer, its subsidiaries or parents, or derive more than 50% of their annual income from those entities. *See* Rule 701(c) and General Instructions A.1(a)(1)-(3) to Form S–8.

[3] 15 U.S.C. 77e.

[4] *See, e.g., Notice of Proposed Form S–8,* Release No. 33–3469–X (Apr. 12, 1953) [18 FR 2182 (Apr. 17, 1953)] and *Adoption of Form S–8,* Release No. 33–3480 (Jun. 16, 1953) [18 FR 3688 (Jun. 27, 1953)], each observing that the investment decision to be made by the employee is of a different character than when securities are offered for the purpose of raising capital.

[5] Only issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m and 78o(d)) and are not investment companies registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) are eligible to use Rule 701. *See* Rule 701(b). As such, the use of the term ''non-reporting issuer'' in this release means issuers that are not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, and includes issuers subject to Rule 257 of Regulation A [17 CFR 230.257].

[6] *Exempt Offerings Pursuant to Compensatory Arrangements,* Release No. 33–10520 (Jul.18, 2018) [83 FR 34940] (''2018 Rule 701 Adopting Release'').

[7] Public Law 115–174, 132 Stat. 1296 (2018). Section 507 of the Act mandated that the Commission amend Rule 701 to increase from $5 million to $10 million the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which the issuer is required to deliver additional disclosures to investors.

[8] *Concept Release on Compensatory Securities Offerings and Sales,* Release No. 33–10521 (Jul. 18, 2018) [83 FR 34958] (''Concept Release''). Unless otherwise noted, comments cited are to the Concept Release and may be found at the following link: *https://www.sec.gov/comments/s7-18-18/s71818.htm.*

[9] *See, e.g.,* letters from Airbnb, Inc. (''Airbnb''); American Bar Association, Business Law Section, Federal Regulation of Securities Committee (''ABA''); American Benefits Council (''Council''); Sen. Sherrod Brown, United States Senator (''Senator Brown''); Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (''Chamber''); Davis Polk & Wardwell (''Davis Polk''); Ernest & Young LLP (''EY''); Indigo Ag, Inc. (''Indigo''); Rep. Patrick McHenry, United States Representative (''Representative McHenry''); National Association of Stock Plan Professionals (''NASPP''); National Employment Law Project (''NELP''); Marie P. Petion (''Petion''); Postmates (''Postmates''); Nick Reyes (''Reyes''); Brian Sament (''Sament''); Shearman & Sterling LLP (''Shearman''); John P. Stoelting (''Stoelting''); Sullivan & Cromwell LLP (''Sullivan''); Uber Technologies, Inc. (''Uber''); Rep. Maxine Waters, United States Representative (''Representative Waters''); Zachor Legal Institute (''Zachor''); and Zionist Advocacy Center (''Zionist'').

[10] The current version of Rule 701 was adopted pursuant to the Commission's general exemptive authority under Section 28 of the Securities Act. *See Rule 701—Exempt Offerings Pursuant to Compensatory Arrangements,* Release No. 33–7645 (Feb. 25, 1999) [64 FR 11095 (Mar. 8, 1999)] (''1999 Adopting Release''). We believe the proposed amendments to Rule 701 would modernize the exemption in light of the significant evolution in compensatory offerings since the Commission last substantively amended the rule, while maintaining important investor protections. For this reason and the reasons discussed below, we believe the proposed amendments to Rule 701, if adopted, would be necessary and appropriate in the public interest and consistent with investor protections.

sales pursuant to defined contribution plans;

○ Conforming Form S–8 instructions with current IRS plan review practices; and

• Revise Item 1(f) of Form S–8 to eliminate the requirement to describe the tax effects of plan participation on the issuer.

With respect to both the Rule 701 exemption and the Form S–8 registration statement, we propose to:

• Extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services; and

• Expand eligibility for former employees to specified post-termination grants and former employees of acquired entities.

To comply with current **Federal Register** formatting requirements, we also propose a ministerial amendment to Rule 701 to remove the Preliminary Notes and move their provisions without change to Rule 701(a). This change does not affect the purpose or effect of these provisions.

The Concept Release also discussed the scope of eligible plan participants, including whether persons providing services in the so-called ''gig economy'' should be eligible to receive securities pursuant to Rule 701 and Form S–8. We are addressing these issues and the comments received on these topics in a separate companion release.[11]

We discuss the proposed amendments below. We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

II. Rule 701

A. Disclosure Requirements

We are proposing to amend Rule 701(e) to revise the disclosure requirements for transactions exceeding $10 million, including the age of financial statements, and to allow issuers to provide alternative valuation information in lieu of financial statements. In addition, we are proposing to allow certain foreign private issuers [12] to provide financial statements using home country accounting standards if financial statements prepared in accordance with generally accepted accounting principles in the United States (''U.S. GAAP'') or International Financial Reporting Standards as issued by the International Accounting Standards Board (''IFRS'') are not otherwise available. Finally, we propose to modify the timing requirement for providing disclosure for certain derivative securities granted to new hires in specified circumstances.

Rule 701(e) currently provides that an issuer must deliver to investors a copy of the compensatory benefit plan or contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the issuer must deliver the following additional disclosure to investors a reasonable period of time before the date of sale:[13]

• A copy of the summary plan description required by ERISA [14] or a summary of the plan's material terms if it is not subject to ERISA;

• Information about the risks associated with investment in the securities sold pursuant to the compensatory plan or compensation contract; and

• Financial statements required to be furnished by Part F/S of Form 1–A [15] under 17 CFR 230.251 through 230.263 (''Regulation A''). These financial statements must be as of a date no more than 180 days before the sale of securities relying on Rule 701.[16]

• Foreign private issuers must provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or IFRS.

This disclosure must be provided to investors a reasonable period of time before the date of sale. For options and other derivative securities, this requires the issuer to deliver disclosure a reasonable period of time before the date of exercise or conversion.[17] In adopting Rule 701(e), the Commission made clear that if the required disclosure has not been provided to all investors on a timely basis, the issuer will lose the exemption for the entire offering.[18]

1. The Disclosure Requirement for the Period Preceding the Threshold Amount Being Exceeded

We are proposing to revise Rule 701(e) to provide that, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the issuer must deliver to investors the additional disclosure required by the rule only with respect to those sales that exceed the rule's $10 million threshold. One commenter who addressed the current rule characterized the requirement that the disclosure be provided for all sales, including those occurring before the threshold is exceeded, as ''largely unworkable'' and ''a trap for the unwary.'' [19] The same commenter recommended that there be a thirty-day ''grace period'' following the date when the threshold is exceeded, so that the issuer would be required to provide disclosure only for future offers or sales after the ''grace period.'' Another commenter suggested that crossing the threshold should impact the exemption's availability only for: (1) The securities issued that caused the threshold to be breached and for which disclosure was not provided; and (2) any subsequent offerings in the same 12-month period for which sufficient disclosure was not provided.[20] This commenter further expressed the view that treating sales over $10 million separately from earlier sales would be consistent with the current operation of Rule 504 of Regulation D.[21]

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[11] *Temporary Rules to Include Certain ''Platform Workers'' in Compensatory Offerings Under Rule 701 and Form S–8,* Release No. 33–10892 (Nov. 24, 2020).

[12] A ''foreign private issuer'' is defined in Rule 405 and 17 CFR 240.3b–4(c) [Exchange Act Rule 3b–4(c)] as a foreign issuer other than a foreign government, except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter: (i) More than 50 percent of the outstanding voting securities of which are directly or indirectly owned of record by residents of the United States; and (ii) any of the following: (A) the majority of the executive officers or directors are United States citizens or residents; (B) more than 50 percent of the assets of the issuer are located in the United States; or (C) the business of the issuer is administered principally in the United States.

[13] Rule 701(e).

[14] The Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*).

[15] Form 1–A [17 CFR 239.90].

[16] Rule 701(e)(4).

[17] Rule 701(e)(6). As described in Section II.A.5, *infra,* for options and other derivative securities, the issuer's obligation to deliver Rule 701(e) disclosure is determined based on whether the option or other derivative security was granted during a 12-month period in which the disclosure threshold is exceeded. If the grant occurred during such a period, the issuer must deliver the Rule 701(e) disclosure a reasonable period of time before the date of exercise or conversion.

[18] In the 1999 Adopting Release at Section II.B, the Commission, referencing the $5 million threshold that applied at the time, stated: ''Where the formula permits sales in excess of $5 million during a 12-month period, and the issuer chooses to take advantage of this increased amount, the new disclosure should be provided to all investors before sale. This requirement will obligate issuers to provide disclosure to all investors if the issuer believes that sales will exceed the $5 million threshold in the coming 12-month period. If disclosure has not been provided to all investors before sale, the issuer will lose the exemption for the entire offering when sales exceed the $5 million threshold.''

[19] *See* letter from ABA.

[20] *See* letter from Sullivan.

[21] *See* Instruction to paragraph (b)(2) of Rule 504 (''If a transaction under § 230.504 fails to meet the

Currently, for issuers to be able to rely on Rule 701, they must anticipate whether their compensatory sales could exceed $10 million at the outset of a 12-month period. If an issuer does not anticipate exceeding the $10 million threshold and, as a result, does not provide disclosures to all investors, then that issuer cannot exceed the $10 million threshold without losing the exemption for all of the sales in that 12-month period. We understand that the ''lookback'' aspect of the requirement may make it unduly difficult for issuers to plan their compensatory programs or respond efficiently to unforeseen situations, such as where an issuer wants to offer equity compensation in connection with an unanticipated opportunity to hire new employees.

We are proposing to amend the rule to provide that the disclosure required by Rule 701(e) be delivered to investors only with respect to sales after the $10 million threshold is exceeded and not to require after-the-fact disclosure for sales made in reliance on the rule during the 12-month period before the threshold was exceeded.[22] The exemption would remain available for all sales that exceed the $10 million threshold during the 12-month period if the issuer provides the required disclosure for those sales. We are not proposing to include a ''grace period'' between the point at which the $10 million threshold is exceeded and the requirement to deliver the Rule 701(e) disclosure, given that other amendments to Rule 701(e) proposed in this release should make it easier for issuers to comply with the disclosure delivery requirement.[23]

Request for Comment:

1. Should the rule be amended, as proposed, to require additional disclosure only for those sales during the 12-month period that exceed the $10 million threshold? Are there circumstances in which issuers may have trouble providing the information upon exceeding the threshold? If so, how could those difficulties be addressed?

2. Should there be a ''grace period'' between crossing the $10 million threshold and the requirement to provide additional disclosure with respect to the sales exceeding the $10 million threshold? If so, how long a period is appropriate? Would the other amendments proposed in this release that make it easier for issuers to comply with Rule 701's disclosure delivery requirement mitigate the need for a grace period?

3. Alternatively, upon crossing the $10 million threshold, should the issuer be required to provide the additional Rule 701(e) disclosure on a retrospective basis to all investors who had previously been granted or purchased securities during the 12-month period? Would such after-the fact disclosure mitigate informational asymmetry between investors who purchase before and investors who purchase after crossing the $10 million threshold? If we impose such a requirement, should the issuer lose the exemption for those earlier transactions if it fails to retrospectively provide the disclosure? Should there be a ''grace period'' between crossing the $10 million threshold and the requirement to retrospectively provide the disclosure? If so, how long a period is appropriate?

2. Age of Financial Statements

We propose to conform the age of financial statement requirement set forth in Rule 701(e) to the corresponding requirement in Part F/S of Form 1–A. Rule 701(e) requires delivery of financial statements required to be furnished by Part F/S of Form 1–A, which prescribes the financial statements required for Regulation A Tier 1 and Tier 2 offerings. In Regulation A offerings, issuers generally must include two years of consolidated balance sheets, statements of comprehensive income, cash flows, and changes in stockholders' equity.[24] Issuers relying on Rule 701 may choose to provide financial statements that comply with the requirements of either tier.[25]

Currently, the age of the financial statements must be as of a date no more than 180 days before the date of sale of securities relying on the Rule 701 exemption.[26] This requirement, in effect, necessitates financial statements to be prepared on a quarterly basis, and to be completed within three months after the end of each quarter, in order to keep current information available for delivery a reasonable time before the date of sale so that sales may occur on an uninterrupted basis. One commenter[27] recommended requiring the financial statement disclosure to be updated and provided only once per fiscal year, unless a material event results in a material change to the issuer's enterprise value or the value of the securities.[28]

Moreover, under existing Rule 701, foreign private issuers are required to provide financial information on the same schedule as domestic issuers.[29] Foreign private issuers, like domestic issuers, may issue securities in reliance on Rule 701 throughout the year, which could require them to update their financial statements more frequently than required for registered offerings under Form 20–F.[30] Commenters expressed the view that non-reporting foreign private issuers should not be obligated to prepare quarterly financial statements solely to rely on Rule 701, but instead should be able to satisfy the requirements of Rule 701 by providing investors financial statements conforming to the requirements for annual financial statements in reports on Form 20–F and interim financial statements within the timeframe required by home country rules.[31]

We propose to amend Rule 701(e) to apply the age of financial statement requirements of Form 1–A, Part F/S, paragraphs (b)(3) and (4) at the time of sale.[32] This proposal, which would apply to both domestic and foreign issuers, would conform the Rule 701(e) financial statement age requirements with those of Regulation A.[33] Under the proposal, financial statements must be available on at least a semi-annual basis

limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $10,000,000 of its securities on June 1, 2021 under this § 230.504 and an additional $500,000 of its securities on December 1, 2021, this § 230.504 would not be available for the later sale, but would still be applicable to the June 1, 2021 sale.'').

[22] Proposed Rule 701(e).

[23] *See* Sections II.A.2–6, *infra.*

[24] Tier 2 offerings require audited financial statements. *See* Part F/S of Form 1–A [17 CFR 239.90].

[25] Specifically, an issuer may elect to provide financial statements that follow the requirements of either Tier 1 or Tier 2 Regulation A offerings without regard to whether the amount of sales that occurred pursuant to Rule 701 during the time period contemplated in Rule 701(e) would have required the issuer to follow the Tier 2 financial statement requirements in a Regulation A offering of the same amount. Rule 701 does not, and the proposals would not, require an issuer utilizing Rule 701 that would be subject to Tier 2 financial statement requirements to file with the Commission the current and periodic reports required by Rule 257(b) [17 CFR 230.257(b)].

[26] *See* Rule 701(e)(4).

[27] *See* letter from ABA.

[28] This is generally the same timing that applies to updating valuation disclosures under the IRS Section 409A regulations. *See* Treas. Reg. § l.409A–l(b)(5)(iv)(B) (2017).

[29] *See* Rule 701(e). *See also* 1999 Adopting Release at Section II.C.

[30] 17 CFR 249.220f. *See* Item 8.A.5 of Form 20–F.

[31] *See* letters from ABA, Davis Polk, and Shearman. In particular, one commenter noted that foreign private issuers subject to Exchange Act reporting requirements can use Form S–8 for compensatory offerings without providing financial statements more frequently than required by their home jurisdiction, which puts U.S. employees of non-registered foreign private issuers at a disadvantage compared to U.S. employees of registered foreign private issuers. *See* letter from Davis Polk.

[32] Proposed Rule 701(e)(4)(i).

[33] *See* Part F/S of Form 1–A.

and completed within three months after the end of the second and fourth quarters. Issuers would no longer be required to prepare financial statements quarterly in order for sales to be made continuously pursuant to Rule 701. We believe the financial statement updating requirements for Rule 701 compensatory offerings need not be more stringent than those applicable to capital raising transactions under Regulation A, which may be used by the same issuers. The proposal also would be consistent with foreign private issuers' financial statement updating requirements for registered offerings on Form 20–F, thereby eliminating any disadvantage for non-reporting foreign private issuers.

Rule 12h–1(f)[34] under the Securities Exchange Act of 1934[35] (''Exchange Act''), which exempts from Exchange Act Section 12(g)'s registration requirements stock options issued under written compensatory stock option plans by non-reporting issuers, includes, as a condition to the exemption, the delivery of Rule 701(e) information every six months with the financial statements that are not more than 180 days old. For ease of plan administration, we considered proposing to amend the age of financial statements requirements of this rule to remain consistent with those of Rule 701(e). However, it is unclear to what extent non-reporting companies continue to rely on Rule 12h–1(f) after the adoption of Exchange Act Rule 12g5–1(a)(8),[36] which excludes from the definition of ''held of record'' for purposes of Section 12(g) certain securities held by persons who received them pursuant to employee compensation plans. Accordingly, we request comment below on whether we should rescind or adopt a conforming amendment to Rule 12h–1(f).

Request for Comment:

4. Would the proposed amendment to the age of financial statement requirements ease the burden of compliance with Rule 701(e) in a manner consistent with investor protection, both for domestic issuers and foreign private issuers? Would a different age of financial statement requirement better promote this objective? For example, should issuers be required to update financial statements only once per fiscal year, unless there is a material change to the issuer's enterprise value or the value of the securities? Should issuers be permitted to rely on either Tier 1 or Tier 2 financial statement requirements regardless of the size of the offering, as proposed?

5. Subsequent to the adoption of Exchange Act Rule 12g5–1(a)(8), to what extent do non-reporting issuers rely on the Rule 12h–1(f) exemption? If we amend Rule 701(e), should we also make conforming amendments to the age of financial statement requirement under Rule 12h–1(f), assuming non-reporting issuers continue to rely on the rule? If non-reporting issuers no longer rely on the exemption it provides, should we rescind Rule 12h–1(f)?

3. Financial Statement Content Requirements for Foreign Private Issuers

We propose to allow foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3–2(b)[37] to provide financial statements prepared in accordance with home country accounting standards for purposes of Rule 701(e) disclosure without reconciliation to U.S. GAAP in certain circumstances. Currently, all foreign private issuers relying on the Rule 701 exemption must provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or IFRS to satisfy their financial statement disclosure requirements under Rule 701(e).[38]

The Concept Release requested comment on whether we should amend any aspect of the Rule 701 financial statement requirements that apply to foreign private issuers other than the timing requirements.[39] A few commenters addressed this topic. One commenter[40] stated that the financial statement reconciliation and the need to keep it current for an ongoing plan is unduly costly and burdensome. Another commenter[41] stated that Rule 701 should allow foreign private issuers to provide financial statements audited under the International Standards on Auditing (''ISAs'').

After consideration of the comments received, we propose to permit foreign private issuers that are eligible for the exemption from registration under Section 12(g)[42] of the Exchange Act provided by Exchange Act Rule 12g3–2(b) to provide financial statements prepared in accordance with home country accounting standards to satisfy the financial statement disclosure requirements of Rule 701(e) if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available.[43] Consistent with the current requirements, all other foreign private issuers would continue to be required to provide a reconciliation to U.S. GAAP if their financial statements are not prepared in accordance with U.S. GAAP or IFRS.

We believe it is appropriate to extend this relief to foreign private issuers that are eligible for the exemption from registration under Section 12(g) because, in other contexts, those issuers are currently not required to provide a reconciliation to U.S. GAAP if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available. Specifically, to be eligible for the exemption from registration under Rule 12g3–2(b), a foreign private issuer that is not otherwise subject to Exchange Act reporting must maintain a securities listing on one or more exchanges in a foreign jurisdiction that constitutes the primary trading market for its securities and must publish in English, on its website or through an electronic information delivery system generally available to the public in its primary trading market, information that satisfies specified public dissemination and shareholder distribution requirements.[44] The Rule 12g3–2(b) exemption allows a foreign private issuer to exceed the registration thresholds of Section 12(g) and effectively have its equity securities traded on a limited basis in the over-the-counter market in the United States. The Commission determined that such Section 12(g) exemptive relief was appropriate for a foreign private issuer that has not sought a public market in the United States and that makes available its non-U.S. disclosure documents.[45] As a foreign private issuer eligible for the exemption under Rule 12g3–2(b) would not be seeking to create a public market for its securities in the United States through its reliance on Rule 701, we believe that the same level of disclosure would be appropriate.

The proposal would not modify the disclosure requirements of Rule 701(e) to permit foreign private issuers to provide financial statements audited under ISAs, as suggested by one

[34] 17 CFR 240.12h–1(f).

[35] 15 U.S.C 78a *et seq.*

[36] 17 CFR 240.12g5–1(a)(8). *See* discussion in Section II.C.1, *infra.*

[37] 17 CFR 230.12g3–2(b).

[38] *See* Rule 701(e)(4).

[39] *See* Concept Release at Section II.C.1.

[40] *See* letter from Shearman.

[41] *See* letter from EY.

[42] 15 U.S.C. 78*l*(g).

[43] Proposed Rule 701(e)(4)(i).

[44] *See* the specific requirements of Exchange Act Rule 12g3–2(b).

[45] *See Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers,* Release No. 34–57350 (Feb. 19, 2008), citing *Adoption of Rules Relating to Foreign Securities,* Release No. 34–8066 (Apr. 28, 1967).

commenter, because such an approach would require us to conduct a thorough evaluation of issuer financial statements audited in accordance with ISAs, which is beyond the scope of this rulemaking. Instead, the rule would continue to recognize only audits prepared in accordance with U.S. generally accepted auditing standards or Public Company Accounting Oversight Board auditing standards.

Request for Comment:

6. Should we permit foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3–2(b) to provide financial statements prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP, as proposed? Would such an accommodation provide financial information that is consistent with investor protection?

7. Should the proposal be expanded to apply to any foreign private issuer with securities that are listed and traded in its home country, without regard to Exchange Act Rule 12g3–2(b) eligibility? Alternatively, if we do not expand the proposal to all foreign private issuers with securities listed and traded in its home country, should we amend Rule 701(e)(4) to allow issuers to present their financial statements in accordance with other international financial reporting standards, such as International Financial Reporting Standards as adopted by the European Union, without requiring such issuers to provide a reconciliation to U.S. GAAP?

4. Alternative Valuation Disclosure

We propose to allow issuers to provide alternative valuation information, specifically an independent valuation report of the securities' fair market value as determined by an independent appraisal consistent with the rules and regulations under Internal Revenue Code Section 409A [46] (a ''Section 409A independent valuation report''), in lieu of financial statements, for purposes of Rule 701(e) disclosure. The Concept Release solicited comment on whether we should allow valuation information regarding the securities in lieu of, or in addition to, financial statements. In particular, the Concept Release asked what valuation method should be used for this purpose, and whether ASC Topic 718 [47] grant date fair value information or IRC Section 409A valuation information would be informative.

A few commenters recommended allowing issuers to provide valuation information prepared for purposes of IRC Section 409A in lieu of U.S. GAAP financials.[48] These commenters stated that this information would be a practical alternative to financial statement disclosure, as it is subject to an existing regulatory scheme and has independent economic significance. One of the commenters stated that it is less costly to comply with IRC Section 409A than to produce than U.S. GAAP financials.[49] Another commenter stated that valuation information would be more useful for an employee in evaluating an equity award than early stage financial information and that many issuers already prepare IRC Section 409A valuations to determine option exercise prices and tax withholding.[50] This commenter also stated that non-reporting issuers would be more willing to disclose valuation information than U.S. GAAP financial statements and observed that some issuers choose not to rely on Rule 701 to avoid facing competitive risks from unauthorized release of sensitive financial information.

We propose amending Rule 701(e)(4) to permit, as an alternative to financial statement disclosure, the use of a Section 409A independent valuation report prepared in accordance with the rules and regulations applicable to determining the fair market value of service recipient stock for stock not readily tradable on an established securities market.[51] The proposed alternative would apply to all issuers other than foreign private issuers eligible for the Rule 12g3–2(b) exemption. We believe that permitting this alternative is appropriate because the disclosure would be particularly helpful to employee investors in non-reporting issuers, which typically do not have a significant trading market from which to readily derive valuation information. To provide employee investors with meaningful information that they can use to assess the manner in which fair market value was derived, the amendments would require the issuer to provide employees the entire Section 409A independent valuation report provided to the issuer.[52] As noted above,[53] the applicable rules and regulations under IRC Section 409A specify numerous factors to be taken into account in determining the fair market value of securities not readily tradeable on an established securities market, including but not limited to recent arm's length transactions involving the sale or transfer of such securities, and specifically provide that use of a valuation method is not reasonable if such valuation method does not take into consideration all available information material to the value of the company. These rules are widely-used and have independent legal significance under Federal tax law. We believe that a Section 409A independent valuation report containing a rigorous analysis of the factors considered in such a valuation would provide employee investors with appropriate financial disclosure.

To ensure appropriate investor protections, we are proposing certain conditions on the use of a Section 409A independent valuation report. First, the proposed amendments require an independent appraisal that is consistent with the rules and regulations under Section 409A applicable to determination of the fair market value of service recipient stock for stock not

[46] 26 U.S.C. 409A (''IRC Section 409A'').

[47] FASB ASC Topic 718.

[48] *See* letters from ABA and Sullivan.

[49] *See* letter from ABA.

[50] *See* letter from Sullivan.

[51] Proposed Rule 701(e)(4)(ii). As provided in Treasury Reg. 1.409A–1(b)(5)(iv)(B)(*1*), in the case of service recipient stock that is not readily tradable on an established securities market, the fair market value of the stock as of a valuation date means a value determined by the reasonable application of a reasonable valuation method. For this purpose, a valuation is presumed to be a reasonable valuation if the valuation is determined by an independent appraisal that meets certain requirements. *See* Treasury Reg. 1.409A–1(b)(5)(iv)(B)(*2*)(i). The determination whether a valuation method is reasonable, or whether an application of a valuation method is reasonable, is made based on the facts and circumstances as of the valuation date. Factors to be considered under a reasonable valuation method include, as applicable, the value of tangible and intangible assets of the corporation, the present value of anticipated future cash-flows of the corporation, the market value of stock or equity interests in similar corporations and other entities engaged in trades or businesses substantially similar to those engaged in by the corporation the stock of which is to be valued, the value of which can be readily determined through nondiscretionary, objective means (such as through trading prices on an established securities market or an amount paid in an arm's length private transaction), recent arm's length transactions involving the sale or transfer of such stock or equity interests, and other relevant factors such as control premiums or discounts for lack of marketability and whether the valuation method is used for other purposes that have a material economic effect on the service recipient, its stockholders, or its creditors. The use of a valuation method is not reasonable if such valuation method does not take into consideration in applying its methodology all available information material to the value of the corporation. Under the Treasury Regulation, the use of a value previously calculated under a valuation method is not reasonable as of a later date if such calculation fails to reflect information available after the date of the calculation that may materially affect the value of the corporation (for example, the resolution of material litigation or the issuance of a patent).

[52] Proposed Rule 701(e)(4)(ii)(B).

[53] *See* n. 51, *supra.*

readily tradable on an established securities market. Those rules and regulations call for an independent appraisal. The proposed amendments would not permit reliance on other aspects of the Section 409A rules that permit determination of fair value for tax purposes by other means. This condition would have the effect of requiring an independent party to prepare the appraisal and report to reduce potential risks that may arise from an issuer providing its own valuation.[54] Further, in order to keep valuation information current, similar to Rule 701(e) financial statement disclosure, the proposed amendments would require the Section 409A independent valuation report to be as of a date that is no more than six months before the sale of securities in reliance on this exemption.[55] This updating schedule would be comparable to the proposed age of financial statement requirements for Rule 701(e).

We anticipate that providing the proposed valuation disclosure may be less costly, particularly because it is likely the issuer is already preparing such reports for purposes of complying with IRC Section 409A. At the same time, as commenters suggested, valuation disclosure may be as useful to an investor, if not more so, than financial statements in the particular context of evaluating the value of an equity award granted pursuant to Rule 701.

Although most non-reporting issuers relying on Rule 701 are unlikely to have a trading market of the necessary depth and liquidity to justify using the IRC Section 409A valuation standard for stock readily traded on an established securities market, foreign private issuers eligible for the Rule 12g3–2(b) exemption may meet this criterion. In particular, such an issuer must maintain a listing of a class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities.[56] For this reason, the proposed amendments would allow Rule 12g3–2(b) eligible foreign private issuers to provide alternative valuation disclosure prepared consistent with the IRC Section 409A rules and regulations applicable to determining the fair market value of stock readily tradeable on an established securities market.[57] To comply with this alternative disclosure requirement, the eligible issuer would simply disclose the fair market value of the stock on the most recent trading day preceding the date of sale.[58]

Request for Comment:

8. Should we permit a Section 409A independent valuation report to be provided in lieu of financial statement disclosures, as proposed? Would the IRC Section 409A regulations for determining the fair market value of stock not readily tradable on an established securities market generate valuation information that is easy to understand and appropriate to the financial disclosure needs of investors receiving securities under Rule 701? Would such disclosure be an acceptable alternative to financial statements prepared in accordance with U.S. GAAP or IFRS, as applicable? Would this proposal provide meaningful information to securities recipients while avoiding competitive risks from unauthorized financial statement disclosure?

9. Should we require, as proposed, that Section 409A independent valuation reports be prepared pursuant to an independent appraisal for Rule 701(e) disclosure purposes? Taken together, would the related Treasury Regulations defining the terms ''independent appraiser,'' ''qualified appraiser,'' and ''qualified appraisal'' provide adequate guidance for purposes of satisfying this proposed requirement? If not, should we provide further guidance? Would the proposed independence requirement add significantly to preparation costs? How would those costs compare to the costs of preparing the financial statements required by the proposed amendments?

10. As proposed, the Section 409A independent valuation reports would need to be updated at six-month intervals. Would a different interval be more appropriate to ensure that such valuation disclosures provide appropriate information? If so, what interval should we prescribe? Would the proposed updating schedule impose significant costs? Would a less frequent updating schedule raise investor protection concerns?

11. More specifically, would the Section 409A updating schedule imposed for tax purposes, calling for an independent valuation report to be updated if it fails to reflect information that may materially affect the value of the issuer and otherwise only once per fiscal year, result in more frequently updated information than if the issuer provides financial statement disclosure only on a semi-annual basis as proposed? Would using the tax updating schedule for Rule 701(e) purposes provide adequate investor protection?

12. Should we require disclosure of the entire Section 409A independent valuation report, as proposed? Would requiring disclosure of the entire Section 409A independent valuation report result in disclosure of competitively sensitive information? If so, how could we modify the proposal to avoid this result while still providing investors with appropriate disclosure? Are there particular contents of the report that would be competitively sensitive and not meaningful to investors?

[54] To meet the requirements of Treasury Reg. 1.409A–1(b)(5)(iv)(B)(2)(i), the valuation must be determined by an independent appraisal that meets the requirements of IRC Section 401(a)(28)(C) and the Treasury Regulations thereunder. For purposes of IRC Section 401(a)(28)(C), the term ''independent appraiser'' means any appraiser meeting requirements similar to the requirements of the Treasury Regulations prescribed under IRC Section 170(a)(1). IRC Section 170(f)(11)(E) and Treasury Reg. 1.170A–17 define the terms ''qualified appraisal'' and ''qualified appraiser.'' In order to be a ''qualified appraisal,'' a valuation of property must be made by a ''qualified appraiser.'' *See* IRS Publication 561, which generally describes a ''qualified appraiser'' as a disinterested person who has earned an appraisal designation from a generally recognized professional appraiser organization or met specified minimum educational requirements, and regularly prepare appraisals for which he or she is paid.

[55] In contrast, the applicable Treasury Regulations provide that use of a previously calculated valuation is not reasonable if the value was calculated more than 12 months earlier than the date for which the valuation is being used, or if the valuation fails to reflect information available after the date of the calculation that may materially affect the value of the corporation. Treasury Reg. 1.409A–1(b)(5)(iv)(B).

[56] Exchange Act Rule 12g3–2(b)(1)(ii).

[57] Proposed Rule 701(e)(4)(ii)(A).

[58] For stock readily tradable on an established securities market, the fair market value of the stock must be determined ''based upon the last sale before or the first sale after the grant, the closing price on the trading day before or the trading day of the grant, the arithmetic mean of the high and low prices on the trading day before or the trading day of the grant, or any other reasonable method using actual transactions in such stock as reported by such market.'' *See* Treasury Reg. 1.409A–1(b)(5)(iv)(A). For this purpose, stock is treated as ''readily tradable'' if it is regularly quoted by brokers or dealers making a market in such stock, and the term ''established securities market'' means an established securities market within the meaning of Treasury Reg. 1.897–1(m). *See* Treasury Reg. 1.409A–1(b)(5)(vi)(G) and 1.409A–1(k). Treasury Reg. 1.897–1(m) provides that the term ''established securities market'' means ''(1) A national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f), (2) A foreign national securities exchange which is officially recognized, sanctioned, or supervised by governmental authority, and (3) Any over-the-counter market. An over-the-counter market is any market reflected by the existence of an interdealer quotation system. An interdealer quotation system is any system of general circulation to brokers and dealers which regularly disseminates quotations of stocks and securities by identified brokers or dealers, other than by quotation sheets which are prepared and distributed by a broker or dealer in the regular course of business and which contain only quotations of such broker or dealer.''

13. Is the proposed alternative valuation information based on IRC Section 409A valuation standards for stock readily tradable on an established securities market appropriate for Rule 12g3–2(b) eligible foreign private issuers? From an investor protection standpoint, would disclosure of the securities' fair market value alone be a sufficient alternative to financial statement disclosure? Would disclosure of the securities' fair market value provide any benefit considering the securities are traded in an established trading market?

14. Are there any other circumstances in which an issuer should be able to provide the alternative valuation information based on market price in accordance with the IRC Section 409A valuation standards for stock readily tradable on an established securities market?

15. Are there any other aspects of the Section 409A valuation regulations that would be useful for purposes of Rule 701(e) disclosure?

16. Other than the independent valuation prescribed with respect to IRC Section 409A, are there any other securities valuation methods that would be appropriate to import into the Rule 701(e) disclosure requirements?

5. Disclosure Requirements for Derivative Securities

We propose to amend the date by which Rule 701(e) disclosure must be provided for certain derivative securities. Specifically, for derivative securities that do not involve a decision by the recipient to exercise or convert, we propose to modify the date by which Rule 701(e) disclosure must be delivered for grants to new hires in specified circumstances.

Rule 701(e)(6) currently provides that if a sale involves a stock option or another derivative security, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. Adopted in 1999, this rule contemplates derivative securities where the sale of the underlying shares involves an investment decision at the time of exercise or conversion.[59]

Since Rule 701(e) was initially adopted, compensatory programs have developed that use derivative securities—such as restricted stock units (''RSUs'') and performance stock units (''PSUs'')—that do not require a decision to exercise or convert. Instead, when held to maturity, these instruments settle automatically in the underlying shares without need for any investment decision by the holder. In the Concept Release, the Commission observed that, because such instruments settle by their terms without action by the holder, the relevant investment decision, if there is one, likely takes place at the date of grant. Consequently, the issuer's obligation to provide Rule 701(e) disclosure would apply a reasonable period of time before the date the RSU or PSU award is granted.[60]

Commenters did not raise any concerns regarding the application of the existing rule to options, stock appreciation rights, or convertible securities. While commenters did not dispute the logic of the Commission's date of sale analysis for RSUs and PSUs,[61] they questioned its practicability in the context of grants to new hires.[62] In particular, one commenter stated that providing financial information to an individual who is considering whether to join the issuer would result in an obligation to provide sensitive financial and operational risk information before the individual starts employment.[63]

To address these practical challenges, commenters suggested several alternative approaches. One commenter suggested permitting issuers to provide the required disclosure within 30 days after employment commences.[64] Another commenter recommended treating RSU settlement as a conversion within the meaning of Rule 701(e)(6) on the date of settlement, so that disclosure delivery would be required a reasonable period of time before settlement.[65]

We propose revising Rule 701(e)(6) to clarify the distinction between derivative securities that involve a decision to exercise or convert, and those that do not.[66] If the sale involves a stock option or other derivative security that involves a decision to exercise or convert, the issuer would continue to be required to deliver disclosure a reasonable period of time before the date of exercise or conversion. If the sale involves an RSU or other derivative security that does not involve a decision to exercise or convert, the issuer generally would continue to be required to deliver disclosure a reasonable period of time before the date the RSU or similar derivative security is granted.

We also propose to amend the rule's application to the grant of an RSU or similar derivative security made in connection with the hire of new employees. In such circumstances, the disclosure would be considered delivered a reasonable period of time before the date of sale if it is provided no later than 14 calendar days after the date the person begins employment. In our view, providing an accommodation for delivery 14 calendar days after commencing employment would provide the issuer an opportunity to address confidentiality concerns while providing the employee disclosure within an appropriate time period. In any other circumstances, the issuer would be required to deliver the disclosure a reasonable period of time before the date the RSU or similar derivative security is granted. In any case, however, the disclosure may be provided subject to appropriate confidentiality conditions. We do not propose to treat RSU settlement the same as a conversion because, unlike conversion, RSU settlement does not involve an investment decision, and, as discussed above, the requirements of Rule 701 contemplate disclosure delivery as part of an investment decision.

Request for Comment:

17. Does the proposal sufficiently clarify the distinction between derivative securities that involve a decision to exercise or convert and those that do not with respect to the timing of the obligation to deliver Rule 701(e) disclosure?

18. Is there any basis for treating settlement of an RSU or PSU as a conversion under the current rule, given that the holder does not make any investment decision at the time of settlement? For example, should the decision whether to settle tax obligations arising at settlement by withholding shares be viewed as an investment decision?

19. For new hires, is it appropriate to require delivery of Rule 701(e) disclosures within 14 calendar days after a recipient's commencement of employment, as proposed? Would a shorter period, such as seven calendar days, or longer period, such as 30 calendar days, be more appropriate?

20. Does the proposal adequately address issuer confidentiality concerns in the context of new hires, in a manner consistent with investor protection?

21. Are there any circumstances in which the proposed new hire accommodation should not apply, such

[59] *See* 1999 Release, which predates issuers' utilization of restricted stock units and similar instruments for compensatory awards.

[60] *See* Concept Release at Section II.C.3.

[61] *See* letters from Chamber and Davis Polk.

[62] *See* letters from ABA and Chamber.

[63] *See* letter from ABA.

[64] *See* letter from Chamber.

[65] *See* letter from ABA.

[66] Proposed Rule 701(e)(6)(i).

as where the grant of securities is individually negotiated?

22. Should the proposed accommodation for new hires be available only if the financial disclosure that will be provided consists of financial statements, rather than the alternative proposed Section 409A valuation disclosure? Does a Section 409A independent valuation report raise the same concerns about disclosure of sensitive financial and operational risk information?

23. Are there any other categories of Rule 701 eligible participants for whom the proposed accommodations should apply?

24. Would it be helpful to amend Rule 701(e) to specify that disclosure may be made either by physical or electronic delivery or by written notice of the availability of the information on a website that may be password-protected and of any password needed to access the information? Would it be helpful for the rule to specifically permit use of dedicated physical disclosure rooms that house the medium used to convey the information required to be disclosed?

6. Disclosure Requirements Following Business Combination Transactions

To clarify the application of Rule 701 to merged entities, we propose to amend Rule 701(e) to address the application of the exemption and its disclosure delivery obligations to acquired entity derivative securities that the acquiring issuer assumes in a business combination transaction.[67]

In some business combination transactions, outstanding derivative securities issued by the acquired entity in compensatory transactions will not be accelerated, but will instead be assumed by the acquiring issuer. In these circumstances, shares of the acquiring issuer will be issued upon the exercise or conversion of the derivative securities, instead of those of the acquired entity. Under the proposal, as long as the acquired entity complied with Rule 701 at the time it originally granted the derivative securities, the exercise or conversion of those derivative securities that are assumed by the acquiring issuer would be exempt from registration, subject to the acquiring issuer's compliance, where applicable, with Rule 701(e). For assumed derivative securities for which the acquired entity was required to provide disclosure pursuant to Rule 701(e) and where the derivative securities are exercised or converted after completion of the business combination transaction, the acquiring issuer would satisfy that disclosure obligation by providing information meeting the requirements of Rule 701(e) consistent with the timing requirements of Rule 701(e)(6).[68] In other words, if the acquired entity would have been required to provide Rule 701(e) disclosure upon exercise or conversion of its derivative securities, the acquiring issuer that assumes those derivative securities would assume the obligation to provide Rule 701(e) disclosure upon their exercise or conversion.

Following completion of a business combination transaction, in determining whether the amount of securities the acquiring issuer sold during any consecutive 12-month period exceeds $10 million, the acquiring issuer would consider only the securities that it sold in reliance on Rule 701 during that period and would not be required to include any securities sold by the acquired entity pursuant to the rule during the same 12-month period.[69] Because the acquiring issuer presumably did not consider the acquired entity's Rule 701 sales preceding the business combination transaction in planning its own Rule 701 transactions, taking them into account after the business combination transaction could in some cases result in retroactive loss of the exemption if the combined Rule 701 transactions exceed the $10 million threshold. We believe that this result would be unduly restrictive and could create hurdles to potentially value-enhancing business combinations.

Request for Comment:

25. Would the proposal addressing acquired entity derivative securities assumed by an acquiring issuer sufficiently clarify the exempt status of and disclosure obligations applicable to exercises and conversions of those securities after completion of the business combination transaction? Are any additional clarifications needed? For example, is guidance needed to clarify who is the acquiring issuer in a business combination transaction where the acquirer is not the same entity for legal and accounting purposes?

26. Following completion of a business combination transaction, in determining whether the amount of securities the acquiring issuer sold pursuant to Rule 701 during any consecutive 12-month period exceeds $10 million, should the acquiring entity be permitted to disregard the securities that the acquired entity sold pursuant to the rule during the same 12-month period, as proposed? Are there any circumstances in which the acquiring entity should be required to take those acquired entity securities into account for purposes of the $10 million disclosure threshold, and how do these circumstances relate to investor protection?

B. Rule 701(d)

We propose to raise two of the three alternative regulatory ceilings that cap the overall amount of securities that a non-reporting issuer may sell pursuant to Rule 701 during any consecutive 12-month period. Since 1999,[70] the rule has provided that the amount of securities that may be sold in reliance on the exemption during any consecutive 12-month period is limited to the greatest of:[71]

- $1 million;
- 15% of the total assets of the issuer,[72] measured at the issuer's most recent balance sheet date; or
- 15% of the outstanding amount of the class of securities being offered and sold in reliance on the rule, measured at the issuer's most recent balance sheet date.

These measures apply on an aggregate basis, not plan-by-plan. For securities underlying options, the aggregate sales price is determined when the option grant is made, using the exercise price of the option, without regard to when it becomes exercisable.[73] For deferred compensation plans, the calculation is made at the time of the participant's irrevocable election to defer.[74] There is no separate limitation on the amount of securities that may be offered.

In proposing the current rule, the Commission explained that the purpose of a 12-month cap is to ''assur[e] that the exemption does not provide a threshold that small issuers could use to raise substantial capital from employees.'' [75] The alternatives based on 15% of total assets or 15% of the outstanding amount

[67] Proposed Rule 701(e)(7).

[68] Proposed Rule 701(e)(7)(ii).

[69] Proposed Rule 701(e)(7)(i).

[70] *See* 1999 Adopting Release.

[71] Rule 701(d).

[72] The relevant limit applies to the total assets of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees.

[73] *See* Rule 701(d)(3)(i)–(ii).

[74] *See* Rule 701(d)(3)(ii).

[75] *See Employee Benefit and Compensation Contracts,* Release No. 33–6726 (July 30, 1987) [52 FR 29033 (Aug. 5, 1987)] (''Rule 701 Reproposing Release''). As originally adopted, the rule permitted the amounts of securities offered and sold annually to be the greatest of $500,000, 15% of total assets of the issuer, or 15% of the outstanding securities of the class, subject to an absolute limit of $5,000,000 derived from Securities Act Section 3(b). *See Compensatory Benefit Plans and Contracts,* Release No. 33–6768 (Apr. 14, 1988) [53 FR 12918 (Apr. 20, 1988)] (''Rule 701 Adopting Release'').

of the class of securities were intended to increase the flexibility and utility of the exemption.[76] The $1 million alternative provides an amount that any issuer can use, regardless of size.

The Concept Release solicited comment on whether there is a continuing need for any annual regulatory ceiling for Rule 701 transactions, and whether investors would be harmed if the Commission eliminated or raised the ceiling. One commenter stated that compliance with Rule 701(d) imposes costly ongoing analysis and monitoring on issuers without any clear benefit to them or their employees.[77] A different commenter recommended raising the $1 million limit to $2 million, to retain its utility for start-up issuers that have few assets and may want to issue a large percentage of current equity to first round employees.[78] This commenter also recommended raising the 15% asset cap to 25%, as modern issuers rely increasingly on human capital and are less asset-intensive. Another commenter recommended providing relief in business combination transactions where the acquirer assumes the target's employee benefit plans, resulting in the combined enterprise exceeding the aggregate offering limitations in Rule 701(d)(2), particularly in the first year following closing of the transaction.[79]

We continue to believe that the Rule 701(d) caps are useful in curbing non-compensatory sales in reliance on the rule. Accordingly, the proposal retains the general structure of Rule 701(d)(2), providing that the aggregate sales price or amount of securities sold in reliance on Rule 701 during any consecutive 12-month period must not exceed the greatest of the three alternative ceilings. In light of the less asset-intensive nature of contemporary businesses and the effects of inflation since the adoption of these alternatives in 1999, we believe that it could be beneficial to issuers and securities recipients to raise two of the ceilings. As proposed, the asset cap would be raised from 15% to 25% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees) measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).[80] The alternative $1 million cap available to any issuer would be raised to $2 million.[81] The third alternative cap—15% of the outstanding amount of the class of securities being offered and sold—would be retained with no changes. The considerations that motivate us to propose raising the alternative percentage of assets cap and the $1 million cap do not apply to the percentage of outstanding securities cap, and we continue to believe this cap is appropriate to prevent misuse of the exemption for capital-raising purposes.

To facilitate the operation of compensatory plans following a merger or acquisition, we propose an amendment to provide that after completion of a business combination transaction, to calculate compliance with paragraph (d)(2) of this section, the acquiring issuer may use a pro forma balance sheet that reflects the transaction or a balance sheet for a date after the completion of the transaction that reflects the total assets and outstanding securities of the combined entity.[82] Furthermore, in determining the amount of securities that it may offer pursuant to Rule 701 following a business combination transaction, as proposed, the acquiring issuer would not be required to include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period. We believe that these changes would remove hurdles to potentially value-enhancing business combination transactions, consistent with investor protection.

Request for Comment:

27. Do the two proposed sales cap increases appropriately adjust the ceilings in a manner that benefits both issuers and securities recipients, consistent with investor protection? Should either cap be raised by a higher or lower amount? If so, what amount would be more appropriate? Should either cap remain unchanged?

28. Should we retain the current structure of Rule 701(d) with three alternative sales caps? If not, how should the structure be changed? In particular, do the caps further the goal of facilitating only compensatory transactions in reliance on Rule 701? Are there alternative provisions that would serve this purpose?

29. Does the cap based on 15% of the outstanding amount of the class of securities being offered and sold continue to play a useful and effective role in Rule 701? Does it prevent issuers from improperly relying on the rule to raise capital from employees? Have there been changes in the marketplace, as discussed above for the two other alternative caps, which suggest that this cap may inhibit beneficial compensatory transactions? Should this cap be raised? If so, what would be a more appropriate percentage?

30. Does the proposal to permit use of a pro forma balance sheet, or a balance sheet for a date after the completion of the business combination transaction that reflects the total assets and outstanding securities of the combined entity, meaningfully facilitate the operation of compensatory plans following a business combination transaction? Are any other changes necessary to achieve this objective?

31. Should we amend Rule 701(d), as proposed, to provide that following a business combination transaction, in determining the amount of securities that it may offer pursuant to Rule 701, the acquiring issuer need not include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period?

C. Eligible Recipients

1. Consultants and Advisors

We propose to extend Rule 701 consultant and advisor eligibility to entities meeting specified ownership criteria designed to assure that the securities compensate the performance of services. Currently, consultants and advisors may participate in Rule 701 offerings only if:

- They are natural persons;
- They provide bona fide services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and
- The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.[83]

Some commenters on the Concept Release addressed whether participation should be limited to natural persons and corporate alter egos, as currently permitted, or expanded to include entities. One commenter noted that staff has not objected to treating personal services businesses as corporate alter egos of natural persons with respect to the ability to participate in Form S–8

[76] *See* Rule 701 Adopting Release at Section I.A.(2).

[77] *See* letter from ABA.

[78] *See* letter from Sullivan.

[79] *See* letter from Chamber.

[80] Proposed Rule 701(d)(2)(ii).

[81] Proposed Rule 701(d)(2)(i).

[82] Proposed Rule 701(d)(3)(v).

[83] Rule 701(c)(1). Where the consultant or advisor performs services for the issuer through a wholly-owned corporate alter ego, the issuer may contract with, and issue securities as compensation to, that corporate entity. *Cf., Registration of Securities on Form S–8,* Release No. 33–7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] at n. 20, (''1999 Form S–8 Adopting Release'') addressing such a corporate alter ego in the Form S–8 context.

offerings under existing employee, consultant and advisor categories, where such businesses are wholly-owned by (or jointly owned with the spouse of) the natural person who provides services to the issuer.[84] The commenter suggested that we expand eligible corporate alter egos to include entities wholly-owned by multiple natural person service providers or the management of the entities. Other commenters noted that service providers may be organized as entities in order to provide legal benefits such as tax and estate planning and stated that these providers should not have to choose between such benefits and receiving equity compensation.[85]

While we acknowledge these points, we are concerned that opening up Rule 701 eligibility to entities that are more broadly held than the corporate alter ego of an individual consultant could undermine the compensatory nature of the exemption by permitting securities to be issued to passive investment vehicles rather than individuals who perform services for the issuer. This concern is amplified by the fact that a person who receives securities pursuant to the plan and participant conditions of Rule 701(c) is not considered a holder of record for purposes of Exchange Act Section 12(g) registration. Specifically, Section 502 of the Jumpstart Our Business Startups Act[86] (''JOBS Act'') amended Exchange Act Section 12(g)(5)[87] to exclude from the definition of ''held of record,'' for purposes of determining whether an issuer is required to register a class of equity securities, securities that are held by persons who received them pursuant to an ''employee compensation plan'' in transactions exempted from the registration requirements of Section 5 of the Securities Act.[88] To implement this statutory amendment, the Commission amended the definition of ''held of record'' in Exchange Act Rule 12g5–1[89] to exclude certain securities held by persons who received them pursuant to employee compensation plans in a transaction exempt from, or not subject to, the registration requirements of Section 5.[90] This amendment also established a non-exclusive safe harbor for determining whether securities are ''held of record'' for purposes of registration under Exchange Act Section 12(g), providing that an issuer may deem a person to have received securities pursuant to an employee compensation plan if the plan and the person who received the securities pursuant to it met the plan and participant conditions of Rule 701(c). It is therefore important in expanding eligible participants under Rule 701(c) not to include passive investment vehicles that properly should be record holders for purposes of triggering Section 12(g) registration and the protections of Exchange Act reporting.

The proposed amendments seek to strike a balance between, on the one hand, allowing service providers flexibility to obtain the legal benefits of organizing as entities and, on the other hand, preventing Rule 701 securities from being issued to passive investment vehicles that would not be record holders, by expanding consultant or advisor eligibility to an entity, subject to the following conditions:

- Substantially all of the activities of the entity involve the performance of services; and
- Substantially all of the ownership interests in the entity are held directly by:
  - No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;
  - The estate of a natural person specified above; and
  - Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified above.[91]

The proposal seeks to expand eligibility for consultant entities while helping to ensure that compensatory securities are issued only to entities through which services are provided that are owned by those service providers. We believe that the proposed conditions are appropriate to help achieve this objective. In particular, substantially all of the ownership interests would need to be held directly by no more than 25 natural persons, at least 50 percent of whom provide services to the issuer, and by the estates and heirs of those natural persons. An entity that satisfies these conditions would also—like a natural person—need to satisfy the existing requirements for consultant and advisory eligibility by providing bona fide services that are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the issuer's securities.[92]

Request for Comment:

32. Should we extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services for the issuer, as proposed?

33. Does the proposed standard for consultant and advisor entity eligibility appropriately balance a consultant's needs to obtain the legal benefits of entity organization with the rule's purpose to exempt from Securities Act registration offerings of securities issued in compensatory circumstances?[93]

34. The proposed standard would require that substantially all of the ownership interests of the entity be held by no more than 25 natural persons, of whom at least 50 percent perform services for the issuer through the entity, their estates, and natural persons who acquired ownership interests due to their death. Are the proposed conditions appropriate? Are there different or additional conditions we should consider? Should the rule specify criteria defining what ''substantially all'' would mean for this purpose? For example, should 95 percent ownership be required to establish ''substantially all''?[94]

35. To ensure that securities are issued to compensate persons who provide services to the issuer and not to

[84] *See* letter from Davis Polk.

[85] *See* letters from Chamber and Indigo.

[86] Sec. 502, 126 Stat. at 326. Section 501 of the JOBS Act [Sec. 601, 126 Stat. at 325] amended Section 12(g)(1) of the Exchange Act to require an issuer to register a class of equity securities (other than exempted securities) within 120 days after its fiscal year-end if, on the last day of its fiscal year, the issuer has total assets of more than $10 million and the class of equity securities is ''held of record'' by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. Section 601 of the JOBS Act [Sec. 601, 126 Stat. at 326] further amended Exchange Act Section 12(g)(1) to require an issuer that is a bank or bank holding company, as defined in Section 2 of the Bank Holding Company Act of 1956 [12 U.S.C. 1841], to register a class of equity securities (other than exempted securities) within 120 days after the last day of its first fiscal year ended after the effective date of the JOBS Act, on which the issuer has total assets of more than $10 million and the class of equity securities is ''held of record'' by 2,000 or more persons.

[87] 15 U.S.C. 78*l*(g)(5).

[88] This statutory exclusion applies solely for purposes of determining whether an issuer is required to register a class of equity securities under the Exchange Act and does not apply to a determination of whether such registration may be terminated or suspended.

[89] 17 CFR 240.12g5–1.

[90] *See Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act,* Release No. 33–10075 (May 3, 2016) [81 FR 28689 (May 10, 2016)] (''JOBS Act Release''), adopting Exchange Act Rule 12g5–1(a)(8).

[91] Proposed Rule 701(c)(1)(iii). These conditions are loosely modeled on, but have a different focus than, the Internal Revenue Code definition of a ''qualified personal service corporation. *See* 26 U.S.C. 448(d)(2).

[92] Rule 701(c)(1)(ii) and (iii), proposed to be re-designated as Rule 701(c)(1)(i) and (ii), respectively.

[93] *See* Proposed Rule 701(a)(5), formerly Preliminary Note 5 to Rule 701.

[94] Regulation Reg. Sec. 1.448–1T(e)(5)(i)(D) defines ''substantially all'' as 95% or more for purposes of a ''personal service corporation'' as defined in IRC Section 448(d)(2).

passive investors, is it necessary to specify a maximum number of natural person owners for an entity to be eligible, as proposed? Should the number be larger or smaller? [95] Should the entity's eligibility to receive securities be conditioned on at least 50 percent of those natural person owners performing services for the issuer, as proposed? Should that percentage be larger or smaller?

36. To assure that a compensatory purpose is maintained, would it be necessary to further restrict ownership by persons who acquire the securities by reason of the death of a current or former service provider to a two-year period beginning on the date of death, as in the Internal Revenue Code definition of a qualified personal service corporation?

37. As noted above, a person who receives securities pursuant to the plan and participant conditions of Rule 701(c) is not considered a holder of record for purposes of Exchange Act Section 12(g) registration. How should this provision influence the limitations we place on those persons eligible to receive Rule 701 securities? Are any other restrictions or conditions needed to ensure that Rule 12g5–1(a)(8) excludes from the definition of held of record securities received as compensation for services that the recipients provided to the issuer?

2. Former Employees

We are proposing to expand Rule 701 eligibility for former employees to specified post-termination grants and to former employees of acquired entities. Rule 701 currently exempts offers and sales to former employees, directors, general partners, trustees, officers, or consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered.

In response to the Concept Release, one commenter stated that Form S–8 should be available to register new grants to former employees that are made as compensation for prior service during the 12-month period after retirement or termination.[96] Another commenter suggested expanding eligible participants to include former employees of an acquired issuer that were granted equity awards in an acquisition in exchange for securities issued as compensation while such former employees were still employed by the acquired issuer.[97]

We believe that expanding Form S–8 eligibility to encompass former employees as suggested by commenters could benefit both issuers and securities recipients by facilitating compensatory transactions consistent with the purposes of the form.[98] We believe that this rationale applies equally to Rule 701 and Form S–8. Accordingly, we propose to expand the eligibility of former employees under Rule 701 to include offers and sales to:

- Persons who were employed by or providing services to the issuer, its parents, its subsidiaries, or subsidiaries of the issuer's parent and who are issued securities after resignation, retirement, or other termination as compensation for services rendered during a performance period that ended within 12 months preceding such termination; and
- former employees of an entity that was acquired by the issuer if the securities are issued in substitution or exchange for [99] securities that were issued to the former employees of the acquired entity on a compensatory basis while such persons were employed by or providing services to the acquired entity.

The proposal also would define ''employee'' for purposes of Rule 701 to include executors, administrators, and beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the estate or assets of former employees. This amendment would conform to the corresponding provision relating to former employee eligibility in Form S–8.[100]

Request for Comment:

38. Should we make Rule 701 available for new offers and sales to former employees as compensation for their service while employed by the issuer in the preceding 12 months, as proposed? Would expanding the exemption in this way facilitate compensatory transactions consistent with the purpose of the rule? To what extent do issuers grant awards on such a retrospective basis? Does ''following resignation, retirement, or other termination'' clearly describe the relationship of the award to former employment? Should the rule specifically address any other scenarios, such as expiration of the term of employment?

39. Should Rule 701 be available to a former employee of an acquired entity for securities substituted or exchanged for acquired entity securities issued as compensation for the former employee's work for the acquired entity, as proposed? Would this be consistent with the underlying rationale that the Rule 701 exemption is available based on the compensatory relationship with the issuer?

40. Would amending the rule, as proposed, to extend eligibility to executors, administrators, and beneficiaries of employees' estates and others duly authorized by law to administer the estates or assets of former employees facilitate the administration of compensatory plans relying on the exemption? If not, how should this proposal be modified to facilitate that objective?

3. Employees of Subsidiaries

In an effort to harmonize Rule 701 and Form S–8, we also propose to amend Rule 701(c) by substituting the term ''subsidiaries'' [101] for ''majority-owned subsidiaries.'' The proposed amendment would make the exemption available for offers and sales of securities under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its subsidiaries, or subsidiaries of the issuer's parent.[102] Like Form S–8, Rule 701 would be available for the issuance of issuer securities to employees of its subsidiaries, without regard to whether those subsidiaries are majority-owned.[103] We are not aware of

[95] In this regard, we note that to qualify for S corporation status, a corporation may have no more than 100 shareholders. *See generally* IRC Sections 1361(a)(2) and 1361(b).

[96] *See* letter from Sullivan.

[97] *See* letter from Davis Polk.

[98] *See* Section III.C.1, *infra.*

[99] Consistent with Exchange Act Rule 12g5–1(a)(8)(i)(B), we are using the language ''in substitution or exchange for'' to cover the various methods by which issuer securities may be received in place of acquired entity securities that were issued in compensatory transactions, such as upon exercise or conversion of those securities. *See* JOBS Act Release at Section III.B.3.

[100] General Instruction A.1(a)(3) to Form S–8, which as discussed in Section III.C.1, *infra,* would similarly be amended to expand eligibility for former employees and former employees of an entity acquired by the issuer.

[101] Rule 405 defines ''subsidiary'' for purposes of the Securities Act as an affiliate controlled by such person directly, or indirectly through one or more intermediaries. Rule 405 defines ''control'' as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

[102] Under the proposal, ''subsidiary'' would replace ''majority-owned subsidiary'' in each place in Rule 701(c) where ''majority-owned subsidiary'' currently appears.

[103] The term ''majority-owned subsidiary'' is defined as a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors, is owned by the subsidiary's parent and/or one or more of the

Continued

any reason to limit Rule 701 to employees of majority-owned subsidiaries. Expanding Rule 701 eligibility in this manner could facilitate the continued operation of compensation programs when non-reporting issuers transition to reporting status and are only eligible to use Form S–8 rather than Rule 701.

By broadening the exemption to include all subsidiaries, as defined, rather than only those that are majority-owned, the proposal would, among other things, expand eligibility to subsidiaries consolidated by the issuer as variable interest entities, such as physicians employed by medical practices controlled by the issuer.[104]

Request for Comment:

41. Should we harmonize the Rule 701 and Form S–8 eligibility requirements by broadening the Rule 701 exemption to include all subsidiaries, as proposed? Would the proposal facilitate a non-reporting issuer's transition to reporting issuer status and its subsequent registration of compensatory offerings on Form S–8?

42. Unlike Form S–8, the Rule 701 exemption currently is available to majority-owned subsidiaries of the issuer's parent rather than only subsidiaries of the issuer itself.[105] Should we amend Form S–8 to further harmonize the scope of Rule 701 and Form S–8 by making Form S–8 available to employees of all subsidiaries of the issuer's parent? Are there any other harmonizing amendments we should consider?

43. Are there any reasons not to extend Rule 701 eligibility to persons employed by subsidiaries that are consolidated by the issuer as variable interest entities? For example, are there any reasons not to extend Rule 701 eligibility to physicians employed by medical practices controlled by the issuer, based on their employment by a subsidiary of the issuer?

parent's other majority-owned subsidiaries. *See* Rule 405.

[104] In the 1999 Adopting Release at Section at Section II.D, n. 41, the Commission rejected a view expressed by the staff in certain no-action letters that such physicians were eligible as consultants or advisors in light of the narrower definition of consultant or advisor adopted in that release. Under Financial Accounting Standards Board Accounting Standards Codification Subtopic 810–10, *Consolidation—Overall,* a medical practice is often a variable interest entity. An issuer that has a controlling financial interest in such a medical practice generally would consolidate it. As a result, physicians employed by the medical practice would become eligible as employees of the issuer's subsidiary.

[105] *See* Form S–8, General Instruction A.1.(a).

III. Form S–8

Form S–8 was originally adopted in 1953, as a simplified form for the Securities Act registration of securities to be issued pursuant to employee stock purchase plans.[106] Form S–8 is available for the registration of securities to be offered under any employee benefit plan to an issuer's employees or employees of its subsidiaries or parents.[107] Registration on Form S–8 is used for many different types of employee benefit plans, including Internal Revenue Code Section 401(k) plans and similar defined contribution retirement savings plans, employee stock purchase plans, nonqualified deferred compensation plans, and incentive plans that provide for issuance of options, restricted stock, or RSUs. The form may be used by any issuer that is subject, at the time of filing, to the reporting requirements of Section 13 or 15(d) of the Exchange Act and has filed all reports required during the preceding 12 months or such shorter period that it was subject to those requirements.[108] Form S–8 is not available for shell companies.[109]

Over time, the Commission has made revisions to the Form S–8 requirements to simplify the use of the form and streamline the form's requirements where such simplification is consistent with investor protection.[110] In the Concept Release, the Commission asked whether Form S–8 registration is still necessary, and if so, how the Commission could further streamline Form S–8 registration. Among other things, the Concept Release solicited comment on the potential elimination of Form S–8 in favor of allowing Exchange Act reporting issuers to use the Rule 701 exemption and whether Form S–8 incentivized issuers to remain current in their Exchange Act reporting obligations. Commenters who addressed this issue generally supported eliminating the form, while expressing some reservations.[111] One commenter stated that the principal advantage of such an approach would be the elimination of compliance costs associated with filing and maintaining an effective Form S–8.[112] A few other commenters indicated that keeping Form S–8 is not necessary to provide an incentive for reporting issuers to remain current in their Exchange Act reporting obligations.[113]

At the same time, commenters noted a number of potential disadvantages with eliminating Form S–8. One commenter stated that reporting issuers would find it a significant disadvantage if failure to register on Form S–8 would subject an issuance of employee benefit plan shares to registration under state blue sky laws.[114] A different commenter stated that reporting issuers would not migrate to Rule 701 if securities issued under the exemption would be restricted securities, as defined in Rule 144, and observed that, unlike Rule 701 offerings, securities issued as part of an offering registered on Form S–8 are not ''restricted securities'' as defined in Rule 144.[115]

In evaluating this potential change, we considered these and other disadvantages that would result from eliminating Form S–8 and allowing reporting issuers to use Rule 701, such as:

- Employees' loss of the information required in Part I of Form S–8 that is part of the prospectus that must be provided to them; and
- Employees' potential loss of the protections provided by Section 11 and, in some cases, Section 12(a)(2) liability in the case of material misstatements or omissions.[116]

On balance, we believe that Form S–8 continues to provide a useful and effective means of registering securities to be issued in compensatory offerings under the Securities Act. Accordingly, we are proposing amendments to the

[106] *See generally Registration of Securities Offered Pursuant to Employees Stock Purchase Plans,* Release No. 33–3480 (June 16, 1953) [18 FR 3688 (June 27, 1953)].

[107] ''Employee benefit plan'' is defined in Securities Act Rule 405.

[108] *See* Form S–8, General Instruction A.1.

[109] ''Shell company'' is defined in Securities Act Rule 405. When a company ceases to be a shell company, by combining with a formerly private operating business, General Instruction A.1 to Form S–8 provides that it then becomes eligible to use Form S–8 60 days following the filing of Form 10-equivalent information with the Commission.

[110] *See, e.g.,* 17 CFR 230.462(a) (allowing Form S–8 to go effective automatically without review by the staff or other action by the Commission); Item 3 and General Instruction G of Form S–8 (allowing the incorporation by reference of certain past and future reports required to be filed by the issuer under Section 13 or 15(d) under the Exchange Act); 17 CFR 230.428(a)(1) (providing an abbreviated disclosure format that eliminated the need to file a separate prospectus and permitting the delivery of regularly prepared materials to advise employees about benefit plans to satisfy prospectus delivery requirements); Rule 416(c) and Rule 457(h)(2) (providing for registration of an indeterminate amount of plan interests and providing that there is no separate fee calculation for registration of plan interests, respectively); and General Instruction E to Form S–8 (providing a procedure for the filing of a simplified registration statement covering additional securities of the same class to be issued pursuant to the same employee benefit plan).

[111] *See* letters from ABA, Davis Polk, and NASPP.

[112] *See* letter from ABA.

[113] *See* letters from NASPP and ABA.

[114] *See* letter from NASPP.

[115] *See* 17 CFR 230.144(a)(3)(ii) and letter from Chamber.

[116] *See* 15 U.S.C. 77k and 77*l*(a)(2).

form and related rules that maintain the current non-reporting issuer-reporting issuer distinction between Rule 701 and Form S–8, but we are proposing amendments to simplify the use of Form S–8. The proposed amendments should significantly reduce the compliance burdens of filing and maintaining an effective Form S–8, while retaining the protection that registration under the Securities Act provides to investors. Finally, we are proposing amendments that would harmonize the requirements of Rule 701 and Form S–8.

Request for Comment:

44. Should we eliminate Form S–8? If so, what exemption or other registration statement should the Commission replace it with? What should the requirements and conditions of such exemption or registration statement be? If such an approach were adopted, what other steps should the Commission take to preserve companies' ability to offer equity-based compensation to employees (*e.g.,* preemption of state blue sky laws) and to protect investors?

A. Addition of Plans and Securities or Classes of Securities to Form S–8

1. Addition of Plans to Form S–8

To maximize the utility of Form S–8 for legitimate compensatory purposes, we are clarifying and proposing changes to our rules and to Form S–8 to provide additional flexibility for compensatory offerings, similar to provisions available to issuers in capital raising shelf offerings. The Concept Release solicited comment on whether we should permit an issuer to register on a single form the offers and sales pursuant to all employee benefit plans that it sponsors. One commenter stated that there is not currently an explicit requirement under Form S–8 that only shares under a single employee benefit plan may be registered on a specific registration statement but nonetheless recommended that the Commission clarify this point in any amendments to the form.[117] Other commenters were generally supportive of permitting offers and sales of securities pursuant to multiple plans to be registered on a single Form S–8.[118]

We are clarifying that issuers may add additional plans to an existing Form S–8. Specifically, issuers may file an automatically effective post-effective amendment to a previously filed Form S–8 to add employee benefit plans where the new plan does not require the authorization and registration of additional securities for offer and sale.[119] For example, assume an issuer has an effective Form S–8 that registers sales of common stock to be issued under the issuer's 2010 equity compensation plan and has recently adopted a new 2020 equity compensation plan to replace the 2010 plan that does not authorize additional securities. Upon effectiveness of the 2020 plan, no further awards may be granted pursuant to the 2010 plan and any shares covered by an award under the 2010 plan are now duly authorized for issuance under the 2020 plan. In order to sell under the 2020 plan, the issuer may register the securities to be offered and sold pursuant to the new plan on a new Form S–8. Alternatively, under the current requirements of Form S–8 or Rule 428,[120] the issuer could file an automatically effective post-effective amendment to the previously filed Form S–8 to add employee benefit plans, such as the 2020 plan in the example. The post-effective amendment to include the additional plan would be required to disclose any material change in the plan of distribution, including that a new plan is being added to an existing Form S–8.[121] This post-effective amendment would need to describe how shares that will not be issued under the previous plans may become authorized for issuance under the current plans. The post-effective amendment also must identify all covered plans on the cover page and describe, if applicable, how the shares that were registered for previous offerings on the Form S–8 pursuant to other plans have instead become authorized for issuance under the newly added plan.[122]

At the time of the filing of any post-effective amendment to Form S–8, the issuer must continue to meet the requirements of the form.[123] The issuer would also add the signatures and file the required opinions of counsel with the post-effective amendment. The issuer would thereafter deliver or cause to be delivered in accordance with Rule 428(b)(2)(i) the documents identified in Rule 428(a) as part of the prospectus that describes the new plan.

We believe that clarifying the ability to add plans to an existing Form S–8 via an automatically effective post-effective amendment will reduce the administrative burdens to the extent issuers previously believed that the filing an entirely new Form S–8 for each new plan was required. This approach also will help facilitate the use of a single Form S–8 for all employee benefit plans, if the issuer chooses to do so. In addition, it will reduce the problems associated with fee transfers between multiple registration statements that have registered ongoing offers and sales that cannot be terminated (*e.g.,* outstanding options that require continuous ongoing registration of the underlying shares).[124] Similar to permitting the allocation of securities between plans on Form S–8, which we discuss below, we do not believe that amendments to the current disclosure requirements of Form S–8 or Rule 428 are required to implement the proposed clarification. We are proposing, however, a minor modification to the cover page of Form S–8 to clarify that the full title of multiple plans may be listed.[125]

Request for Comment:

45. Is the clarification regarding the ability of issuers to register offers and sales of securities pursuant to multiple plans on a single Form S–8 sufficient, or is additional guidance needed? Should we instead amend Form S–8 to prohibit issuers from adding plans to an existing Form S–8?

46. Would registering multiple plans on a single Form S–8 work well in practice? For example, would registering incentive plans on the same Form S–8 as a 401(k) plan or other defined contribution plan cause administrative difficulties or investor

[117] *See* letter from ABA.

[118] *See* letters from Council, Davis Polk and NASPP.

[119] After discussing these clarifications, we discuss the proposed amendments regarding plans that authorize additional securities in Section III.A.2, *infra.*

[120] 17 CFR 230.428.

[121] *See* 17 CFR 230.464 and Rule 456. Item 9 of Form S–8 requires an issuer to make the undertaking set forth in Item 512(a)(1)(iii) of Regulation S–K in a post-effective amendment. The undertaking in Item 512(a)(1)(iii) states that the registrant will include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement to disclose a material change in the plan of distribution. For example, in certain circumstances, a material change may be the identification on the registration statement cover page of a new plan that is being added to an already existing Form S–8.

[122] *Id.* This would include, for example, if the 2010 plan included outstanding options that expired unexercised and the underlying shares became authorized for issuance under the 2020 plan. Using other aspects of the proposed amendments, if necessary, issuers would also be able to add securities to an existing Form S–8 as described below. *See* Section III.A.3, *infra.*

[123] *See* 17 CFR 230.464.

[124] *See* Rule 457(p). Under current rules, the issuer may be unable to avail itself of Rule 457(p) to transfer the fees previously paid for plans on other Forms S–8 because Rule 457(p) permits filing fees to be transferred only after the registered offering has been completed or terminated or the registration statement has been withdrawn. As a result, in our example, the issuer would not be able to transfer the fees associated with any remaining shares under the 2010 plan until it completes or terminates the 2010 plan offering registered on the existing Form S–8.

[125] *See* proposed amendments to the Cover Page of Form S–8.

confusion? Would issuers use this feature principally to update and refresh their incentive compensation plans?

47. Are there additional or different disclosures that should be required when a plan is added to an existing Form S–8?

2. Securities Allocation Among Incentive Plans

In addition to clarifying the ability to add additional plans using a post-effective amendment, as discussed in Section III.A.1 above, we are clarifying that issuers are not required to allocate registered securities among incentive plans and may use a single Form S–8 for multiple incentive plans.[126] Although we do not believe that amendments to the current disclosure requirements of Form S–8 or Rule 428 are necessary to permit an issuer's use of a single Form S–8, we are proposing several related clarifying amendments.[127]

For issuers utilizing this flexibility, the initial registration statement would be required to list the types of securities covered by the registration statement and identify the plan or plans pursuant to which the issuer intended to issue securities as of that date.[128] The full title of each plan would be required to be listed on the face of the registration statement on the appropriate line.[129] The Part I information delivered pursuant to Rule 428 with respect to each plan would be required to be specific to that plan. If any Part II information relates specifically to one plan, the issuer would be required to disclose that relationship clearly. The registration statement would not need to assign or allocate the securities to particular incentive plans. In this way, the form may be used to create a pool of registered shares that may be issued under the issuer's various incentive plans as necessary. However, issuers would need to track their offers and sales of securities to ensure they have sufficient capacity registered in order to fulfill the needs of the various incentive plans identified on the form.

In the Concept Release, the Commission solicited comment on whether the ability to file a single Form S–8 with respect to multiple plans and pay filing fees based on the aggregate dollar amount of securities to be registered would effectively reduce administrative burdens. Commenters were generally supportive of the Commission permitting the use of a single Form S–8 to register securities to be issued under multiple plans.[130] One commenter stated that a single ''omnibus'' Form S–8 registration statement would reduce administrative burdens of registering transactions for multiple plans.[131] According to another commenter, issuers find it to be a ''frustrating limitation'' that currently the pools of securities registered for offer and sale pursuant to separate plans on separate Forms S–8 cannot be used interchangeably.[132] Other commenters stated that while it may not be practicable for issuers to include all plans in a single Form S–8, they would benefit from combining at least some with similar characteristics,[133] with one of these commenters noting that 401(k) plans are administered separately from long-term incentive plans.[134]

We believe that clarifying the ability to use Form S–8 to create a pool of registered shares that may be issued under the issuer's various incentive plans will promote efficiency and flexibility because it will eliminate any doubt about whether authorized but unissued shares under a plan that expires would be immediately available for issuance under another authorized plan.[135] In addition, this clarification will reduce administrative burdens for those issuers that now believe they must use a separate Form S–8 for each plan. Specifically, issuers using a single Form S–8 to register the offer and sale of shares issuable pursuant to multiple plans simultaneously could avoid collecting signatures for multiple, independent Form S–8 filings and multiple consents of auditors and other experts whose reports are incorporated by reference.[136] In addition, issuers are required to file the consent of auditors with respect to audit opinions appearing in Exchange Act reports that are incorporated into Securities Act registration statements.[137] In such a situation, issuers using a single Form S–8 registration statement would only need to inform the auditors that there is a single Form S–8 into which the auditor's opinion is being incorporated by reference (along with any other outstanding registration statements on other forms).

Furthermore, we note that when shares are offered pursuant to a plan previously identified on the Form S–8, issuers must continue to prepare and deliver a plan-specific prospectus, according to current requirements, and thus investors would continue to receive the same information as is currently required for any Form S–8 offering.[138] Issuers also retain the option to register securities to be issued pursuant to individual incentive plans on separate Forms S–8.

Request for Comment:

48. Is the clarification regarding the ability of issuers to allocate securities among incentive plans on a single Form S–8 sufficient, or is additional guidance needed? Should we instead adopt amendments to prohibit allocation of securities among incentive plans?

49. Would allocation of securities among incentive plans on a single Form S–8 result in a more efficient process of registration?

50. Would allocation of securities among incentive plans result in disclosure that is confusing to investors?

51. Are there additional or different amendments (other than the proposed changes to the cover page of Form S–8) that we should make to facilitate the allocation of securities among various incentive plans?

3. Addition of Securities or Classes of Securities to Form S–8

In addition to adding plans to a Form S–8, from time-to-time, issuers may find that they need to add additional securities to the registration statement as well. Accordingly, after considering the comments received on the Concept Release, we are proposing amendments to Rule 413 that would permit issuers to add securities to an existing Form S–8 by filing an automatically effective post-effective amendment.

The Concept Release solicited comment on whether issuers should be

[126] We note that this clarification regarding allocation of securities will not apply to defined contribution plans if the amendments are adopted as proposed. Forms S–8 registering securities to be offered and sold pursuant to defined contribution plans will be deemed to have registered an indeterminate amount of securities to be offered and sold pursuant to those plans. *See* Section III.B.1, *infra* and Proposed Rule 416(d).

[127] *See* proposed changes to the Cover Page of Form S–8.

[128] *See id.*

[129] *Id.*

[130] *See* letters from ABA, Council, Davis Polk, NASPP and Shearman.

[131] *See* letter from ABA.

[132] *See* letter from NASPP.

[133] *See* letter from Davis Polk.

[134] *See* letter from NASPP.

[135] Exchange listing rules generally require shareholder approval of incentive plans. *See* NYSE Listed Company Manual Section 303A.08 (Shareholder Approval of Equity Compensation Plans), and NASDAQ Listing Rule 5635(c) (Equity Compensation).

[136] *See* Item 17 CFR 229.601(b)(23) of Regulation S–K Footnote 5 to the Item 601 Exhibit Table.

[137] General Instruction G.2 to Form S–8 provides that registrant information shall be updated by the filing of Exchange Act reports, which are incorporated by reference in the registration statement and the Section 10(a) prospectus. *See also* Footnote 5 to the Exhibit Table in Item 601 of Regulation S–K, and the Note to the Required Information in Form 11–K. Auditor consents typically make reference to each registration statement into which the consent is incorporated.

[138] *See* 17 CFR 230.428 and Part I of Form S–8.

able to add securities to an existing Form S–8 by automatically effective post-effective amendment. As certain commenters noted, Rule 413 currently does not permit an issuer to register the offer and sale of additional securities by means of a post-effective amendment, and therefore an issuer must instead file a new Form S–8 to register the offer and sale of those securities.[139] A few commenters supported enabling an issuer to add securities to its existing Form S–8 by automatically effective post-effective amendment.[140] One of these commenters stated that this would be necessary in order to allow a single Form S–8 to cover securities offered under new plans established by the issuer and new authorizations of shares under then-existing plans.[141] Another commenter supported this approach noting that it would create a pool of shares that could be issued under the issuer's various benefit plans as necessary.[142]

We are proposing to amend Rule 413 to permit issuers to register the offer and sale of additional securities or classes of securities on Form S–8 by post-effective amendment.[143] Under the proposed amendments, an issuer that has an effective registration statement for a previous incentive plan, would no longer be required to file a new Form S–8 to register the offering of additional shares under an existing or new incentive plan.[144] Instead, the issuer could file an automatically effective post-effective amendment to the existing Form S–8 to register the offer and sale of the additional securities.[145] Similarly, if an issuer were to adopt a new employee benefit plan which made available a new class of security on a compensatory basis,[146] the issuer would only be required to file an automatically effective post-effective amendment to its existing Form S–8 to add the new plan and the new class of security to the registration fee table and any additional disclosure [147] that would be required to inform investors about the new class of securities.[148] However, issuers adding new classes of securities in this manner would be required to satisfy all of the requirements of the form upon filing the post-effective amendment. This would include either filing the information required by Item 4. Description of Securities in the post-effective amendment to Form S–8 or incorporating such information by reference if the class has already been registered pursuant to Section 12 of the Exchange Act.[149]

Proposed Rule 413(c) would provide additional flexibility in that issuers registering compensatory offerings on Form S–8 would not need to predict how many securities would be required to fulfill obligations under each individual plan or even the types of securities that might be authorized for issuance pursuant to a plan in the future. For example, assume an issuer has an existing Form S–8 on file and intends to adopt a new incentive plan that would include awards in the form of issuer stock, stock options, restricted stock, stock appreciation rights or other share-based awards. Upon taking the necessary steps to approve the incentive plan and obtaining any necessary approvals to register the offer and sale of shares to be issued pursuant to the plan, the issuer could file an automatically effective post-effective amendment to its existing registration statement to name the newly authorized incentive plan on the cover page and provide all of the disclosures required by Rule 428 and Form S–8 for the new plan.[150] In the same post-effective amendment, the issuer could add the securities associated with the plan to the registration statement by listing the securities in the Calculation of Registration Fee table and checking the proposed new checkbox on the cover page of the amended Form S–8 to indicate that the sale of the newly included securities is registered pursuant to proposed Rule 413(c).[151] If this issuer later takes the necessary steps to increase the number of shares issuable under the plan, a new post-effective amendment could be filed that would register the offer and sale of the additional securities.[152] Similarly, if an issuer takes the necessary steps to adopt a new plan to include a new class of securities such as preferred stock, the issuer could file a post-effective amendment to the existing Form S–8 to add both the new class of securities and new plan to the registration statement simultaneously.[153]

Alternatively, assume an issuer that has maintained a 401(k) employee savings plan for several years decides to add its common stock as an investment option for employee contributions to the plan. As a result, both the 401(k) plan interests and the employer stock to be offered as an investment option would become subject to Securities Act registration requirements.[154] The ability to add new plans to an existing Form S–8 used in combination with proposed Rule 413(c), would permit both the plan interests and the issuer's stock to be added to the issuer's existing Form S–8 for an already-existing plan.[155] The issuer would be required to file a post-effective amendment, which would include the offer and sale of any shares of employer stock and plan interests required to be registered,[156] and the types of information described in the previous example.

Request for Comment:

52. Should we permit issuers to add securities to an existing Form S–8 registration statement by means of automatically effective post-effective amendments, as proposed?

53. Are there concerns associated with allowing issuers to register the offer and sale of additional securities or classes of securities by post-effective amendment to an existing Form S–8 instead of on a new registration statement?

[139] *See* letter from Sullivan; Rule 413; and Form S–8, General Instruction E.

[140] *See* letters from Davis Polk and NASPP.

[141] *See* letter from Davis Polk.

[142] *See* letter from NASPP.

[143] *See* Proposed Rule 413(c).

[144] The registration of the offer and sale of additional securities pursuant to proposed Rule 413(c) could be accomplished in the same automatically effective post-effective amendment used to add a new plan to a registration statement, as described in Section III.A.1, *supra.*

[145] As proposed, the current method of registering additional shares of the same class on Form S–8 by filing a new registration statement pursuant to General Instruction E of the form also would remain available for use in registering additional securities.

[146] An issuer adopting a new plan that did not include a new class of security may be able to amend the registration statement in the manner described in Section III.A.1, *supra,* to the extent that the new plan did not require the addition of new securities.

[147] As discussed in Section III.A.1, *supra,* adoption of a new plan to be included in the registration statement would require disclosure of a material change in the existing plan of distribution, as well as other information.

[148] *See, e.g.,* Item 4 Form of Form S–8, Description of Securities.

[149] *See* Item 3(c) of Form S–8.

[150] *See* Section III.A.1, *supra.*

[151] *See* Proposed Rule 413(c) and the proposed checkbox on Form S–8.

[152] *Id.*

[153] *See* Section III.A.1, *supra,* and Proposed Rule 413(c).

[154] The proposed amendments would not eliminate the requirement to register plan interests as separate securities. Nevertheless, where a registration statement on Form S–8 relates to securities to be offered pursuant to an employee benefit plan, including interests in such plan that constitute separate securities required to be registered under the Securities Act, such registration statement is deemed to register an indeterminate amount of such plan interests. No separate fee is required with respect to the registered plan interests. *See* Rule 416(c) and Rule 457(h)(2). Furthermore, the proposed amendments would not eliminate the requirement to file an Exchange Act annual report on Form 11–K [17 CFR 249.311] with respect to those plan interests.

[155] *See* Proposed Rule 413(c).

[156] If all of the amendments proposed today are adopted, in this circumstance, for the 401(k) plan, the issuer would be deemed to register an indeterminate amount of defined contribution plan securities on the registration statement. *See* Section III.B.1, *supra,* and Proposed Rule 416(d).

54. Would the interplay between adding new plans and registering the offer and sale of new securities by post-effective amendment to Form S–8 cause problems for particular types of issuers or plans? If so, please explain how.

55. If we adopt proposed Rule 413(c) for the registration of the offer and sale of additional securities on Form S–8, should we rescind current General Instruction E, which permits the filing of a new, abbreviated registration statement to register the offer and sale of additional securities of the same class relating to a plan for which a Form S–8 registration statement is already effective?

B. Fee Calculation and Fee Payments on Form S–8 for Defined Contribution Plans

As described below, we are proposing changes that we believe should ease potential challenges for issuers with respect to timing and calculation of fees for offerings of securities pursuant to defined contribution plans on Form S–8. First, we propose to amend Rule 457 to require registration based on the aggregate offering price of all the securities registered. Second, we are proposing a new fee payment method that would require issuers to pay the fee for all sales made pursuant to defined contribution plan offerings during a given fiscal year no later than 90 days after the issuer's fiscal year end. We are also soliciting additional comments on the topic of fee calculation to determine whether we should clarify how issuers should count shares or amounts offered and sold pursuant to defined contribution plans.

Several commenters noted difficulties currently involved with administering the registration of offers and sales pursuant to defined contribution plans and offered solutions that the commenters believed would reduce complexity and cost of compliance while retaining investor protection.[157] For defined contribution plans, when employees elect to invest in issuer securities, the plan may acquire additional shares from the issuer, buy shares on the open market, or allocate shares divested by other plan participants to fulfill the purchase.[158] As securities are sold to employees pursuant to the plan, issuers are required to account for the number of shares sold against the specified number of shares registered on the Form S–8. As described by one commenter, the issuer must estimate the number of shares to register on the original Form S–8, balancing the costs of registering a potentially excess number of securities for which fees have been paid,[159] but that may go unsold against the possibility that the issuer could inadvertently violate Section 5 if the number of shares sold exceeds the number registered under the plan.[160]

We believe the proposed rules should help resolve many of the share-counting difficulties that arise when registering shares to be offered and sold pursuant to defined contribution plans such as 401(k) plans. For this purpose, we propose to define a ''defined contribution plan'' as ''an employee benefit plan (as defined in § 230.405) that provides for specified or determinable contributions by the employee, employer, or both to an individual account for each employee participant where the amount of benefits paid depends, in addition to the level of contributions, on the return on the investment.'' [161]

Request for Comment:

56. As proposed, would the definition of ''defined contribution plan'' properly encompass the types of plans that would benefit from the fee calculation and payment methods outlined below? Should the definition be revised? If so, should it be broader or narrower?

1. Calculation of the Registration Fee Using the Aggregate Offering Price

One commenter recommended that the Commission permit registration of a dollar amount corresponding to an indeterminate number of shares because tracking dollar inflows to issuer stock funds would be less onerous than tracking the number of shares that remain available.[162] The commenter noted that because defined contribution plans are unitized plans whose participants own units of a fund that holds issuer stock, plan administrators frequently experience difficulty tracking the number of shares of issuer stock that have been offered and sold under a Form S–8.[163] As proposed, issuers relying on the new rules would be deemed to register an offering amount corresponding to an indeterminate number of securities that would be available for offer and sale through the issuer's defined contribution plans. Currently, issuers may be calculating the registration fee based on the maximum aggregate offering price of all the securities (*e.g.,* common stock, debt securities, convertible debt securities, preferred stock, and warrants) listed in the ''Calculation of Registration Fee'' table.[164] We are proposing amendments to Rule 457 and Form S–8 to require that the registration fee for a defined contribution plan be calculated in a similar way, based on the aggregate offering price of all the securities sold.[165] Upon the yearly calculation and payment of the registration fee within 90 days of the issuer's fiscal year end, as described below,[166] issuers that had registered an indeterminate number of securities on the Form S–8 for defined contribution plans would need to calculate their registration fee in accordance with proposed Rule 457(h)(4) by multiplying the aggregate offering price of securities sold during the fiscal year by the fee payment rate in effect on the date of the fee payment, and then pay such fee in accordance with the proposed requirements of Rule 456(e).

Under the proposed amendments, an issuer would calculate the fee based, in part, on the funds that plan participants have allocated via their payroll deductions to the purchase of issuer stock. Similarly, if an issuer contributes shares of issuer stock to satisfy its obligation to make matching contributions, the dollar amount of the matching obligation satisfied would be aggregated with the overall offering amount for the purpose of calculating the fees owed.

We believe that a fee calculation based on the aggregate offering amount of securities sold pursuant to defined contribution plans could simplify plan administration by eliminating the need

[157] *See* letters from ABA, Davis Polk, Shearman and Sullivan.

[158] For a discussion of sales and registration of securities to be issued pursuant to employee benefit plans, *see generally Employee Benefit Plans: Interpretations of Statute,* Release No. 33–6188 (Feb. 1, 1980) [45 FR 8960 (Feb. 11, 1980)] (''1980 Employee Benefit Plans Release''), and *Employee Benefit Plans,* Release No. 33–6281 (Jan. 15, 1981) [46 FR 8446 (Jan. 27, 1981)] .

[159] We note that registration fee payments pursuant to Section 6(b)(1) of the Securities Act [15 U.S.C. 77f(b)(1)] are not refundable. *See* 17 CFR 230.111.

[160] *See* letter from Sullivan.

[161] Proposed amendment to Rule 405.

[162] *See* letter from Shearman.

[163] *Id.*

[164] *See* Rule 457(o).

[165] *See* Proposed Rule 457(h)(4) and proposed Note 3 under Calculation of Registration Fee. We understand that issuers may have previously used existing Rule 457(o) to calculate registration fees based on the maximum aggregate offering price of the securities registered on Form S–8 for defined contribution plans. If these amendments are adopted, all issuers registering shares to be offered and sold pursuant to defined contribution plans, including issuers previously using 457(o) to calculate registration fees, would thereafter make use of Rule 416(d) to register an indeterminate amount of securities to be offered and sold pursuant to defined contribution plans and Rules 457(h)(4) and 456(e) to calculate and pay the required fee, respectively. Where necessary, issuers should refer to such fee calculation in the ''Calculation of Registration Fee Table'' in the Form S–8 registration statement or post-effective amendment to Form S–8 filed to pay the required fee.

[166] *See* Section III.B.2, *infra.*

to track offers and sales of individual shares of issuer stock within unitized plans and should reduce the risks of violating Section 5 by allowing offers and sales to be accounted for and paid for based on a known aggregate offering dollar amount after contributions are made to the issuer stock fund. For plans that are not defined contribution plans, such as incentive plans, we believe that issuers will continue to register a maximum number of securities issuable under the plan that are covered by the registration statement as is currently contemplated by Rule 457(h)(1). An issuer may rely on these provisions on the same registration statement if the fee table clearly explains how the registration fees are being calculated. For example, the proposed amendments would permit an issuer to use Rule 457(h)(1) to register the offer and sale of a specific number of securities that will be allocated to incentive plans and also to use proposed Rule 457(h)(4) to register the offer and sale of an indeterminate amount of securities pursuant to defined contribution plans on a single Form S–8. Alternatively, issuers may continue to file separate Forms S–8 for plans of different types.

Request for Comment:

57. Should we amend Rule 457 and Form S–8 to require registration based on the aggregate offering price of all the securities registered pursuant to defined contribution plans, as proposed?

58. For defined contribution plans, would registration of the offer and sale of an aggregate amount of securities mitigate difficulties in counting registered offers and sales?

59. Should the proposed fee calculation method be optional for issuers registering the offer and sale of shares to be issued pursuant to defined contribution plans?

60. Should we adopt a transition period for the proposed amendments to Rule 457 and Form S–8? If so, how long should the transition period be?

61. Should the proposed requirement to calculate registration fees based on an aggregate offering amount of securities be required only for defined contribution plans? Are there other types of plans whose administration would be simplified by a similar fee calculation?

62. Would there be difficulties in using separate registration and fee instructions (*e.g.,* Rule 457(h)(1) and proposed Rules 416(d) and 456(e)) on a single Form S–8? If so, would additional guidance on how the instructions apply be helpful?

63. Would issuers register the offer and sale of shares for defined contribution plans on the same registration statement as that used for other types of plans?

64. If an issuer wishes to use a single Form S–8 for all plans, would the proposed rules create difficulties for issuers that seek to register and pay fees for sales pursuant to incentive plans on the same form for which defined contribution plans are registered?

2. New Fee Payment Method for Sales Pursuant to Defined Contribution Plans

As discussed in the previous section, issuers may face difficulties with respect to calculating the number of securities that have been sold pursuant to defined contribution plans. In addition to the new fee calculation method described above, we are proposing a modernized approach to registration fee payment that would provide for the registration on Form S–8 of offers and sales of an indeterminate amount of securities of the issuer to be issued pursuant to defined contribution plans.[167] As proposed, the issuer would subsequently pay the securities registration fees on a delayed basis, in arrears.

In general, Form S–8 issuers today are required under the Securities Act to pay a registration fee to the Commission at the time of filing a registration statement, which is not refunded if the issuer does not sell the related securities.[168] As noted by one commenter, for defined contribution plans, the current fee payment method results in issuers estimating the potential number of future sales off the registration statement, both with respect to the initial employee deferrals and subsequent investment elections, based on historical usage and expected future participation and election rates.[169] Because this calculation and fee payment must occur at the time the registration statement is filed, issuers may over- or underestimate the number of securities to be offered and sold pursuant to the registration statement.

In order to alleviate these difficulties, several commenters suggested that for securities to be issued pursuant to a plan, issuers should be permitted to register the offer and sale of an indeterminate amount of securities initially and then pay a periodic fee based on the total sales over a given period.[170] Commenters that supported the registration of the offer and sale of an indeterminate amount of shares suggested different methods of calculating the fee owed for registration. One suggested a fee payment based on the size of the issuer (*e.g.,* market capitalization).[171] Some commenters suggested an issuer should measure usage by totaling the sales that occurred during the prior fiscal year and pay the fee based on the amount of shares offered and/or sold on an annual basis,[172] such as at the time of the filing of the Form 10–K.[173] Other commenters supported a pay-as-you-go fee payment system similar to that which currently exists for well-known seasoned issuers (''WKSIs'') by which WKSIs are able to pay filing fees on an as-needed basis rather than when the registration statement is initially filed.[174] Several commenters recommended a cure provision to remedy inadvertent or nominal errors, enabling issuers to pay the registration fee after the original due date if the issuer makes a good faith effort to pay the fee on a timely basis and then pays the fee within a certain number of business days after the original due date.[175] One commenter suggested that this type of fee payment method could be optional for issuers that have difficulty estimating the amount of securities to be offered and sold pursuant to the registration statement and calculating the fee under the current system.[176]

Consistent with our goal of further simplifying registration on Form S–8 and in order to help alleviate the difficulties that currently exist when registering the offer and sale of securities pursuant to defined contribution plans, we are proposing a new fee payment method for defined contribution plans. We have proposed the annual fee payment method because we believe it would permit issuers to accurately determine how many shares were sold pursuant to defined contribution plans in the covered period after-the-fact, and therefore should eliminate the problem of inadvertently registering the offer and sale of too many or too few shares in these offerings. Under the new method, when registering the offer and sale of shares pursuant to defined contribution plans, issuers would be deemed to have registered the offer and sale of an indeterminate amount of securities

[167] *See* Proposed Rules 416(d) and 456(e).

[168] Section 6(b)(1) of the Securities Act [15 U.S.C. 77f(b)(1)]. In some cases, unused filing fees may be carried forward to a new registration statement. *See* Rule 457(p) and the limitations described in note 124, *supra.*

[169] *See* letter from Sullivan.

[170] *See* letters from ABA, Chamber, Davis Polk, Postmates, and Sullivan.

[171] *See* letter from Davis Polk.

[172] *See* letters from ABA and Sullivan.

[173] *See* letter from ABA.

[174] *See* letters from Chamber and Council. *See also* the definition of well-known seasoned issuer in Rule 405.

[175] *See* letters from ABA, Council and Davis Polk.

[176] *See* letter from Sullivan.

pursuant to the plan.[177] We believe the proposed amendments would therefore eliminate the need for issuers to estimate the number of shares that will be sold pursuant to the registration statement and avoid the possibility that an issuer would inadvertently sell more shares than it had estimated. The amendments also would eliminate the need for issuers to register additional offers and sales under these plans either by using a new registration statement or proposed Rule 413(c).

Under the proposed annual fee payment method, any fees associated with sales made pursuant to a defined contribution plan in a given fiscal year would be required to be paid within 90 calendar days after the plan's fiscal year end.[178] We believe 90 days after the closing of the plan's fiscal year should provide issuers ample opportunity to calculate the total amount of the shares sold and the associated fee. An issuer would pay the fee by filing an automatically effective post-effective amendment to the Form S–8 registration statement. This post-effective amendment need only contain the cover page of the registration statement, including the calculation of the registration fee table, and the required signatures. In any such post-effective amendment, an issuer would also be required to check a newly proposed box on the post-effective amendment cover page to indicate that the amendment is being filed to pay filing fees using the method required by Rule 456(e).[179] This post-effective amendment would only be used for the purpose of the payment of fees and not for any other purpose such as adding plans or securities to the registration statement as proposed elsewhere in this release.[180]

Issuers would continue to rely on the applicable provision of Rule 457 to calculate the fee to be paid. As described earlier, if the proposed amendments are adopted, the applicable provision for defined contribution plans would be Rule 457(h)(4). Consistent with current requirements, issuers would be required to clarify their fee calculation by providing specific details relating to the fee calculation in notes to the Calculation of the Registration Fee table, including references to the applicable provisions of Rule 457, if the basis of the calculation is not otherwise evident from the information presented in the table.[181] If necessary, this would include specifying whether the issuer is relying on existing Rule 457(h)(1) or is otherwise registering the offer and sale of an indeterminate number of securities pursuant to a defined contribution plan and will pay the fees after fiscal year-end using proposed 457(h)(4) and Rules 456(e) for the calculation and payment of the fees, respectively.

In addition, proposed Rule 456(e) would include provisions designed to clarify the status of defined contribution plan securities where the fee is paid in accordance with the proposed rule as well as other provisions designed to ease the administration of the fee payments in certain circumstances. These proposed provisions include:

- Instruction 1 to Rule 456(e)—on how to count the 90-day period after the end of a fiscal year;
- Rules 456(e)(2) and (e)(3)—addressing the treatment of the offerings for purposes of Securities Act Sections 5 and 6(a).
- Rule 456(e)(4)—addressing when an issuer ceases operations or enters into a merger or other transaction between the sale of securities on Form S–8 and when the registration fees are due; and
- Rule 456(e)(5)—on the amount of interest due for late payments.

As proposed in Rule 456(e)(4), if an issuer ceases operations whether upon the merger, liquidation, or sale of substantially all issuer's assets, the plan's fiscal year would be deemed to end on the date of the merger, liquidation, or sale of substantially all issuer's assets for the purposes of Rule 456(e). Ninety days after such date, the issuer would be required to make a final payment for its securities that were sold pursuant to the defined contribution plan as of the plan's last fiscal year-end.

The fee payment method we are proposing today would be mandatory for issuers that register the offer and sale of shares pursuant to defined contribution plans, as we believe the after-fiscal year-end fee calculation would be easier for both issuers and the staff to administer. The proposed rule would not affect the amount of fees owed by issuers for previously registered defined contribution plan offerings on Form S–8 that paid the fee upon filing. If the rule is adopted as proposed, when the rule becomes effective, all newly filed registration statements on Form S–8 for offerings pursuant to defined contribution plans would be deemed to register the offer and sale of an indeterminate amount of employer securities, and the filing fee for those registration statements would be paid not later than 90 days after the plan's fiscal year end.

Request for Comment:

65. Should we adopt a new registration fee payment method that would require issuers to pay the fee for all sales made pursuant to defined contribution plan offerings during a given fiscal year no later than 90 days after the plan's fiscal year-end, as proposed?

66. Would the proposed registration fee payment method help to address administrative issues regarding the difficulty of keeping track of offers and sales registered pursuant to defined contribution plans?

67. Would the proposed fee payment method be workable in practice? If not, what changes should we make to render it more workable?

68. Is 90 days after the plan's fiscal year-end an appropriate period of time in which to calculate the required fee payment? If not, would a shorter or longer period be more appropriate?

69. Instead of paying the fee 90 days after the plan's fiscal year-end, should the rule be revised to require payment 90 days after the issuer's fiscal year-end? Should the payment due date be tied to some other date?

70. Given that these proposed rules are designed to prevent inaccuracies in estimating the amounts to be offered and sold under, and the calculation of registration fees for, defined contribution plans, should we consider adopting an ''insignificant deviations'' provision for immaterial or unintentional failures to comply with the proposed rules?

71. Should the proposed fee payment method be optional rather than mandatory?

72. Should the new registration fee payment method be limited to certain classes of issuers (*e.g.,* WKSIs or issuers with a proven compliance record)?

73. Are there other types of plans for which the new fee payment method would be beneficial? For example, should this payment method apply to

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[177] *See supra* note 165.

[178] *See* Proposed Rule 456(e).

[179] The Commission has recently proposed amendments that would modernize filing fee disclosure and payment methods. The proposed amendments would revise most fee-bearing forms, schedules, statements, and related rules to require each fee table and accompanying disclosure to include all required information for fee calculation in a structured (*i.e.,* tagged) format. As proposed, the amendments would add the option for fee payment via Automated Clearing House (''ACH'') and eliminate the option for fee payment via checks and money orders. We expect that improvements in the payment validation process made possible by the proposed tagging of the fee table and accompanying information with pre-submission validation by the filer would provide more certainty to issuers that the proper filing fee has been paid. *See Filing Fee Disclosure and Payment Methods Modernization,* Release No. 33–10720 (Oct. 24, 2019) [84 FR 71580]. To the extent these changes are adopted, we expect that technical changes may be required to conform the new method proposed here to the other changes being proposed.

[180] *See* Proposed Rule 456(e)(1).

[181] *See* Note 2 to the Calculation of Registration Fee Table.

nonqualified deferred compensation plans?

74. Instead of requiring the registration fees for defined contribution plans to be paid on an annual basis, as proposed, should we permit all issuers registering securities for defined contribution plans on Form S–8 to make registration fee payments on a pay-as-you-go basis, as WKSIs are permitted to do for capital-raising offerings today? Should we adopt a pay-as-you-go fee payment procedure for other types of plans?

75. As proposed, the payment of the fee would require the filing of an automatically effective post-effective amendment to Form S–8 not later than 90 days after the plan's fiscal year-end. Are there any problems with using this existing form type for the fee payment? In the alternative, should we instead require the fee payment with a different form or should we adopt a new form dedicated to the payment of the fees? If so, what information should that form require?

76. If we were to require that filing fee information be tagged, is there a reason fee-tagging should not be required in the proposed post-effective amendments to Form S–8?

77. In the case of a merger, liquidation, or sale of substantially all of an issuer's assets, would the proposal to deem the closing of the plan's fiscal year to be the date of such transaction work well in practice? Are there better ways to ensure correct payment of fees in these situations?

78. Is a transition period needed to implement the proposed fee payment method? If so, what would be an appropriate transition period? For example, should we delay the effective date of the new fee payment method by one year?

79. If the new fee payment method is adopted as proposed, are there any other rules or guidance we should adopt to ensure the fee payment rules work effectively?

3. Additional Requests for Comment on Counting the Shares Registered on Form S–8 for Defined Contribution Plans

We believe that the rules proposed today will aid issuers in paying accurate and timely fees when registering the offer and sale of securities pursuant to defined contribution plans. Below, we address some of the additional challenges associated with counting securities to be offered and sold pursuant to a registration statement on Form S–8 for defined contribution plans. One commenter requested clarification of how sales and purchases should be tracked and how any netting of shares affects the amount of offers and sales that should be registered.[182] Difficulties in estimating the number of shares to be offered and sold may arise, for example, when employees participating in a defined contribution plan divest their holdings in the issuer stock fund, and the divested shares are used to satisfy another employee's investment in the issuer stock fund pursuant to the plan.

Currently, Section 5 of the Securities Act requires registration of the offer and sale of the securities to the investing employee under the plan because it is a separate transaction from the initial offer and sale of the securities to the divesting employee. Although current practice may vary, because each offer and sale of a security needs to be registered or exempt from registration,[183] we preliminarily believe that when employees divest and other employees invest in issuer securities within the plan, an issuer should not ''net'' or ''offset'' these plan transactions against each other in determining the number of shares to deduct from the total number of shares to be offered and sold pursuant to the Form S–8. If such securities become available for a subsequent sale, after their earlier sale pursuant to a registration statement, we preliminarily believe the fact that those shares may be the ''same'' shares that were part of a previous, registered transaction does not negate the fact that the subsequent sale involves a different transaction by the issuer and the plan.

We are requesting additional input from commenters that would help us clarify how sales of shares pursuant to defined contribution plans should be counted for purposes of the Securities Act. In addition, if we adopt the changes to the fee payment calculation rules [184] described above, as proposed, issuers will not be able to ''net'' or ''offset'' employee investments against employee divestments when calculating the fees owed for sales made pursuant to the defined contribution plan. We are requesting additional comments on whether this would be an appropriate result.

Request for Comment:

80. Does counting the sales of securities pursuant to a defined contribution plan on a gross basis, as described above, cause difficulty in administering defined contribution plans? Would Commission guidance indicating that ''netting'' or ''offsetting'' is not permitted eliminate or further mitigate this difficulty?

81. Should we permit the netting or offsetting of sales made within the defined contribution plan so that securities that were made available due to employee divestment from the issuer stock fund and sold pursuant to employee investment elections would not be counted against the number of securities for which sales were registered on Form S–8?

82. Should we adopt the new fee payment method described above without netting or offsetting as proposed? Alternatively, if we adopt the new fee payment method, should we permit the netting or offsetting of sales made within the defined contribution plan to apply to the payment of fees for defined contribution plans?

83. Should we provide additional guidance on this topic in the adopting release or elsewhere?

C. Conforming Form S–8 to Rule 701

The proposed amendments to Rule 701 include, among other things, changes to the scope of individuals eligible to receive shares pursuant to the exemption.[185] Several commenters indicated the scope of eligible individuals should remain consistent for Rule 701 and Form S–8 and recommended that, to the extent the Commission changes the scope of individuals eligible to receive securities under Rule 701, similar changes should be made to the scope of individuals eligible to receive securities where the offer and sale is registered on Form S–8.[186] For example, one commenter stated that different eligibility standards would create unnecessary compliance burdens and impede the ability of issuers to implement consistent and beneficial equity compensation strategies without regard to reporting status.[187] A different commenter noted that Rule 701 and Form S–8 promote the same goals (including recognizing the difference in the relationship between issuer and recipient in compensatory offerings compared to capital-raising transactions), and given the fact that issuers transition from non-reporting to reporting (or vice versa), suggested the two regimes should be aligned to the extent practicable.[188] In view of the amendments we are proposing to Rule 701, we are also proposing amendments to harmonize the scope of persons who are eligible to receive securities

[182] *See* letter from Council.

[183] *See* Sections 5(a) and 5(c) of the Securities Act of 1933 [15 U.S.C. 77e(a) and (c)].

[184] *See* Proposed Rules 456(e) and 457(h)(4).

[185] *See* Sections II.C. 1 and 2, *supra.*

[186] *See* letters from ABA, Chamber, Davis Polk, NASPP and Sullivan.

[187] *See* letter from NASPP.

[188] *See* letter from Sullivan.

pursuant to the Rule 701 exemption with those eligible to receive securities where the offer and sale is registered on Form S–8.

1. Scope of ''Former Employee''

As discussed above, we are proposing to expand Rule 701 eligibility for former employees to specified post-termination grants and to former employees of acquired entities.[189] We believe that expanding Form S–8 eligibility to encompass former employees in these ways could benefit both issuers and securities recipients by facilitating compensatory transactions consistent with the purposes of the form.

Accordingly, we propose to amend Form S–8 such that it may be used to register acquisitions of issuer securities by former employees as compensation for such a former employee's service to the issuer during a performance period ending within 12 months preceding the former employee's resignation, retirement or other termination.[190] We are also proposing that former employees of an acquired entity would be eligible to receive securities the offer and sale of which is registered on the form.[191] These individuals would be able to participate in an acquiring issuer's employee benefit plan with respect to equity awards granted in connection with the acquisition to replace awards issued by the target while employed there.

Request for Comment:

84. Should we conform the ''former employee'' eligibility provisions of Rule 701 and Form S–8, as proposed? Are there any unique considerations with respect to including former employees in compensatory offerings registered on Form S–8?

2. Consultants and Advisors

As discussed above, we are proposing to amend Rule 701 to expand eligibility to certain consultants and advisors that have chosen to organize their business as an entity.[192] Form S–8 may not be used by issuers offering securities to consultants who set up passive investment vehicles for a non-compensatory or capital raising purpose.[193] Therefore, consistent with the compensatory purpose of Form S–8, we propose to make conforming amendments to the form with the same conditions as Rule 701, which we believe would prevent issuers from using Form S–8 to offer and sell securities to third-party investors who did not actually perform services for the issuer. We also are proposing conforming changes to the definition of ''employee benefit plan'' in Rule 405 [194] to ensure that the scope of consultants or advisors that are eligible to participate in an employee benefit plan is consistent with our changes to Form S–8.[195]

We believe the proposed limitations on the use of Form S–8 to offer and sell securities to consultants and advisors that organize as entities would mitigate the risk that the form would be used to compensate investors that do not provide bona fide services to the issuer or for capital-raising transactions. As is currently the case, the instruction would continue to condition consultant and advisor eligibility on the provision of bona fide services to the issuer that are not in connection with the offer or sale of securities in a capital-raising transaction and do not directly or indirectly promote or maintain a market for the issuer's securities. In addition, the instruction would permit use of Form S–8 to compensate those entities that are owned by the individuals who are actually performing services for the issuer.

Request for Comment:

85. Should we adopt the same treatment of consultants and advisors under Rule 701 and Form S–8? Are there any unique considerations with respect to including consultants or advisors organized as entities in compensatory offerings registered on Form S–8?

D. Conforming Form S–8 Instructions With Current IRS Plan Review Practices

Item 8(b) of Form S–8 currently specifies that in lieu of providing an opinion of counsel regarding compliance with the requirements of ERISA or an Internal Revenue Service determination letter, as required by Item 601(b)(5)(ii) and (iii) of Regulation S–K,[196] the issuer may undertake to submit the plan and any amendments to the plan to the IRS in a timely manner and to make all changes required by the IRS in order to qualify the plan. The IRS, however, is only issuing determination letters for amendments to previously qualified plans under very limited circumstances.[197]

Given the IRS's changed practice, several commenters supported modifying or eliminating this requirement in Form S–8.[198] A few commenters stated that requiring the determination letter or legal opinion for plan modifications is overly burdensome on issuers and should be eliminated.[199] One commenter stated that it would be helpful to provide guidance that those issuers that have adopted a prototype or volume submitter plan may satisfy the IRS determination letter requirement by providing a copy of the IRS letter regarding the prototype or volume submitter plan that was issued to the sponsor of the plan that the issuer adopted.[200] The same commenter stated that the Item 8 undertaking should recognize the IRS correction program with respect to qualification of plans by having the issuer undertake to make corrections in order to maintain the qualification of the plan as required by the IRS.[201]

We are proposing amendments that take into account the IRS's changed practices for plan amendments, while continuing to protect investors with respect to the plan's compliance with ERISA. We propose to amend Item 8(b) to eliminate the requirement that issuers undertake to submit any amendment to the plan to the Internal Revenue Service.[202] We are likewise amending Item 601(b)(5)(iii) of Regulation S–K to remove the requirement to file a copy of the IRS determination letter that the amended plan is qualified under Section 401 of the Internal Revenue Code.[203] The proposal would revise Item 8(b) to permit an undertaking that issuers will maintain the plan's compliance with ERISA and will make all changes required to maintain such compliance in a timely manner. However, if the issuer does not provide the undertaking required by Item 8(b), as proposed to be revised, the requirements of Regulation S–K Item 601(b)(5)(iii) would continue to apply with regard to plan amendments and therefore require the issuer to file with respect to any amendment a legal opinion confirming compliance of the

[189] *See* Section II.C.2, *supra.*

[190] *See* proposed General Instruction A.1(a)(3) of Form S–8.

[191] *Id.*

[192] *See* Section II.C.1, *supra.*

[193] *See* Release 33–7646 (Feb. 25, 1999) [64 FR 11103 (Mar. 8, 1999)] (describing the requirements adopted in Securities Act Release No. 6867 (June 6, 1990) [55 FR 23909]: ''To be eligible, a consultant must provide the issuer *bona fide* services not in connection with the offer or sale of securities in a capital-raising transaction'' (emphasis in original)).

[194] Rule 405.

[195] *See* the proposed revised definition of ''employee benefit plan'' in Rule 405.

[196] 17 CFR 229.601(b)(5)(ii) and (iii).

[197] *See* Rev. Proc. 2016–37, 2016–29 I.R.B. 136.

[198] *See* letters from ABA, Council, Davis Polk and Shearman.

[199] *See* letters from ABA and Council.

[200] *See* letter from ABA.

[201] *Id.*

[202] *See* proposed Item 8(b) of Form S–8.

[203] *See* proposed Item 601(b)(5)(iii) of Regulation S–K.

amended provisions of the plan with the requirements of ERISA.[204]

In addition, in lieu of compliance with Item 601(b)(5) and notwithstanding the undertaking required by Item 8(b) of Form S–8, the proposed amendments would eliminate the issuer-specific determination letter or opinion requirements in Item 601(b)(5)(ii) and the opinion requirement in Item 601(b)(5)(iii) for those issuers that adopt a third-party pre-approved plan [205] that has been approved by the IRS if such issuers file the IRS opinion letter [206] issued to the pre-approved plan's provider.[207] Issuers relying on proposed Item 8(c) would not need to obtain their own determination letter from the IRS or otherwise provide an opinion of counsel unless the issuer makes revisions to the pre-approved plan that may call into question whether the revised plan is still qualified.

Request for Comment:

86. Should we adopt the proposed amendments to conform the Form S–8 requirements to current IRS practices?

87. Do the proposed amendments provide investors adequate assurance of the plan's qualified status?

88. Do the proposed amendments ease administrative burdens for adopters of pre-approved plans? Are there any changes to the requirements for adopters of these types of plans that we should consider?

89. Is the undertaking for plan amendments with respect to maintaining ERISA qualification necessary? Are there alternative approaches to ensuring plan qualification under ERISA that would protect investors?

E. Revisions to Item 1(f) of Form S–8; Tax Effects of Plan Participation

We are proposing revisions to the disclosure requirements in Form S–8 to eliminate the description of the tax effects, if any, on the issuer.[208] One commenter asked us to reconsider the Item 1(f) requirement to describe the tax effect that may accrue to employees as a result of participating in a plan, and the tax effects, if any, on the issuer.[209] In a Form S–8, investors are not making a decision whether to approve or disapprove a plan; rather, the investment decision is whether to participate in an existing plan. We are therefore proposing revisions to Form S–8 that would remove the requirement to briefly describe the tax consequences of the plan for the issuer.

With respect to the requirement to disclose the tax consequences for employees, the same commenter stated that tax effects depend on individual circumstances, which can vary among participants, especially for consultants in light of the new deduction for qualified business income under IRC Section 199A.[210] Nevertheless, we are not proposing to eliminate the requirement in Form S–8 to describe the tax consequences to employees [211] and to state whether or not the plan is qualified under Section 401(a) of the Internal Revenue Code. We continue to believe such disclosure could provide relevant information for investors as they assess the tax consequences of their participation in the plan. We are soliciting further comments, however, about the usefulness of this disclosure for investors.

Request for Comment:

90. Should we revise the disclosure requirements in Form S–8 to eliminate the description of the tax effects, if any, on the issuer, as proposed?

91. Are disclosures regarding the tax effects of plan participation useful to investors in the context of a Form S–8 registration statement? If so, how?

92. Are there other ways, outside of the registration statement, that investors receive the same information regarding the tax consequences to them of plan participation, such that disclosure from the issuer would not provide additional or material information?

93. Are disclosures regarding the description of tax effects of plan participation that may accrue to employees helpful? If not, how should we address this concern?

F. Additional Requests for Comment About Form S–8

1. Plan Trustee Signatures on Form S–8

Where interests in a plan are being registered, Form S–8 requires the registration statement to be signed by the plan. For the plan signature, Form S–8 indicates that it may be signed by the trustees or other persons who administer the employee benefit plan. Some commenters stated that it is unnecessary and burdensome to require the plan trustee to sign the Form S–8.[212] Instead, the commenters suggested the employer/sponsor of the plan whose interests are being registered should be able to sign Form S–8 on behalf of the plan.[213]

As noted above, we continue to believe that Form S–8 plays a useful and effective role in registering the offer and sale of securities issued in compensatory offerings under the Securities Act. This is true, in part, because the Securities Act registration statement provides employees with the liability protections of Section 11 and Section 12(a)(2) in the case of material misstatements or omissions of information contained in the registration statement or prospectus, respectively.[214] Securities Act Section 11 imposes liability on every person who signs the registration statement.[215] Furthermore, the plan and its administrators are responsible for a portion of the disclosure investors will receive in connection with the registered offering,[216] and the signature of the plan trustee or other persons who administer the employee benefit plan acknowledges that responsibility. As a result, we are not proposing changes to the signature requirements of Form S–8 at this time. We are, however, soliciting additional comment about the legal and practical consequences of the commenters' recommended approach.

Request for Comment:

94. Assuming that having the employer sign on behalf of the plan would be legally sufficient to meet the requirements in Section 11, such that liability would attach for plan disclosures included in the registration statement, could a plan legally authorize the employer to sign on its behalf? If so, how would this be done?

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[204] *Id.*

[205] We note that the pre-approved program, as described in Rev. Proc. 2015–36, 2015–27 I.R.B. 20 provided for two types of pre-approved plan programs: Master & prototype (''M&P'') and volume submitter. Those programs were merged into a single pre-approved program in Rev. Proc. 2017–41, 2017–29 I.R.B. 92 (''Rev. Proc. 2017–41'').

[206] *See* Section 4.06 of Rev. Proc. 2017–41.

[207] *See* proposed Item 8(c) of Form S–8.

[208] *See* proposed revisions to Item 1(f) of Form S–8.

[209] *See* letter from Davis Polk.

[210] *See* letter from Davis Polk, referencing IRC Section 199A.

[211] General Instruction A.1(a)(1) defines ''employee'' to include certain consultants and advisors.

[212] *See* letters from Council and Davis Polk.

[213] *See* letters from Council and Davis Polk.

[214] *See* the signature block of Form S–8, which requires the trustees or other persons who administer the employee benefit plan to have duly caused the registration statement to be signed on its behalf. *See also* 15 U.S.C. 77k and 77*l*(a)(2).

[215] *See* Section 11(a)(1) of the Securities Act [15 U.S.C. 77k(a)(1)].

[216] Where plan interests are being registered, Form S–8 requires the plan, at the time of filing, either to (a) have been subject to Exchange Act Section 15(d) for at least 90 days and be current in its filings thereunder; or (b) file, concurrently with the filing of the Form S–8 registration statement, an annual report on Form 11–K for its latest fiscal year (or, if the plan has not yet completed its first fiscal year, for a period ending not more than 90 days prior to the filing date). However, the requirement to file an annual report on Form 11–K does not apply if the plan was established less than 90 days prior to the Form S–8 filing date. Therefore, the form may be used for the initial registration of interests in a newly established plan.

2. Bridging the IPO Gap for Employee Stock Purchase Plans

It is common for issuers that are completing an initial public offering (''IPO'') to also implement an employee stock purchase plan (''ESPP''). Such stock purchase plans permit employees to purchase stock of their employer through payroll deductions or otherwise, typically at a discount to market.[217] The stock may be acquired either directly from the employer or in open market purchases effected by the plan.

A few commenters cited difficulty in implementing ESPPs for issuers that plan to conduct an IPO.[218] According to one of these commenters, most issuers want employees to be enrolled in the ESPP on the IPO date to give employees the benefit of the IPO price for the first offering under the plan.[219] Commenters indicated that the registration requirement is a ''significant obstacle'' in this process because when employees authorize contributions to an ESPP to be made via payroll deductions, such authorization is viewed as an investment decision on the part of the employee, even if the employee retains the right to withdraw contributions prior to the purchase.[220]

Where employees elect to participate in the ESPP, the pre-IPO enrollment of employees would constitute an offer and sale of securities to the participant employees, which would need to be either registered or exempt. One commenter noted that, without a valid exemption, the employer would be unable to solicit employees for participation in the plans prior to the IPO.[221] Consequently, for the offer and sale of shares purchased under the ESPP to be covered by a Form S–8 registration, the Form S–8 must be effective prior to the date that employees authorize the payroll deductions, which cannot occur because the issuer is not yet a reporting company, and therefore does not meet the requirements to use Form S–8.[222]

Commenters stated that to avoid the communication and registration issues, issuers implementing an ESPP that starts at the time of the IPO automatically enroll all of their eligible employees in their ESPPs, and then have employees withdraw from or confirm their enrollment before the first purchase is made under the ESPPs.[223] According to these commenters, this is an awkward solution because it requires them to enroll all the employees before they can communicate about the plan.[224] One commenter further stated that solving the issue of planning for an ESPP around the time of an IPO would remove a barrier that issuers face when undertaking an IPO.[225] We are not proposing specific amendments at this time but are soliciting additional comments on how to best address this issue.

Request for Comment:

95. Would extending Rule 701 to offers to participate in an ESPP made before the IPO and sales pursuant to ESPPs made after the IPO facilitate the use of ESPPs? If so, how could we limit such exempt sales to IPO employee stock purchase plans?

96. If Rule 701 were extended to reporting issuers for this purpose, would we also need to address the resale limitations set forth in Rule 701(g)? If so, how should we do so?

97. Aside from the Rule 701 exemption, are there alternative solutions that we could adopt that would allow employees to participate in ESPPs during an IPO?

98. Would the ability to communicate about the ESPP prior to the IPO without pre-IPO plan enrollment be sufficient to allow employee participation at the IPO price? If so, what types of communications should we exempt and for how long a time period prior to the IPO?

IV. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the proposed amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

V. Economic Analysis

Compensatory practices, and the composition of the workforce have evolved significantly since the Commission last amended the Rule 701 exemption and the Form S–8 registration statement. For example, businesses have become less asset-intensive, and there have been non-trivial inflationary effects over the last 20 years. Under the current Rule 701 provisions, start-up non-reporting issuers may not be able to offer the amount of compensatory securities [226] that would attract and retain human capital and provide incentives to employees. The proposed amendments to Rule 701 are in response to such changes in the business environment and intended to update the rule's provisions to current business environment conditions.

We are proposing several amendments to Rule 701, Form S–8, and related rules to modernize the requirements for compensatory transactions. We are mindful of the costs imposed by and the benefits obtained from our rules and the proposed amendments.[227] The discussion below addresses the potential economic effects of the proposed amendments. These include the likely benefits and costs of the proposed amendments and reasonable alternatives thereto, as well as the potential effects on efficiency, competition, and capital formation. We attempt to quantify these economic effects whenever possible; however, due to data limitations, in many cases we are unable to do so. Particularly for Rule 701, we are unable to quantify the economic effects due to lack of data on non-reporting issuers. Where we are unable to provide a quantitative assessment, we provide a qualitative discussion of the economic effects instead.

A. Economic Baseline

The baseline for the economic analysis consists of the current

[217] The offer and sale of securities pursuant to ESPPs, when not exempt from registration, are typically registered on Form S–8. *See* 1980 Employee Benefit Plans Release at Section II.A.5.a.

[218] *See* letters from Davis Polk and NASPP.

[219] *See* letter from NASPP.

[220] *See* letters from Davis Polk and NASPP.

[221] *See* letter from Davis Polk. *See also* Section 5(c) of the Securities Act.

[222] *See* General Instruction A.1. of Form S–8 requiring that Form S–8 eligible issuers be subject to the requirement to file reports pursuant to Section 13 (15 U.S.C. 78m) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act.

[223] *See* letters from Davis Polk and NASPP.

[224] *Id.*

[225] *See* letter from NASPP.

[226] We believe that most, if not all, issuances under Rule 701 will be equity-based securities, although the scope of the proposed rules is broader than ''equity-based'' compensation.

[227] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)], Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)], and Section 2(c) of the Investment Company Act of 1940 [15 U.S.C. 80a–2(c)] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in (or, with respect to the Investment Company Act, consistent with) the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. In addition, Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires us to consider the effects on competition of any rules that the Commission adopts under the Exchange Act and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

regulatory requirements applicable to issuers issuing securities to their employees as part of their compensation arrangements. Non-reporting issuers are able to rely on Rule 701 to offer compensatory securities to their employees. Reporting issuers are able to register compensatory securities offerings to their employees on Form S–8.

1. Rule 701

The proposed amendments to Rule 701 would affect many of the requirements associated with the exemption, including the timing and content of disclosure for certain offerings, the overall ceiling applicable to offerings under the exemption, and the eligible recipients of compensatory securities under Rule 701.

We can approximate the number of growth companies with external financing needs using data on companies conducting exempt securities offerings under Regulation D, Regulation A, and Regulation Crowdfunding. This group may be likely to rely on Rule 701 for the purpose of offering competitive compensation packages to attract and retain individuals. Based on filings in 2019, we estimate there are approximately 17,837 non-reporting companies conducting exempt offerings of unregistered securities under the aforementioned exemptions.[228] However, we do not have any data regarding the current utilization of the Rule 701 exemption that would allow us to quantify the effect of the proposed amendments. Accordingly, in the discussion below, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs, and the potential impacts of the proposed amendments on efficiency, competition, and capital formation.

2. Form S–8

The proposed amendments to Form S–8 would affect reporting issuers that currently offer, or seek to offer, securities pursuant to employee benefit plans. We estimate that 1,753 unique issuers filed 2,006 Forms S–8 with the Commission during calendar year 2019. The majority of these issuers filed one Form S–8 during 2019. There were 1,522 issuers filing one, 201 issuers filing two, and 30 issuers filing three or more Forms S–8 during 2019.

Among the issuers that filed at least one Form S–8 during 2019, 1,610 were domestic reporting issuers and 143 were FPIs. Among the domestic Form S–8 filers, approximately 41% were large accelerated filers, 27% were accelerated filers, and 32% were non-accelerated filers.[229] In addition, we estimate that 40% of domestic Form S–8 filers were smaller reporting companies (''SRCs''), and 28% were emerging growth companies (''EGCs'').[230] Approximately 20% of domestic Form S–8 filers were both EGCs and SRCs. Among the FPIs that filed at least one Form S–8 during 2019, approximately 23% were large accelerated filers, 15% were accelerated filers, and 46% were non-accelerated filers. Among these FPIs, 48% were EGCs. We further estimate that of the 1,753 unique issuers filing at least one Form S–8 during 2019, at least 85% (1,523 companies) filed a Form S–8 to register the sale of compensatory securities for a non-retirement related plan.[231]

B. Benefits and Costs to Proposed Amendments to Rule 701 and Form S–8

1. Proposed Amendments to Rule 701(e)

Rule 701(e) specifies the disclosure requirements for non-reporting issuers relying on the Rule 701 exemption to offer securities as compensation to employees if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million. For non-reporting issuers that exceed this threshold, the required disclosure includes: A copy of the summary plan description required by ERISA or a summary of the plan's material terms if it is not subject to ERISA; information about the risks associated with investment in the securities sold under the plan or contract; and financial statements required to be furnished by Part F/S of Form 1–A [232] under Regulation A.[233] Such financial statements must be as of a date no more than 180 days before the sale of securities relying on Rule 701. Moreover, the rule requires that the associated disclosures be delivered to all investors if the $10 million threshold is surpassed, and not only for the sales that exceed the $10 million threshold. For FPIs, Rule 701(e) requires financial statements that are not prepared in accordance with U.S. GAAP or IFRS to be reconciled to U.S. GAAP. We are proposing multiple amendments to Rule 701(e).

The proposed amendments would change various aspects of the disclosure required if the aggregate sales price or amount of securities sold during a consecutive 12-month period under Rule 701 exceeds $10 million. The proposed amendments would affect these disclosure requirements for all non-reporting issuers relying on the exemption, both domestic and FPIs. As proposed, such issuers would be required to provide financial statements that are no more than 270 days old (as compared to the current 180-day requirement), similar to the Regulation A disclosure requirement. FPIs that are eligible for the Rule 12g3–2(b) exemption would be able to provide such financial statements prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available. In lieu of financial statements, non-reporting issuers would be able to disclose a Section 409A independent valuation report, as described in more detail below.

In general, these proposed amendments would lower the cost to non-reporting issuers that rely on, or seek to rely on, the Rule 701 exemption, particularly the associated disclosure burden. Lower costs related to the use of the exemption may lead to an increase in the use of the exemption by non-reporting issuers, to the extent that

[228] Based on staff analysis of EDGAR filings in calendar year 2019, there were approximately 17,071 non-reporting operating companies conducting Regulation D offerings. In addition, there were 73 Regulation A issuers that were not Exchange Act reporting companies and that did not file a Form D or amendment to it. Finally, 693 non-reporting companies conducted offerings solely under Regulation Crowdfunding in 2019 (companies conducting both Regulation D and Regulation Crowdfunding offerings or both Regulation A and Regulation Crowdfunding offerings in 2019 are included in the number for Regulation Crowdfunding offerings).

[229] Although Rule 12b–2 [17 CFR 240.12b–2] defines the terms ''accelerated filer'' and ''large accelerated filer,'' it does not define the term ''non-accelerated filer.'' If an issuer does not meet the definition of accelerated filer or large accelerated filer, it is considered a non-accelerated filer.

[230] An ''emerging growth company'' is defined, in part, as an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. *See* Rule 405 and 17 CFR 240.12b–2. *See also* Rule 405; 15 U.S.C. 77b(a)(19); 15 U.S.C. 78c(a)(80); and *Inflation Adjustments and Other Technical Amendments under Titles I and II of the JOBS Act,* Release No. 33–10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)].

''Smaller reporting company'' is defined in 17 CFR 229.10(f) as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (i) Had a public float of less than $250 million; or (ii) had annual revenues of less than $100 million and either: (A) No public float; or (B) a public float of less than $700 million.

[231] We estimate that 712 issuers filed a form 11–K for fiscal year 2019. Of these issuers, 230 also filed a Form S–8 during 2019. We assume that Forms S–8 filed by these 230 issuers are in regard to a retirement related plan.

[232] 17 CFR 239.90.

[233] 17 CFR 230.251 through 230.263.

the current disclosure costs discourage non-reporting issuers from relying on it. In the context of securities-based compensation, we expect that the information contained in financial statements assists employees in valuing their compensation packages. However, we lack information as to how employees use the existing financial statement disclosures to interpret the value of offered securities-based compensation or to make investment decisions. To the extent that the proposed disclosure requirement leads to less information about the value of the non-reporting issuer being available to employees, economic theory suggests that increased uncertainty about such value may weaken the expected benefits associated with the use of equity-based pay.[234]

Below, we discuss the costs and benefits of each proposed amendment to Rule 701(e) individually.

(a) Disclosure Requirement for the Period Preceding the Threshold Amount Being Exceeded

The first proposed amendment to Rule 701(e) would limit the transactions that are subject to the rule's additional disclosure requirements when sales of securities under Rule 701 exceed $10 million in a 12-month period. Currently, disclosure must be provided a reasonable period of time before the date of sale to all investors to whom securities are sold during any consecutive 12-month period in which the $10 million threshold is exceeded. If disclosure has not been provided to all such investors before sale, the non-reporting issuer will lose its ability to rely on the exemption for the entire offering. The proposed amendment would require disclosure to only those investors receiving securities that exceed the $10 million threshold. The proposal would thus eliminate the ''look-back'' aspect of the disclosure requirement, which may facilitate non-reporting issuers' efforts to plan their compensatory programs or respond efficiently to unforeseen situations.

This proposed amendment is likely to provide more certainty to non-reporting issuers regarding their compliance with disclosure obligations under the rule. The proposed amendment also would allow non-reporting issuers the flexibility to offer compensatory securities as needed throughout the year to take advantage of opportunities to attract human capital, without the risk of retroactively losing the exemption if the required disclosure was not provided to investors involved in sales below the $10 million threshold. To the extent that the current disclosure requirement constrains non-reporting issuers from fully utilizing the exemption and the potential benefits that may accrue from the use of employee securities-based pay, the proposed amendment would likely loosen such constraint and allow for more efficient use of securities-based pay. We also expect employees to benefit from the proposed amendment as they would be able to further participate in a securities-based compensation program that might be currently constrained due to the existing disclosure requirements.

We do not expect this proposed amendment to generate any costs for employees and issuers. However, the proposed revision could create an information asymmetry among employees receiving compensatory securities, with some employees being provided more information about the non-reporting issuer's value than others. This asymmetry could affect the value that employees with different information assign to such compensation (higher value generally being associated with greater disclosure). Consequently, the benefits from using such compensation, such as the alignment of incentives between employees and other investors, could be weaker for the group of employees that do not receive the prescribed disclosure. Non-reporting issuers could choose to voluntarily provide the disclosure to all employees, if it is net beneficial for the non-reporting issuer.

(b) Age of Financial Statements

Another proposed amendment to Rule 701(e) would increase the maximum permissible age of the financial statements required to be provided to investors to harmonize the requirement with the corresponding requirements for capital-raising transactions under Regulation A. Currently, non-reporting issuers subject to the Rule 701(e) disclosure requirement must provide financial statements that are dated no more than 180 days before the securities' date of sale. As a practical matter, such a requirement compels non-reporting issuers to update their financial statements on a quarterly basis in order to make continuous offerings in compliance with the rule. The proposed revision would require non-reporting issuers to provide financial statements that are dated less than 270 days before the securities' date of sale, which would permit issuers to satisfy the disclosure requirement through semi-annual updating of their financial statements. For non-reporting issuers that would otherwise not prepare quarterly financial statements, increasing the maximum age of the financial statements to be provided to investors would lower the compliance costs associated with the rule. Such a decrease in the costs of complying with the rule's disclosure requirement could lead to an increase in the number of non-reporting issuers that rely on the exemption to compensate their employees or other eligible parties with securities to the extent such non-reporting issuers anticipate exceeding Rule 701's $10 million threshold for additional disclosure.

As mentioned above, more flexibility in the use of securities-based compensation may increase the ability of non-reporting issuers that are eligible to use the exemption to attract and retain employees, among other potential benefits. The proposed amendment would lower compliance costs for non-reporting issuers that do not otherwise prepare financial statements more frequently than semi-annually. For example, the proposed amendments would lower compliance costs relative to current Rule 701 for Tier 2 Regulation A issuers that are not Exchange Act reporting companies that utilize Rule 701 to offer compensatory securities and thus already are required to provide financial statement disclosure on a semi-annual basis.

We do not expect this proposed amendment to generate any costs for employees and issuers. We lack information as to how or the extent to which employees use these disclosures to make investment decisions, but to the extent that less frequent disclosure leads to less timely information about the value of the non-reporting issuer, increased uncertainty about such value may weaken the expected benefits associated with the use of equity-based pay.

(c) Financial Statement Content Requirements for FPIs

A third proposed amendment would permit FPIs that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3–2(b) to provide financial statements prepared in accordance with home country accounting standards, if financial statements prepared in accordance with U.S. GAAP or IFRS are not otherwise available. Such FPIs

[234] Non-reporting issuers have more opaque information environments, and with few exceptions their securities are not traded in an active market. As such, there is more inherent uncertainty about their value due to elevated liquidity and valuation risks, as compared to reporting companies. Such uncertainty is likely to exist for the value of compensatory securities offered and may potentially attenuate the incentive effects of equity-based pay for non-management employees.

would experience lower compliance costs under the proposed amendment because they would not incur the cost of reconciling their financial statements in order to offer more than $10 million in securities in a 12-month period. Also, to the extent that the cost of the required reconciliation to U.S. GAAP discourages Rule 12g3–2(b)-eligible FPIs from relying on the exemption, we expect that the proposed amendment would likely increase the number of such FPIs that may rely on the exemption in the future. Lowering the costs of compliance for such FPIs may increase their ability to attract and retain human capital through offering securities-based pay.

With respect to costs, the proposed amendment could generate some uncertainty for employees or increase their cost of processing the information disclosed in financial statements if those employees are less familiar with the home country's accounting standards than U.S. GAAP or IFRS, or if those accounting standards do not require the disclosure of as much material information.[235] However, to the extent that employees are more familiar with the home country's accounting standards, we do not expect the proposed amendment to increase their cost of processing the related information.

(d) Alternative Valuation Disclosure

A fourth proposed amendment to Rule 701(e) would permit non-reporting issuers to provide valuation disclosure using a Section 409 independent valuation report. The proposal would require the Section 409A independent valuation report to be prepared pursuant to an independent appraisal to reduce potential risks that may arise from an issuer providing its own valuation. The proposal also would require the Section 409A independent valuation report to be updated at six-month intervals. Rule 12g3–2(b)-eligible FPIs would be permitted to disclose the fair market value of the securities to be sold consistent with the Section 409A rules applicable to stock readily tradeable on an established securities market.[236]

To the extent that the proposed valuation disclosure is a less costly alternative to the applicable financial statement requirements, the proposed amendment is likely to lower compliance costs for at least some non-reporting issuers that issue securities under the Rule 701 exemption.[237] A decrease in compliance costs could lead to more non-reporting issuers relying on the exemption, or to an increase in the amount of compensatory securities issued by non-reporting issuers that were discouraged to offer compensatory securities in excess of $10 million so as to not trigger the disclosure requirement. Moreover, if the requirement for disclosure of financial statements presents a potential risk of unauthorized release of competitively sensitive information, the proposed alternative could reduce such risks (to the extent that valuation disclosure is less likely to have that consequence).

One difference in the information content of a Section 409A independent valuation report versus the information content of financial statements is that financial statements mostly provide information about past economic transactions as captured by applicable accounting standards, whereas Section 409A valuations are based on assumptions about future performance. It is possible that a Section 409A independent valuation report could simplify or enhance an employee's understanding of the value of his or her compensation as the report would provide valuation information that could be more practical for such purpose and, depending on the valuation method applied, does not necessarily need to be derived from the financial statements.[238] However, valuations rely on multiple assumptions, which could introduce some uncertainty with regard to the perceived value of compensatory securities. The proposed requirement that such a valuation report be prepared pursuant to an independent appraisal should lower the risk that valuation assumptions are inaccurate or opportunistic, and increase the reliability of such valuations.

Under the proposed amendment, Rule 12g3–2(b)-eligible FPIs that have stock readily tradeable on an established securities market would disclose the stock price on the most recent trading day preceding the date of sale to satisfy the rule's disclosure requirements. Because the stock price for these FPIs is readily observable and available, we expect the proposed amendment to lower compliance costs for these FPIs. Moreover, a valuation derived from the value of tradable stock on an established securities market is likely to represent a fair and objective value of the securities offered as compensation. To the extent that the market conditions for these FPIs lead to a fair and objective value, then disclosure of the stock price could increase the reliability of such valuation. The foreign listing of a Rule 12g3–2(b)-eligible FPI helps assure that there is a foreign jurisdiction that principally regulates and oversees the trading of the issuer's securities and its disclosure obligations to investors, and increases the likelihood that the issuer's pricing determinants are located outside the United States. While stock price alone does not provide the same level of analysis as an independent valuation report, the combination of the home country disclosure required in connection with the foreign listing and the stock price typically provides a significant amount of information that is available for recipients of compensatory securities under Rule 701.

(e) Disclosure Requirements for Derivative Securities

A fifth proposed amendment to Rule 701(e) would distinguish between derivative securities that involve a decision to exercise or convert, and those that do not, such as RSUs, for purposes of determining when disclosure is required to be delivered. As discussed in Section II.A.5, the timing of an investment decision, if any, is not universal for the various compensatory instruments that are derivative securities. Consistent with the rule's general requirement that disclosure be provided a reasonable period of time before the date of sale, the proposal would generally require delivery of disclosure to recipients of derivative securities under the rule at the time most relevant to making an investment decision.

A stock option or similar instrument may expire without being exercised or converted, and accordingly, does not result in delivery of the underlying shares to the holder absent an affirmative investment decision to exercise or convert. In contrast, a restricted stock unit or similar instrument settles automatically in the underlying shares at maturity, without need for any investment decision by the holder. Because such instruments settle by their terms without action by the

[235] It is also possible that the requirement to reconcile local/country GAAP financial statements to U.S. GAAP or IFRS may have resulted in financial statements with increased reliability, if an independent third party performed such exercise.

[236] *See* Treasury Reg. 1.409A–1(b)(5)(iv)(A).

[237] The frequency of the proposed valuation disclosure is less than the current financial statement disclosure requirement, which would lower compliance costs for non-reporting issuers. The requirement that such valuation reports be prepared by an independent party would increase the cost of the proposed disclosure option, to the extent that non-reporting issuers do not currently use an independent party to prepare such valuations for tax purposes.

[238] There are multiple ways a valuation could be derived, based on facts and circumstances specific to the issuer. Estimation of the sum of present value of anticipated future cash-flows is one method to derive a valuation, which could be based on information from existing financial statements and projections about anticipated future cash flows.

holder, the relevant investment decision, if any, likely takes place at the date of grant.

As proposed, if the sale involves a stock option or other derivative security that involves a decision to exercise or convert, the non-reporting issuer would continue to be required to deliver Item 701(e) disclosure a reasonable period of time before the date of exercise or conversion. If the sale involves a restricted stock unit or other derivative security that does not involve a decision to exercise or convert, the proposal would require the non-reporting issuer to deliver disclosure a reasonable period of time before the date the restricted stock unit or similar derivative security is granted. However, if the sale involves a restricted stock unit or other derivative security that does not involve a decision to exercise or convert and is in connection with the hire of a new employee, the disclosure would be considered timely delivered if provided within 14 calendar days after the date the person begins employment. The proposed amendment could benefit non-reporting issuers by limiting potential leaks of competitively sensitive information by individuals who seek, but do not accept, employment with the non-reporting issuer. If securities-based compensation is a significant component of the compensation offered to new hires, not providing the disclosure required by Rule 701(e) before such grants are awarded could limit the ability of securities-based compensation to attract talent. However, we expect non-reporting issuers to weigh this potential effect and choose the timing of the required disclosure in a way that maximizes their expected net benefit.

(f) Disclosure Requirements Following Business Combination Transactions

A sixth proposed amendment to Rule 701(e) would clarify disclosure delivery obligations for the derivative securities of an acquired entity that the acquiring non-reporting issuer assumed in a business combination transaction. Where an acquired entity complied with Rule 701 at the time it originally granted the derivative securities, the exercise or conversion of acquired entity derivative securities assumed by the acquiring non-reporting issuer would be exempt from registration, subject to the acquiring non-reporting issuer's compliance with Rule 701(e), where applicable. If the acquired entity was required to provide disclosure pursuant to Rule 701(e) and the derivative securities are exercised or converted after completion of the business combination transaction, the acquiring non-reporting issuer would assume that disclosure obligation, and would be required to provide information meeting the requirements of Rule 701(e) about itself, consistent with the timing requirements of Rule 701(e)(6), as amended. Further, in determining whether the amount of securities the acquiring non-reporting issuer sold during any consecutive 12-month period exceeds $10 million for purposes of triggering Rule 701(e) disclosure, the acquiring non-reporting issuer would need to consider only the securities that it sold in reliance on Rule 701 during that period, and would not be required to include any securities sold by the acquired entity pursuant to the rule during the same 12-month period. This proposal would clarify disclosure delivery obligations following a business combination transaction, and permit affected non-reporting issuers to plan their compensation programs with more certainty as to how a potential future business combination transaction would affect the non-reporting issuer's Rule 701(e) disclosure obligations.

2. Proposed Amendments to Rule 701(d)

Currently, for a non-reporting issuer to be eligible to rely on Rule 701, total sales of securities over a consecutive 12-month period may not exceed the greatest of three alternatives: (i) $1,000,000 (''dollar cap''), (ii) 15% of the issuer's total assets (''asset cap''), or (iii) 15% of the outstanding amount of securities of the class. We are proposing to amend two of these three alternative caps: The dollar cap would be raised to $2,000,000, and the asset cap would be raised to 25% of an issuer's total assets.

The proposed increases in the dollar and asset caps would provide non-reporting issuers with more flexibility to structure employee compensation contracts. We anticipate that non-reporting issuers would benefit from this increased flexibility as it would allow them to design compensatory arrangements that may better fit their individual circumstances. For example, the increased flexibility would permit a non-reporting issuer entering a market to grant larger individual awards in an effort to attract talent from competitors.

There is academic literature studying the use of forms of non-executive employee compensation.[239] Most of these studies focus on non-executive employee stock options. In general, there is evidence that the use of stock options in employee compensation contracts correlates to increases in future operating performance, higher levels of innovation, and firm value.[240] The studies also find that employee stock options are more likely to be used by issuers that are capital-constrained and by issuers that need to attract certain types of human capital.[241] In addition, one study finds that employee stock options are more effective in younger and high growth issuers and when such plans are implemented more broadly within issuers.[242] Other forms

[239] These academic studies examine the effects of compensatory benefit plans for publicly traded companies. The findings may not fully generalize to non-reporting issuers that rely on the Rule 701 exemption to provide equity-based pay. For example, as discussed earlier, the value of non-reporting companies is likely to be more uncertain relative to the value of reporting companies due to differences such as the information environment. This may increase the risk that equity-based pay for non-reporting companies imposes for employees receiving such compensation and thereby affect the strength of the incentives provided.

[240] *See* Xin Chang et al., *Non-Executive Employee Stock Options and Corporate Innovation,* 115 J. Fin. Econ. 168 (2015) (''Chang et al. (2015)''), which uses a sample of S&P1500 companies over the 1998–2003 period to examine the effect of stock options to non-executive employees on corporate innovation, as measured by patent applications and patent citations. The study documents a positive relation between the use of stock options to compensate non-executive employees and proxies for corporate innovation. The study also finds that the effect of employee stock options on innovation is due mostly to the risk-taking incentive that stock options provide to employees rather than the incentive to exert effort. *See also* Yael V. Hochberg & Laura Lindsey, *Incentives, Targeting, and Firm Performance: An Analysis of Non-Executive Stock Options,* 23 Rev. Fin. Stud. 4148 (2010) (''Hochberg & Lindsey (2010)''), which uses a sample of S&P1500 companies over the 1997–2004 period to examine the effect of employee stock options on company performance. The study documents a positive relation between implied incentives from employee stock options and future operating performance, on average. The study also documents that the positive relation between employee stock options and firm performance is concentrated in smaller firms and firms with significant growth options. Moreover, the study shows that such effect is stronger for broad-based option plans as they induce a mutual monitoring effect within employees.

[241] *See* John E. Core & Wayne R. Guay, *Stock Option Plans for Non-Executive Employees,* 61 J. Fin. Econ. 253 (2001) (''Core & Guay (2001)''), which examines detailed information about non-executive employee stock option holdings, grants, and exercises for 756 companies during the 1994–1997 period. Among other findings, the study's results support the hypothesis that options are granted to non-executives more intensively when firms have greater financing needs and face financing constraints. *See also* Ilona Babenko, Michael Lemmon, & Yuri Tserlukevich, *Employee Stock Options and Investment,* 66 J. Fin. 981 (2011) (''Babenko et al. (2011)''), which studies a sample of 1,773 companies over the period 2000 to 2005 with regard to their broad-based employee stock option programs. The study finds evidence consistent with the idea that stock options can relax financing constraints by substituting for cash wages at the time of the grant, and by providing significant cash inflows at the time of exercise, conditional on a high stock price. The study further estimates that $0.34 of each dollar of cash inflow received by the firm from the exercise of stock options is allocated to increasing capital and R&D expenditures.

[242] *See* Hochberg & Lindsey (2010), *supra note* 240.

of securities-based compensation could provide different incentives and lead to different outcomes. For example, a study that examines the effects of non-executive employee stock ownership in retirement savings vehicles finds an inverse relationship between employee stock ownership levels and risk-taking.[243]

Relatedly, the proposed amendments may affect non-reporting issuers' ability to attract and retain talent. For example, a non-reporting issuer would likely benefit if it is competing for talent with reporting companies that are relatively less constrained in their ability to offer securities-based incentives to attract talent. Moreover, such benefit would likely be particularly important for non-reporting issuers that are capital constrained. On a similar note, the increased ability to offer securities-based compensation may provide non-reporting issuers with an additional tool to achieve higher employee retention. An academic study finds that the use of broad based employee stock options leads to increased retention rates after the grant, but such increased retention is followed by higher turnover when the options vest.[244]

The proposed increases in the dollar cap and the asset cap may also allow non-reporting issuers to reallocate relatively limited cash resources to other productive uses. This expected benefit may be particularly important for non-reporting issuers that are resource-constrained and for non-reporting issuers whose business models rely on human capital (and are less asset-intensive). We expect the proposed increase to both caps to provide additional flexibility to non-reporting issuers in terms of allocating scarce resources.

While we expect the proposed amendments to Rule 701(d) to benefit non-reporting issuers as described above, there is some uncertainty as to the extent of the expected benefits from the proposed amendments. Specifically, securities-based compensation carries liquidity and valuation risks, and these risks are likely to be relatively higher for compensatory securities of non-reporting issuers.[245] Higher liquidity and valuation risks may blunt the anticipated economic effects of proposed amendments to Rule 701(d) on employee attraction, retention, and incentive alignment.[246]

The proposed amendments also would provide that after completion of a business combination transaction, to calculate compliance with paragraph (d)(2) of Rule 701, the acquiring non-reporting issuer may use a pro forma balance sheet that reflects the transaction or a balance sheet for a date after the completion of the transaction that reflects the total assets and outstanding securities of the combined entity. In addition, in determining the amount of securities that it may offer pursuant to Rule 701 following a business combination transaction, the acquiring non-reporting issuer would not be required to include the aggregate sales price and amount of securities for which the acquired entity claimed the exemption during the same 12-month period. These proposed changes would allow non-reporting issuers to plan their compensation programs without uncertainty as to the effect of a potential future business combination transaction. Further, permitting an acquiring issuer to compute the asset cap based on the combined entity may result in an increase in the maximum dollar amount of securities that may be sold over a 12-month period under the exemption.

3. Proposed Amendments to Rule 701(c) Eligible Participants

(a) Consultants and Advisors

We are proposing to extend the eligibility of consultants and advisors to receive Rule 701 compensatory securities to entities meeting specified ownership criteria designed to link the securities compensation to the performance of services and to prevent such securities from being issued to passive investment vehicles. Currently, only natural persons are eligible to receive securities pursuant to Rule 701 for providing services to the non-reporting issuer. The proposed amendment would expand the scope of eligible consultants or advisors to whom non-reporting issuers may issue securities as compensation for services. The proposed extension of consultant and advisor eligibility would allow non-reporting issuers to use securities-based compensation to engage a wider spectrum of service providers, which could enable these non-reporting issuers to gain access to potentially higher quality and/or lower cost outside expertise and services. These expected benefits likely would be greater for non-reporting issuers that are capital-constrained, and non-reporting issuers whose business models rely on such outside expertise. We do not anticipate any significant costs related to this proposal.

(b) Former Employees

The proposed amendments would extend eligibility to receive securities under Rule 701 to former employees of the non-reporting issuer who are issued specified post-termination grants and former employees of an entity that was acquired by the non-reporting issuer who are issued securities in substitution or exchange for securities issued as compensation while such persons were still employed by or providing services to the acquired issuer. We expect these amendments would benefit non-reporting issuers by making compensation planning and structure more efficient, as there would be less uncertainty and lower administrative costs in cases of employee turnover or business combination transactions. We do not anticipate any significant costs related to this proposal.

(c) Employees of Subsidiaries

Further, the proposed amendments would expand availability of the Rule 701 exemption to securities offered to employees of any subsidiary of the non-reporting issuer, consistent with the scope of eligibility for Form S–8, rather than only employees of majority-owned subsidiaries. This proposed amendment likely would lower administrative burdens for non-reporting issuers relying on the Rule 701 exemption when they transition to reporting status and become eligible to use Form S–8. We also expect the proposed amendment to benefit non-reporting issuers and their employees by providing certainty for this expanded group of eligible employees about their securities-based compensation awards

[243] *See* Francesco Bova et al., *Non-Executive Employee Ownership and Corporate Risk*, 90 Acct. Rev. 115 (2015), which uses U.S. Department of Labor Form 5500 filings to construct stockholdings which include employee stock ownership plans (ESOPs), 401(k) plans, deferred profit sharing plans invested in company stock, and employer stock bonus plans. It finds that a higher level of such employee stock ownership is related to lower risk-taking by employees. The study emphasizes the difference in employee incentives created by the various forms of equity-based pay and their interaction.

[244] *See* Serdar Aldatmaz, Paige Ouimet, & Edward D. Van Wesep, *The Option to Quit: The Effect of Employee Stock Options on Turnover,* 127 J. Fin. Econ. 136 (2018), which examines the effect of broad based stock option plans on employee retention. The study finds decreased employee turnover following the initiation of the plan and increased employee turnover in the third year of the grant.

[245] The absence of an active market for securities of non-reporting issuers introduces uncertainty as to their fair value. Holders of compensatory securities of non-reporting issuers also have to bear liquidity risk that arises from the absence of an active market for these securities.

[246] *See* Brian J. Hall & Kevin J. Murphy, *Stock Options for Undiversified Executives,* 33 J. Acct. & Econ. 3 (2002), which shows that there is a difference between the value of a stock option to an executive versus the cost of the option to the company, due to the executive's risk aversion and undiversified portfolio. *See* Core & Guay (2001), *supra* note 241.

when business combination transactions occur. We do not anticipate any significant costs to issuers or eligible participants related to this proposed amendment.

4. Benefits and Costs to Proposed Amendments to Form S–8

We are proposing multiple amendments regarding the use of Form S–8 by reporting issuers. The proposed amendments would expand the scope of participants that are eligible to receive compensatory securities issued pursuant to a Form S–8 registration statement and conform that scope with the corresponding proposed amendments to Rule 701. Moreover, the proposed amendments would reduce both the complexities associated with registration on Form S–8 and the risk of inadvertent non-compliance by reporting issuers using the form.

(a) Benefits and Costs From Changes to the Scope of Eligible Participants

The proposed amendments would expand the scope of participants eligible to receive compensatory securities issued pursuant to a Form S–8 registration statement to include former employees of the reporting issuer for specified post-termination grants and former employees of an entity that was acquired by the reporting issuer in exchange for securities issued as compensation while such former employees were still with the acquired issuer. We expect these proposed amendments would benefit reporting issuers by reducing uncertainty and administrative costs for these issuers' compensation programs in cases of employee turnover, or business combination transactions, which may make compensation planning and structuring more efficient.

The proposed amendments would permit reporting issuers to offer compensatory securities to consultants and advisors that have chosen to organize their business as an entity, provided that the entity meets specified ownership criteria designed to link the securities compensation with services performed for the issuer, and not issued to passive investment vehicles. We expect the proposed expansion of consultant and advisor eligibility would benefit reporting issuers as the ability to use securities-based compensation to engage a wider spectrum of service providers could enable these companies to gain access to potentially higher quality and/or lower cost outside expertise and services. The expected benefits likely would be greater for reporting issuers that are resource constrained and whose business models rely on such outside expertise. We do not expect any significant costs to issuers or eligible participants associated with the proposed amendments.

(b) Benefits and Costs From Other Amendments to Form S–8

We also are providing clarifications and proposing amendments to Form S–8 that are intended to simplify registration and to reduce compliance and administrative costs while increasing the utility of Form S–8 for reporting issuers.

We expect the main economic effect of these clarifications and proposed amendments to Form S–8 to be the reduction of compliance costs for issuers. For example, we are clarifying that reporting issuers may allocate securities among multiple incentive plans on a single Form S–8 and proposing amendments that would permit the addition of securities to an existing Form S–8 by an automatically effective post-effective amendment. These clarifications and proposed amendments should reduce the number of Form S–8 filings, thus reducing reporting issuers' compliance costs. Reporting issuers would still have to file post-effective amendments, which means they would incur some compliance costs associated with those filings, but we expect the costs of filing an amendment to Form S–8 to be less than those of filing the initial form. Likewise, we expect that the proposed amendments to Rule 457 and Form S–8 to require the registration of the offer and sale of a maximum aggregate offering price of securities pursuant to defined contribution plans would reduce compliance costs for reporting issuers by eliminating the need to track offers and sales of individual shares of issuer stock. For PRA purposes, we estimate the reduction in compliance costs associated with the proposed amendments to be approximately $46,000.[247] We note that the PRA costs relate to paperwork burdens and thus may not encompass all compliance costs. Accordingly, the PRA estimate may underestimate the reduction in compliance costs due to the proposed amendments.

We also expect that the clarifications and proposed amendments to Form S–8 would provide reporting issuers with flexibility to adjust their compensatory benefit plans and should eliminate the risks of over- or underestimating the number of securities required for compensatory offerings, thereby also reducing the associated risk of inadvertent noncompliance. For example, under proposed Rule 413(c), reporting issuers would not need to anticipate how many securities will be needed to fulfill obligations under each individual plan or even the types of securities that might be authorized for issuance pursuant to a plan in the future. Additionally, clarifying the ability to file a single Form S–8 for multiple plans will facilitate its use, especially in connection with incentive plans, because to the extent a plan expires with authorized but unissued shares, those shares would be immediately available for issuance under another authorized plan. By requiring registration of the offer and sale of a maximum aggregate offering price of securities pursuant to defined contribution plans, the proposed amendment would simplify administration of defined contribution plans and avoid inadvertent non-compliance with Section 5 of the Securities Act.

The proposed amendments would implement several improvements to simplify fee payments. Revised Form S–8 would include a new fee payment method for registration of offers and sales pursuant to defined contribution plans. The proposed amendment to the fee payment method would require reporting issuers to pay the registration fee for all sales made pursuant to a defined contribution plan during a fiscal year in arrears, based on the aggregate offering amount, no later than 90 days after the plan's fiscal year end. The proposed fee payment method would simplify administration of defined contribution plans and potentially eliminate the problem of inadvertently over- or underestimating the number of securities to be sold. As a result, it could create savings for issuers because instead of paying a registration fee to the Commission at the time of filing a registration statement, reporting issuers would pay the fee after the end of the fiscal year, when the number of transactions will have been definitively determined.

Finally, the proposed amendments would align Form S–8 instructions with current IRS plan review practices. This proposed amendment would eliminate the requirement that issuers undertake to submit any amendment to the plan to the IRS and file a copy of the IRS determination letter confirming that the amended plan is qualified under Section 401 of the IRC with the Commission. We are also proposing to revise Item 1(f) of Form S–8 to eliminate

[247] *See* Section VII.C, *infra*. We monetize the internal burden hours by multiplying them by $400, the cost per burden hour for outside professional help. Thus, the value of the internal burden hours is 115 * $400 = $46,000.

the requirement to describe the tax effects of plan participation on the issuer but are proposing to retain the requirement to describe the tax consequences to employees. These proposed amendments would align Form S–8 to current IRS review practices and streamline the content of Form S–8 without sacrificing potentially useful disclosure regarding the tax effects of participation in the plan for plan participants. We also expect these amendments to reduce the compliance costs for participants, but we are unable to quantify the cost reduction.

Overall, we expect that the economic impact to reporting issuers from the proposed technical amendments to be limited to reducing administrative burdens and complexity associated with registering offerings of compensatory securities. We do not anticipate any significant costs related to the proposed technical amendments.

C. Anticipated Effects on Efficiency, Competition, and Capital Formation

As described above, we believe that the proposed amendments could have positive effects on efficiency, competition, and capital formation. The proposed amendments to Rule 701 would enable non-reporting issuers to expand the use of securities as compensation for a wider range of outside expertise and services. We expect this to lead to improvements in the operational efficiency of these issuers. We expect a similar result from the proposed amendments to the scope of eligible participants who may receive compensatory securities for reporting issuers in offerings registered on Form S–8. We expect the proposed increase to two of the three alternative Rule 701(d) offering caps to improve affected issuers' ability to compete for talent by increasing their ability to provide equity-based pay packages. The proposed amendments to Rule 701(d) also may allow non-reporting issuers that are cash-constrained to re-allocate scarce resources to other productive uses and, as a result, lead to increased efficiency. Increased efficiency may be achieved because non-reporting issuers could further the use of securities-based compensation for incentive alignment at a lower cost compared to cash. Although offerings made pursuant to Rule 701(d) may not be used for capital-raising purposes, the proposed amendments could lead to improved utilization of limited resources by cash-constrained non-reporting issuers, which would enhance overall capital formation.

The proposed technical amendments to Form S–8 also may enhance efficiency as they are likely to lower administrative burdens and compliance uncertainty for reporting issuers offering securities-based compensation to employees. For example, the proposed amendments are likely to increase the ability of reporting issuers to react to changing conditions by adjusting their compensatory offerings by adding new securities or plans to an existing registration statement, and to pay fees for securities sold pursuant to defined contribution plans without the risk of inadvertent non-compliance.

D. Reasonable Alternatives

In broad terms, the proposed amendments to Rule 701 are likely to have three main effects:

(i) Increase the amount of securities-based compensation non-reporting issuers may provide pursuant to the Rule 701 exemption by increasing the rule's dollar amount and asset caps (Rule 701(d));

(ii) Expand the scope of eligible consultants, advisors and employees that may receive securities-based compensation under Rule 701 in exchange for services provided (Rule 701(c)); and

(iii) Lower the compliance and disclosure costs for non-reporting issuers relying on, or seeking to rely on, the exemption to provide exempt securities-based compensation (Rule 701(e)).

As an alternative to the proposed amendments, we could use different caps on the amount of annual securities-based compensation that a non-reporting issuer could provide under the Rule 701 exemption and/or adjust the third alternative cap (currently set at 15% of the maximum number of shares outstanding). Higher caps would allow non-reporting issuers more flexibility in using the Rule 701 exemption as a tool to compensate, attract, and retain employees (and vice versa for lower caps). However, due to the fact that non-reporting issuers are more opaque and their securities are less liquid, further increasing Rule 701(d) caps could lead to diminishing marginal benefits.

As another alternative, we could choose not to expand Rule 701 and Form S–8 eligibility to consultants or advisors organized as entities with prescribed characteristics, or to expand Rule 701 and Form S–8 to consultant and advisor entities that do not conform to the proposed ownership requirements. Given the tax and legal incentives that such consultants or advisors have to organize as entities, not including such entities under the exemption would result in a limited set of choices for non-reporting issuers to seek such services from third parties. In seeking the highest quality services at the lowest cost, cash-constrained issuers could be at a disadvantage to more established issuers facing fewer resource constraints. We also could expand Rule 701 and Form S–8 eligibility to any consultant or advisor, regardless of ownership structure. Such an alternative may provide an even wider range of options to issuers to engage outside expertise but would increase the risk that such compensatory securities would be issued to passive investment vehicles rather than individuals who perform services for the issuer.

Another alternative that we could have pursued is to extend the Rule 701 exemption to offers to participate in an ESPP made before the IPO and sales pursuant to ESPPs made after the IPO. This would facilitate employees' participation in the ESPP to obtain shares at the IPO price, which could be lower than the subsequent trading price. Such a proposal could present disadvantages, such as employees' loss of the information in the prospectus they receive pursuant to Part I of Form S–8, employees' loss of the legal protections provided by Securities Act liability in the case of material misstatements or omissions, and employees' receipt of restricted stock pursuant to Rule 701. However, as such an alternative could facilitate the use of ESPPs and allow issuers to better align incentives of their employees, the release requests comment on this alternative.

Finally, we could make different amendments to the Rule 701(e) disclosure requirements. For example, instead of harmonizing the Rule 701(e) disclosure requirements with those of Regulation A offerings in terms of age of financial statements, we could require less frequent updating of this disclosure, for example on an annual basis. Less frequent updating would provide less certainty to holders of these securities regarding their value and potentially weaken incentive effects from the provision of securities-based compensation. However, less frequent disclosure of financial statements would be less costly for non-reporting issuers and could lead to increased use of compensatory securities by non-reporting issuers.

As another alternative, we could permit the use of a Section 409A valuation report in lieu of financial statement disclosure but without requiring it to be independently prepared. Such an alternative could provide a lower cost option for affected non-reporting issuers to satisfy the disclosure requirement of Rule 701(e).

However, such alternative could give rise to conflicts of interest that would undermine the reliability of the valuation report. A lower quality valuation report would increase uncertainty about the value of the non-reporting issuer and the offered compensatory securities, and as a result, would attenuate the expected benefits from the provision of equity-based compensation.

Finally, we could eliminate Form S–8 and allow reporting issuers to rely on the Rule 701 exemption instead. Such alternative would lower compliance costs for reporting issuers and could promote further use of securities-based compensation by reporting issuers. However, such alternative could cause employees to receive less information than would be required to be provided pursuant to Part I of Form S–8, which could lead to more uncertainty about their compensation and potentially weaken the expected benefits from the provision of equity-based compensation. Eliminating Form S–8 also would cause employees to lose the protections provided by Section 11 and, in some cases, Section 12(a)(2) liability in the case of material misstatements or omissions.[248]

Request for Comment:

We request comments on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation or affect investor protection. In addition, we also seek comment on alternative approaches to the proposed amendments and the associated costs and benefits of these approaches. Commenters are requested to provide data, estimation methodologies, and other factual support for their views, in particular, costs and benefits estimates.

Specifically, we seek comment with respect to the following questions: Are there any costs and benefits to any entity that are not identified or misidentified in the above analysis? Are there any effects on efficiency, competition, and capital formation that are not identified or are misidentified in the above analysis? Should we consider any of the alternative approaches outlined above instead of the proposed amendments? If so, which approach and why? Are there any other potential alternative approaches we should consider that would promote the ability of companies to compete in the market for talent consistent with investor protection?

VI. Paperwork Reduction Act

A. Summary of the Collection of Information

Certain provisions of our rules and forms that would be affected by the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[249] The Commission is submitting the proposal to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[250] The hours and costs associated with preparing and filing the forms and reports constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed. The titles for the affected collections of information are:

''Rule 701'' (OMB Control No. 3235–0522); and

''Form S–8'' (OMB Control No. 3235–0066).

The Commission adopted Form S–8 and Rule 701 pursuant to the Securities Act. Form S–8 sets forth the disclosure requirements for a registration statement for securities to be offered by a reporting issuer under an employee benefit plan to its employees, or employees of a subsidiary or parent company, to help such investors make informed investment decisions. Rule 701 provides an exemption from registration for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation by non-reporting issuers. Issuers conducting compensatory benefit plan offerings in excess of $10 million in reliance on Rule 701 during any consecutive 12-month period are required to provide plan participants with certain disclosures, including financial statement disclosures.[251] This disclosure constitutes a collection of information. A description of the proposed rule amendments, including the need for the information and its proposed use, as well as a description of the likely respondents, can be found in Sections II and III above, and a discussion of the economic effects of the proposed amendments can be found in Section IV above.

B. Summary of the Proposed Amendments' Effects on the Collections of Information

The following table summarizes the estimated effects of the proposed amendments on the paperwork burdens associated with the affected collections of information.

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS

Collection of information	Proposed amendment	Expected estimated PRA effect of proposed amendment	Current number of average annual responses	Estimated change in number of average annual respondents
Form S–8	• Clarify that registrants may add multiple plans and allocate securities among multiple plans on a single Form S–8; permit addition of securities or classes of securities by automatically effective-post effective amendment; permit registration of an indeterminate amount of securities for Defined Contribution Plans; implement a new fee calculation and payment method for Defined Contribution Plan. • Conform Form S–8 instructions to current IRS plan review practices and eliminate the requirement to describe the tax effects of plan participation on the registrant.	• These proposed amendments are expected to reduce the number of initial Forms S–8 filed annually, and correspondingly increase the number of post-effective amendments to Form S–8 filed annually. We expect the net effect to be no change in the PRA burden per response and no change in the number of responses. • Decrease PRA burden per response by 1 hour.	2,140	0

[248] *See* 15 U.S.C. 77k and 77*l*(a)(2).

[249] *See* 44 U.S.C. 3501 *et seq.*

[250] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[251] *See* Rule 701(e).

PRA TABLE 1—ESTIMATED PAPERWORK BURDEN EFFECTS OF THE PROPOSED AMENDMENTS—Continued

Collection of information	Proposed amendment	Expected estimated PRA effect of proposed amendment	Current number of average annual responses	Estimated change in number of average annual respondents
Rule 701	• Expand eligibility to specified consultant entities and specified former employees of the registrant and acquired companies.	• No change in PRA burden per response or number of responses.	800	40
	• Require Rule 701(e) disclosure to be delivered to investors only for sales that exceed the $10 million threshold.	• Elimination of the requirement to provide Rule 701(e) disclosure to investors who purchase before the $10 million threshold is crossed would permit issuers who did not provide such disclosure to continue relying on the exemption after crossing the $10 million threshold. It would also allow issuers to avoid providing such disclosure as a precautionary measure in offerings where it is unclear whether the threshold will be crossed. We expect the net effect on the number of responses to be 40 additional responses with no change in the PRA burden per response.		
	• Reduce the frequency of Rule 701(e) financial statement updates; allow Rule 12g3–2(b) eligible foreign private issuers to disclose financial statements that are not reconciled to U.S. GAAP; and allow issuers to disclose valuation information consistent with IRC Section 409A rather than financial statements.	• Decrease PRA burden per response by 0.5 hours.		
	• Increase the assets cap to 25% and increase dollar cap to $2 million and expand eligibility to specified consultant entities, employees of all subsidiaries, and specified former employees of issuer and acquired companies.	• No change in PRA burden per response or number of responses.		

C. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments

Below we estimate the incremental and aggregate change in paperwork burden as a result of the proposed amendments. These estimates represent the average burden for all registrants, both large and small. In deriving our estimates, we recognize that the burdens will likely vary among individual issuers based on a number of factors, including the nature of their business. For purposes of the PRA, the burden is to be allocated between internal burden hours and outside professional costs. The table below sets forth the percentage estimates we typically use for the burden allocation for each affected collection of information. We also estimate that the average cost of retaining outside professionals is $400 per hour.[252]

PRA TABLE 2—STANDARD ESTIMATED BURDEN ALLOCATION FOR SPECIFIED COLLECTIONS OF INFORMATION

Collection of information	Internal (%)	Outside professionals (%)
Form S–8	50	50
Rule 701	25	75

For Rule 701, we estimate that the proposed amendments would change both the frequency of responses to, and the burden per response of, the existing collections of information. We believe that increasing the Rule 701 asset and dollar caps and making the exemption available for additional participants would increase the number of securities to be issued and expand eligibility to receive securities but would not increase the number of responses. For Form S–8 we believe the amendments would change only the burden hours. The revised burden estimates were calculated by multiplying the revised estimated number of responses by the revised estimated average amount of time it would take to prepare and review the disclosure required under the affected collection of information. The table below illustrates the incremental change to the annual compliance burden of the affected collection of information, in hours and in costs.[253]

[252] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This estimate is based on consultations with several registrants, law firms, and other persons who regularly assist registrants in preparing and filing reports with the Commission.

[253] In both PRA Table 3 and PRA Table 4, the estimated number of Form S–8 responses is 230, reflecting the number of Forms S–8 filed during 2019 in regards to retirement related plans. *See* n. 231, *supra.*

PRA TABLE 3—CALCULATION OF THE INCREMENTAL CHANGE IN BURDEN ESTIMATES OF CURRENT RESPONSES RESULTING FROM THE PROPOSED AMENDMENTS

Collection of information	Number of estimated affected respondents (A)	Burden hour annual decrease per affected respondent (B)	Decrease in burden hours for affected respondents (C) = (A) × (B)	Decrease in internal burden hours for affected respondents (D) = (C) × 0.5 or 0.25	Decrease in professional hours for affected respondents (E) = (C) × 0.5 or 0.75	Decrease in professional costs for affected respondents (F) = (E) × $400
Form S–8	230	(1)	(230)	(115)	(115)	($46,000)
Rule 701	840	(0.5)	(420)	(105)	(315)	(126,000)

The table below illustrates the program change expected to result from the proposed rule amendments together with the total requested change in reporting burden and costs.

PRA TABLE 4—REQUESTED PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS

Form	Current burden			Program change			Requested change in burden		
	Current annual responses (A)	Current burden hours (B)	Current cost burden (C)	Number of affected responses (D)	Change in company hours (E)	Change in professional costs (F)	Requested annual responses (G)	Requested burden hours (H)	Cost burden (I)
Form S–8	2,140	28,890	$11,556,000	230	(115)	($46,000)	2,140	[1] 28,775	[2] $11,510,000
Rule 701	800	400	480,000	840	[3] (85)	[4] (102,000)	840	[5] 315	[6] 378,000

[1] This equals the sum of (or difference between) Form S–8 current burden hours and the change in company hours.
[2] This equals the sum of (or difference between) the current cost burden and the change in professional costs.
[3] This represents a reduction of (.25 × 400) in the burden hours of the existing 800 respondents, as the PRA burden per response declines from 2 to 1.5 hours, plus (40 × 1.5 × .25) for the additional burden hours attributable to 40 additional responses.
[4] This represents $120,000 reduction in existing cost for existing 800 respondents, plus $18,000 additional cost from adding 40 responses.
[5] This equals 840 issuers × 1.5 hours × 25%.
[6] This equals 840 issuers × 1.5 hours × 75% × $400 per hour.

D. Request for Comment

Request for Comment:

We request comment in order to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility;
- Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.[254]

Any member of the public may direct to us any comments about the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–20. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–20, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Act Analysis (''IRFA'') has been prepared, and made available for public comment, in accordance with the Regulatory Flexibility Act (''RFA'').[255] It relates to the proposed amendments to Securities Act Rule 701 and Form S–8 to modernize the two principal means by which issuers grant securities to employees in compensatory transactions. As required by the RFA, this IRFA describes the impact of these proposed amendments on small entities.[256]

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments are designed to modernize Rule 701, an exemption from Securities Act registration for certain compensatory securities transactions by non-reporting issuers, and Form S–8, a form for registering certain compensatory securities transactions by reporting companies. The Commission has recognized that the relationship between the issuer and recipient of securities is often different in compensatory, rather than capital raising, transactions. The proposed amendments reflect changes in compensatory practices, including the

[254] We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

[255] 5 U.S.C. 601 *et seq.*

[256] 5 U.S.C. 603(a).

types of securities offered, and are intended to modernize and simplify administrative requirements.

B. Legal Basis

We are proposing the amendments contained in this release under the authority set forth in Sections 3(b), 6, 7, 8, 10, 19(a) and 28 of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

C. Small Entities Subject to the Proposed Amendments

The proposed amendments would affect some issuers that are small entities. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [257] For purposes of the RFA, under 17 CFR 240.0–10(a), an issuer, other than an investment company, is a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year and, under 17 CFR 230.157, is also engaged or proposing to engage in an offering of securities that does not exceed $5 million. Under 17 CFR 230.157 and 17 CFR 240.0–10(a), an investment company is considered to be a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.

The proposed amendments would affect both reporting and non-reporting issuers. We estimate that approximately 52 currently reporting issuers that filed a Form S–8 in 2019 qualify as small entities that would be eligible to rely on the proposed amendments, but lack sufficient data to similarly estimate the number of small, non-reporting issuers who may be affected.[258] We therefore are soliciting comment on the number of small entities that would be affected by the proposed amendments.

D. Reporting, Recordkeeping and other Compliance Requirements

The proposed amendments to Rule 701 would:

- Revise the additional disclosure requirements for Rule 701 exempt transactions exceeding $10 million, including how the disclosure threshold applies, the type of financial disclosure required, and the frequency with which it must be updated; and
- Revise the time at which such disclosure is required to be delivered for derivative securities that do not involve a decision by the recipient to exercise or convert in specified circumstances where such derivative securities are granted to new hires.

Because these two proposals affect only Rule 701 offerings that exceed $10 million, it is unlikely that they would affect small entities that are small businesses or small organizations, which, as defined for purposes of the RFA, are subject to a $5 million offering limit.

The remaining proposed amendments would apply to small entities to the same extent as other issuers, irrespective of size. The remaining proposed amendments to Rule 701 would:

- Raise two of the three alternative regulatory ceilings that cap the overall amount of securities that a non-reporting company may sell pursuant to the exemption during any consecutive 12-month period; and
- Make the exemption available for offers and sales of securities under a written compensatory benefit plan (or written compensation contract) established by the issuer's subsidiaries, whether or not majority-owned.

With respect to Form S–8, the proposals would:

- Implement improvements and clarifications to simplify registration on the form, including:
  - Clarify the ability to add multiple plans to a single Form S–8; and
  - Clarify the ability to allocate securities among multiple incentive plans on a single Form S–8;
  - Permit the addition of securities or classes of securities by automatically effective post-effective amendment;
- Implement improvements to simplify share counting and fee payments on the form, including:
  - Permit the registration of an aggregate dollar amount of securities; and
  - Implement a new fee payment method for registration of offers and sales pursuant to Defined Contribution Plans;
  - Conform Form S–8's instructions with current IRS plan review practices; and
- Revise Item 1(f) of Form S–8 to eliminate the requirement that the tax effects of plan participation on the registrant be described.

Finally, for both the Rule 701 and Form S–8, the proposals would:

- Extend consultant and advisor eligibility to entities meeting specified ownership criteria designed to link the securities to the performance of services; and
- Expand eligibility for former employees to specified post-termination grants and former employees of acquired entities.

The proposed amendments are expected to modernize and simplify compensatory securities offerings for all issuers. As a result, we expect that the impact of the proposed amendments would be a reduction in the paperwork burden for all issuers, including small entities.[259] We expect that the nature of any benefits and costs imposed by the proposed amendments to be similar for large and small entities.[260]

The proposed amendments would not impose any new reporting or recordkeeping requirement, except that the new fee payment method for registration of offers and sales pursuant to Defined Contribution Plans would require such plans to file a post-effective amendment annually within 90 days after the end of the plan's fiscal year to pay the registration fee, in arrears, based on aggregate sales by the plan during the fiscal year. Currently, Defined Contribution Plans are required to keep track of the number of shares sold, so that they can maintain registration of sufficient shares to continue compensatory offers and sales without violating Section 5 of the Securities Act. The proposed fee payment method would simplify plan administration by eliminating the need to track individual offers and sales of shares and permit fees to be paid based on a known aggregate dollar amount after contributions are allocated to company stock. This should significantly simplify plan administration and reduce related costs for all reporting companies sponsoring Defined Contribution Plans that offer company stock, regardless of size.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, overlap or conflict with other federal rules.

F. Significant Alternatives

The RFA directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant economic impact on small entities. In connection with the

[257] 5 U.S.C. 601(6).

[258] This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings of Form 10–K, 20–F and 40–F, or amendments, and an S–8 registration filed during the calendar year of January 1, 2019 to December 31, 2019. This analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

[259] For purposes of the Paperwork Reduction Act, we estimate a decrease of 0.5 burden hour per response for Rule 701 and a decrease of 1 burden hour per response for Form S–8. *See* Section VI, *supra.*

[260] *See* the discussion of the proposed amendments' economic effects on all affected parties, including small entities, in Section V, *supra.*

proposed amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

We considered establishing different compliance or reporting requirements or further clarifying, consolidating, or simplifying compliance and reporting requirements for small entities. We have not proposed such alternatives, however, because we believe that investor protection is better served by the proposals we have chosen. In addition, some of the proposals, such as the proposed amendment to Rule 701(e), are unlikely to affect small entities due to the offering size involved.

With respect to performance versus design standards, the proposed amendments generally apply performance standards. For example, the proposed amendments provide issuers with discretion in crafting disclosures that meet broad principles and standards. We believe that it is not appropriate to apply design standards or different performance standards to small entities given that compensatory relationship between the issuer and employees and related investor protection concerns would be the same for small entities and other issuers. The proposed amendments generally would simplify, harmonize and improve the framework for compensatory securities offerings, including for the offering exemption used by small entities. With respect to Rule 701, we believe that the proposed amendments would provide small entities greater flexibility to make compensatory securities offerings at lower costs. With respect to Form S–8, the proposed amendments would not establish any significant new reporting, recordkeeping, or compliance requirements for small entities, and would relieve them of burdens currently associated with registration of compensatory offerings. Accordingly, we do not believe it is necessary to exempt small entities from all or part of the proposed amendments.

G. Request for Comments

Request for Comment:

We encourage the submission of comments with respect to any aspect of this IFRA. In particular, we request comments regarding:

- How the proposed rule and form amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed rule and form amendments;
- The existence or nature of the potential effects of the proposed amendments on small entity companies discussed in the analysis;
- How to quantify the effects of the proposed amendments; and
- Whether the proposed amendments would duplicate, overlap or conflict with other federal rules.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of the effect. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[261] the Commission must advise OMB as to whether the proposed amendments constitute a ''major'' rule if it results in, or is likely to result in:

- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.
- An annual effect on the U.S. economy of $100 million or more;

We request comment on whether our proposal would be a ''major rule'' for purposes of the SBREFA. In particular, we request comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

IX. Statutory Authority

The amendments contained in this release are being proposed under the authority set forth in Sections 3(b), 6, 7, 8, 10, 19(a) and 28 of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

[261] 5 U.S.C. 801 *et seq.*

List of Subjects in 17 CFR Parts 229, 230, and 239

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule and Form Amendments

In accordance with the foregoing, we are proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j–3, 78l, 78m, 78n, 78n–1, 78o, 78u–5, 78w, 78ll, 78 mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11 and 7201 *et seq.;* 18 U.S.C. 1350; sec. 953(b), Pub. L. 111–203, 124 Stat. 1904 (2010); and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012).

* * * * *

■ 2. Amend § 229.601 by revising paragraph (b)(5)(iii) to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

(b) * * *

(5) * * *

(iii) If the securities being registered are issued under a plan that is subject to the requirements of the Employment Retirement Income Security Act of 1974, as amended, (29 U.S.C. 1001 *et seq.*) (''ERISA'') and the plan has been amended subsequent to the filing of the documents required by paragraph (b)(5)(ii)(A) or (B) of this section, furnish an opinion of counsel that confirms the compliance of the amended provisions of the plan with the requirements of ERISA pertaining to such provisions.

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 3. The authority citation for part 230 continues to read as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

■ 4. Amend § 230.405 by adding in alphabetical order a definition for ''*Defined contribution plan*'' and revising the definition of ''*Employee benefit plan*'' to read as follows:

§ 230.405 Definitions of terms.

* * * * *

Defined contribution plan. The term *defined contribution plan* means an employee benefit plan (as defined in § 230.405) that provides for specified or determinable contributions by the employee, employer or both to an individual account for each employee participant where the amount of benefits paid depends, in addition to the level of contributions, on the degree of investment success.

* * * * *

Employee benefit plan. The term *employee benefit plan* means any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors. However, consultants or advisors may participate in an employee benefit plan only if:

(1) They are:

(i) Natural persons; or

(ii) An entity, substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by:

(A) No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;

(B) The estate of a natural person specified in paragraph (1)(ii)(A) of this definition; and

(C) Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in paragraph (1)(ii) (A) of this definition.

(2) They provide bona fide services to the registrant; and

(3) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

* * * * *

■ 5. Amend § 230.413 by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 230.413 Registration of additional securities and additional classes of securities.

(a) Except as provided in section 24(f) of the Investment Company Act of 1940 (15 U.S.C. 80a–24(f)) and in paragraphs (b) and (c) of this section, where a registration statement is already in effect, the registration of additional securities shall only be effected through a separate registration statement relating to the additional securities.

* * * * *

(c) Notwithstanding paragraph (a) of this section, the following additional securities or additional classes of securities may be added to a Form S–8 registration statement already in effect by filing a post-effective amendment to that Form S–8 registration statement:

(1) Securities of the same class as those already registered on a previously effective Form S–8 registration statement; and

(2) Securities of a class different than those registered on the effective Form S–8 registration statement.

■ 6. Amend § 230.416 by adding paragraph (d) to read as follows:

§ 230.416 Securities to be issued as a result of stock splits, stock dividends and anti-dilution provisions and interests to be issued pursuant to certain employee benefit plans.

* * * * *

(d) Where a registration statement on Form S–8 relates to securities to be offered pursuant to a defined contribution plan, such registration statement shall be deemed to register an indeterminate amount of such securities.

■ 7. Amend § 230.456 by adding paragraph (e) to read as follows:

§ 230.456 Date of filing; timing of fee payment.

* * * * *

(e)(1) Notwithstanding paragraph (a) of this section, an issuer that registers securities on Form S–8 to be offered pursuant to a defined contribution plan is not required to pay a registration fee at the time of filing but instead must pay a registration fee to the Commission not later than 90 days after the end of the defined contribution plan's fiscal year. The registration fee must be calculated in the manner specified in section 6(b) of the Act and § 230.457(h)(4) (Rule 457), based on the aggregate offering price for which the issuer's securities were sold pursuant to registration of an indeterminate amount of securities under this subsection during the plan's previous fiscal year, provided that: Not later than 90 days after the end of the relevant plan fiscal year during which it has publicly offered such securities, the issuer files a post-effective amendment to the Form S–8 with the Commission. Such post-effective amendment must be filed for the sole purpose of paying the fees owed by the issuer for sales pursuant to a defined contribution plan, and not for any other purpose. The post-effective amendment is required to contain only the registration statement cover page including the calculation of the registration fee table and the required signatures. The post-effective amendment also must be accompanied by the payment by the issuer of a registration fee with respect to the offering amount of the securities sold during the plan's previous fiscal year as required in this section.

(2) Where an issuer is registering an offering of an indeterminate amount of securities pursuant to a defined contribution plan under paragraph (e)(1) of this section, the securities sold will be considered registered, for purposes of section 6(a) of the Act, if the registration fee has been paid and a post-effective amendment is filed pursuant to paragraph (e)(1) of this section not later than the end of the 90-day period.

(3) A registration statement filed relying on the registration fee payment provisions of paragraph (e)(1) of this section will be considered filed as to the securities identified in the registration statement for purposes of this section and section 5 of the Act when it is received by the Commission, if it complies with all other requirements under the Act, including this part.

(4) For purposes of this section, if an issuer ceases operations, the date the issuer ceases operations will be deemed to be the end of the plan's fiscal year for the purpose of this Rule 456. In the case of a liquidation, merger, or sale of all or substantially all of the assets (''merger'') of the issuer, the plan will be deemed to have ceased operations for the purposes of this section on the date the liquidation, merger or sale is consummated.

(5) An issuer paying the fee required by paragraph (e)(1) of this section or any portion thereof more than 90 days after the end of the fiscal year of the issuer shall pay to the Commission interest on unpaid amounts, calculated based on the interest rate in effect at the time of the interest payment by reference to the ''current value of funds rate'' on the Treasury Department's Financial Management Service internet site at *http://www.fms.treas.gov,* or by calling (202) 874–6995, and using the following formula: I = (X) (Y) (Z/365), where: I = Amount of interest due; X = Amount of registration fee due; Y = Applicable interest rate, expressed as a fraction; Z = Number of days by which the registration fee payment is late. The payment of interest pursuant to this paragraph (e)(5) shall not preclude the Commission from bringing an action to

enforce the requirements of paragraph (e) of this section.

Instruction 1 to paragraph (e): To determine the date on which the registration fee must be paid, the first day of the 90-day period is the first calendar day of the fiscal year following the fiscal year for which the registration fee is to be paid. If the last day of the 90-day period falls on a Saturday, Sunday, or Federal holiday, the registration fee is due on the first business day thereafter.

Instruction 2 to paragraph (e): For the purposes of this paragraph, the term ''issuer'' refers to the registrant who is offering shares to be purchased as part of a defined contribution plan. The term does not refer to the defined contribution plan as issuer of plan interests.

■ 8. Amend § 230.457 by adding paragraph (h)(4) to read as follows:

§ 230.457 Computation of fee.

* * * * *

(h) * * *

(4) If an issuer is registering an offering of an indeterminate amount of securities to be issued pursuant to a defined contribution plan in accordance with paragraph (e)(1) of § 230.456(e) (Rule 456(e)), the registration fee is calculated by multiplying the aggregate offering price of securities sold during the fiscal year by the fee payment rate in effect on the date of the fee payment.

■ 9. Amend § 230.701 by removing the Preliminary Notes, and revising paragraphs (a), and (c) through (e) to read as follows:

§ 230.701 Exemption for offers and sales of securities pursuant to certain compensatory benefit plans and contracts relating to compensation.

(a) *Exemption.* Offers and sales made in compliance with all of the conditions of this section are exempt from section 5 of the Act (15 U.S.C. 77e).

(1) This section relates to transactions exempted from the registration requirements of section 5 of the Act (15 U.S.C. 77e). These transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers and persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.

(2) In addition to complying with this section, the issuer also must comply with any applicable state law relating to the offer and sale of securities.

(3) An issuer that attempts to comply with this section, but fails to do so, may claim any other exemption that is available.

(4) This section is available only to the issuer of the securities. Affiliates of the issuer may not use this section to offer or sell securities. This section also does not cover resales of securities by any person. This section provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

(5) The purpose of this section is to provide an exemption from the registration requirements of the Act for securities issued in compensatory circumstances. This section is not available for plans or schemes to circumvent this purpose, such as to raise capital. This section also is not available to exempt any transaction that is in technical compliance with this section but is part of a plan or scheme to evade the registration provisions of the Act. In any of these cases, registration under the Act is required unless another exemption is available.

* * * * *

(c) *Transactions exempted by this section.* This section exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii) of this section) under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its subsidiaries or subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. This section exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer, its parents, its subsidiaries or subsidiaries of the issuer's parent at the time the securities were offered or during a performance period for which the securities are issued as compensation that ended within 12 months preceding the employee's resignation, retirement or other termination. This section also exempts offers and sales to former employees of an acquired entity of securities issued in substitution or exchange for securities issued to such employees on a compensatory basis while such persons were employed by or providing services to the acquired entity. In addition, the term ''employee'' includes insurance agents who are exclusive agents of the issuer, its subsidiaries, parents, or subsidiaries of the issuer's parent, or derive more than 50% of their annual income from those entities. The term ''employee'' also includes executors, administrators and beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar persons duly authorized by law to administer the estate or assets of former employees.

(1) *Special requirements for consultants and advisors.* This section is available to consultants and advisors only if:

(i) They provide bona fide services to the issuer, its parents, its subsidiaries or subsidiaries of the issuer's parent;

(ii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities; and

(iii) They are:

(A) Natural persons; or

(B) An entity, substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by:

(1) No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;

(2) The estate of a natural person specified in paragraph (c)(1)(iii)(B)*(1)* of this section; and

(3) Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in paragraph (c)(1)(iii)(B)*(1)* of this section.

(d) *Amounts that may be sold*—(1) *Offers.* Any amount of securities may be offered in reliance on this section. However, for purposes of this section, sales of securities underlying options must be counted as sales on the date of the option grant.

(2) *Sales.* The aggregate sales price or amount of securities sold in reliance on this section during any consecutive 12-month period must not exceed the greatest of the following:

(i) $2,000,000;

(ii) 25% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees) measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end); or

(iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on this section, measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).

(3) *Rules for calculating prices and amounts*—(i) *Aggregate sales price.* The term *aggregate sales price* means the sum of all cash, property, notes, cancellation of debt or other consideration received or to be received by the issuer for the sale of the securities. Non-cash consideration must be valued by reference to bona fide sales of that consideration made within a reasonable time or, in the absence of such sales, on the fair value as determined by an accepted standard. The value of services exchanged for securities issued must be measured by reference to the value of the securities issued. Options must be valued based on the exercise price of the option.

(ii) *Time of the calculation.* With respect to options to purchase securities, the aggregate sales price is determined when an option grant is made (without regard to when the option becomes exercisable). With respect to other securities, the calculation is made on the date of sale. With respect to deferred compensation or similar plans, the calculation is made when the irrevocable election to defer is made.

(iii) *Derivative securities.* In calculating outstanding securities for purposes of paragraph (d)(2)(iii) of this section, treat the securities underlying all currently exercisable or convertible options, warrants, rights or other securities, other than those issued under this exemption, as outstanding. In calculating the amount of securities sold for other purposes of paragraph (d)(2) of this section, count the amount of securities that would be acquired upon exercise or conversion in connection with sales of options, warrants, rights or other exercisable or convertible securities, including those to be issued under this exemption.

(iv) *Other exemptions.* Amounts of securities sold in reliance on this section do not affect ''aggregate offering prices'' in other exemptions, and amounts of securities sold in reliance on other exemptions do not affect the amount that may be sold in reliance on this section.

(v) *Merged entities.* After completion of a business combination transaction, to calculate compliance with paragraph (d)(2) of this section, the acquiring issuer may use a *pro forma* balance sheet that reflects the business combination transaction or a balance sheet for a date after the completion of the business combination transaction that reflects the total assets and outstanding securities of the combined entity.

(e) *Disclosure that must be provided.* The issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $10 million, the issuer must deliver to investors, for sales after the $10 million threshold is exceeded, the following disclosure a reasonable period of time before the date of sale:

(1) If the plan is subject to the Employee Retirement Income Security Act of 1974 (''ERISA'') (29 U.S.C. 1104–1107), a copy of the summary plan description required by ERISA;

(2) If the plan is not subject to ERISA, a summary of the material terms of the plan;

(3) Information about the risks associated with investment in the securities sold pursuant to the compensatory benefit plan or compensation contract; and

(4)(i) Financial statements required to be furnished by Part F/S of Form 1–A (Regulation A Offering Statement) (§§ 230.251 through 230.263), for either a Tier 1 or Tier 2 offering. Issuers must apply the age of financial statements requirements of Part F/S paragraphs (b)(3) and (4) at the time of sale. Foreign private issuers as defined in Rule 405 must provide a reconciliation to generally accepted accounting principles in the United States (U.S. GAAP) if their financial statements are not prepared in accordance with U.S. GAAP or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) (Item 17 of Form 20–F (§ 249.220f of this chapter)), provided that foreign private issuers that are eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3–2(b) (§ 240.12g3–2(b) of this chapter) may provide financial statements that are prepared in accordance with home country accounting standards without reconciliation to U.S. GAAP if financial statements prepared in accordance with U.S. GAAP or IFRS as issued by the IASB are not otherwise available.

(ii) In lieu of the financial statements required by paragraph (e)(4)(i) of this section:

(A) A foreign private issuer that is eligible for the exemption from Exchange Act registration provided by Exchange Act Rule 12g3–2(b) (§ 240.12g3–2(b) of this chapter) may provide the fair market value of the securities to be sold as determined consistent with the rules and regulations under Section 409A of the Internal Revenue Code (26 U.S.C. 409A) applicable to stock readily tradeable on an established securities market; and

(B) Any other issuer may provide an independent valuation report of the fair market value of the securities to be sold as determined by an independent appraisal consistent with the rules and regulations under Section 409A of the Internal Revenue Code (26 U.S.C. 409A) applicable to determination of the fair market value of service recipient stock for stock not readily tradable on an established securities market, as of a date that is no more than 6 months before the sale of securities in reliance on this exemption.

(5) If the issuer is relying on paragraph (d)(2)(ii) of this section to use its parent's total assets to determine the amount of securities that may be sold, the parent's financial statements must be delivered. If the parent is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), the financial statements of the parent required by Rule 10–01 of Regulation S–X (§ 210.10–01 of this chapter) and Item 310 of Regulation D–B (§ 228.310 of this chapter), as applicable, must be delivered.

(6) If the sale involves a stock option or other derivative security that involves a decision to exercise or convert, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. If the sale involves a restricted stock unit or other derivative security that does not involve a decision to exercise or convert, the issuer must deliver disclosure a reasonable period of time before the date the restricted stock unit or similar derivative security is granted; *provided that,* if the sale is in connection with the hire of a new employee, the disclosure must be delivered no later than 14 calendar days after the date the person begins employment. For deferred compensation or similar plans, the issuer must deliver disclosure to investors a reasonable period of time before the date the irrevocable election to defer is made.

(7) *Merged entities.* (i) In determining whether the amount of securities the acquiring issuer sold during any consecutive 12-month period exceeds $10 million, the acquiring issuer would not be required to include any securities sold by the acquired entity pursuant to the rule during the same 12-month period.

(ii) As long as the acquired entity complied with Rule 701 at the time it originally granted the derivative securities assumed by the acquiring issuer in the business combination transaction, the exercise or conversion of the derivative securities would be exempted by this section, subject to compliance, where applicable, with

Rule 701(e). For assumed derivative securities for which the acquired entity was required to provide disclosure pursuant to Rule 701(e) that are exercised or converted after completion of the business combination transaction, the acquiring issuer would satisfy that obligation by providing information meeting the requirements of Rule 701(e) consistent with the timing requirements of Rule 701(e)(6).

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 10. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78o(d), 78o–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, 80a–37, and Sec. 71003 and Sec. 84001, Pub. L. 114–94, 129 Stat. 1312, unless otherwise noted.

■ 11. Amend Form S–8 (referenced in § 239.16b) by:

■ a. Revising the cover page;

■ b. Adding Note 3 under Calculation of Registration Fee;

■ c. Revising General Instruction A.1(a)(1)

■ d. Revising General Instruction A.1(a)(3);

■ e. Re-designating the existing text of General Instruction E to be paragraph 1;

■ f. Amending General Instruction E to include paragraph 2

■ g. Revising paragraph (f) of Item 1;

■ h. Revising paragraph (b) of Item 8; and

■ i. Adding paragraph (c) to Item 8.

The revisions and additions read as follows:

Note: The text of Form S–8 does not, and these amendments will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM S–8

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

(Full title of the plan(s))

* * * * *

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction E.2, filed to register additional securities or additional classes of securities pursuant to Rule 413(c) under the Securities Act, check the following box. [checkbox]

If this Form is a post-effective amendment to a registration statement filed pursuant to Rule 456(e)(1) solely to pay fees with respect to securities sold under defined contribution plans in the previous fiscal year, check the following box. [checkbox]

* * * * *

CALCULATION OF REGISTRATION FEE

* * * * *

Notes:

* * * * *

3. If the filing fee is calculated pursuant to Rule 457(h)(4) (§ 230.457(h)(4) of this chapter) under the Securities Act in a post-effective amendment filed pursuant to Rule 456(e) (§ 230.456(e) of this chapter) for defined contribution plans, only the title of the class of securities to be registered, the aggregate offering price for that class of securities, and the amount of registration fee need to appear in the Fee Table.

* * * * *

GENERAL INSTRUCTIONS

A. Rule as to Use of Form S–8

1. * * *

a. * * *

(1) For purposes of this form, the term ''employee'' is defined as any employee, director, general partner, trustee (where the registrant is a business trust), officer, or consultant or advisor. Form S–8 is available for the issuance of securities to consultants or advisors only if:

(i) They provide bona fide services to the registrant;

(ii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities; and

(iii) They are:

(A) Natural persons; or

(B) An entity, substantially all of the activities of which involve the performance of services; and substantially all of the ownership interests of which are held directly by:

(1) No more than 25 natural persons, of whom at least 50 percent perform such services for the issuer through the entity;

(2) The estate of a natural person specified in paragraph *(1);* and

(3) Any natural person who acquired ownership interests in the entity by reason of the death of a natural person specified in paragraph *(1).*

(2) * * *

(3) The term ''employee'' also includes former employees of the issuer, former employees of an entity acquired by the issuer, as well as executors, administrators or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees of the issuer or an entity acquired by the issuer, or similar persons duly authorized by law to administer the estate or assets of former employees of the issuer or an entity acquired by the issuer. The inclusion of all individuals described in the preceding sentence in the term ''employee'' is only to permit registration on Form S–8 of:

(i) The exercise of employee benefit plan stock options and the subsequent sale of the securities, if these exercises and sales are permitted under the terms of the plan;

(ii) the acquisition of registrant securities pursuant to intra-plan transfers among plan funds, if these transfers are permitted under the terms of the plan;

(iii) the acquisition of registrant securities as compensation for a former employee's service to the issuer during a performance period ending within the 12 months preceding the former employee's resignation, retirement or other termination; and

(iv) with respect to former employees of an entity acquired by the issuer, the acquisition of securities issued in substitution or exchange for securities issued to such persons by the acquired entity on a compensatory basis while such persons were employed by the acquired entity.

* * * * *

E. Registration of Additional Securities

1. With respect to the registration of additional securities of the same class as other securities for which a registration statement filed on this Form relating to an employee benefit plan is effective, the registrant may file a registration statement consisting only of the following: The facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any information required in the new registration statement that is not in the earlier registration statement. If the new registration statement covers restricted securities being offered for resale, it shall include the required reoffer prospectus. If the earlier registration statement included a reoffer prospectus, the new registration statement shall be deemed to include that reoffer prospectus; provided, however, that a revised reoffer prospectus shall be filed, if the reoffer prospectus is substantively different from that filed in the earlier

registration statement. The filing fee required by the Act and Rule 457 (§ 230.457) shall be paid with respect to the additional securities only.

2. An issuer may register additional securities or classes of securities, pursuant to Rule 413(c) by filing a post-effective amendment to the effective registration statement. The issuer may add subsidiaries as additional registrants, whose securities are eligible to be sold as part of the Form S–8 by filing a post-effective amendment identifying the additional registrants, and the registrant and the additional registrants and other persons required to sign the registration statement must sign the post-effective amendment. The post-effective amendment must consist of the facing page; any disclosure required by this Form that is necessary to update the registration statement to reflect the additional securities, additional classes of securities, any required opinions and consents; and the signature page. Required information, consents, or opinions may be included in the prospectus and the registration statement through a post-effective amendment or may be provided through a document incorporated or deemed incorporated by reference into the registration statement and the prospectus that is part of the registration statement.

* * * * *

Item 1. Plan Information.

* * * * *

(f) Tax Effects of Plan Participation

Describe briefly the tax effect that may accrue to employees as a result of plan participation and whether or not the plan is qualified under Section 401(a) of the Internal Revenue Code.

Note: If the plan is not qualified under Section 401 of the Internal Revenue Code of 1986, as amended, consideration should be given to the applicability of the Investment Company Act of 1940. *See* Securities Act Release No. 4790 (July 13, 1965).

* * * * *

Item 8. Exhibits.

* * * * *

(b) Neither an opinion of counsel concerning compliance with the requirements of ERISA nor an Internal Revenue Service determination letter that the plan is qualified under Section 401 of the Internal Revenue Code shall be required for any plan amendment if, in lieu thereof, the response to this Item 8 includes an undertaking that the registrant will maintain the plan's compliance with the requirements of ERISA and will make all changes required to maintain such compliance in a timely manner.

(c) Provided that if the plan adopted is a pre-approved plan that previously received an opinion letter from the Internal Revenue Service, neither an opinion of counsel concerning compliance with the requirements of ERISA nor an company-specific Internal Revenue Service opinion letter that the plan is qualified under Section 401 of the Internal Revenue Code shall be required if, in lieu thereof, the registrant files a copy of the IRS opinion letter approving the pre-approved plan that was issued to the provider of the plan, unless the company makes revisions to the pre-approved plan that may call into question whether the plan, as so revised, is still qualified.

* * * * *

By the Commission.

Dated: November 24, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–26390 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 85 Friday,
No. 239 December 11, 2020

Part III

Department of Homeland Security

8 CFR Parts 208 and 235

Department of Justice

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1235
Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 235

RIN 1615–AC42

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208, and 1235

[EOIR Docket No. 18–0102; A.G. Order No. 4922–2020]

RIN 1125–AA94

Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review

AGENCY: Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On June 15, 2020, the Department of Homeland Security (''DHS'') and the Department of Justice (''DOJ'') (collectively ''the Departments'') published a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') that would amend the regulations governing credible fear determinations. The proposed rule would make it so that individuals found to have a credible fear will have their claims for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (''INA'' or ''the Act'') (''statutory withholding of removal''), or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (''CAT''), adjudicated by an immigration judge within the Executive Office for Immigration Review (''EOIR'') in streamlined proceedings (rather than under section 240 of the Act), and to specify what standard of review applies in such streamlined proceedings. The Departments further proposed changes to the regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the Convention Against Torture (''CAT'') regulations. The Departments also proposed amendments related to the standards for adjudication of applications for asylum and statutory withholding. This final rule (''rule'' or ''final rule'') responds to comments received in response to the NPRM and generally adopts the NPRM with few substantive changes.

DATES: This rule is effective on January 11, 2021.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Executive Summary of the Final Rule

On June 15, 2020, the Departments published an NPRM that would amend the regulations governing credible fear determinations to establish streamlined proceedings under a clarified standard of review. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 FR 36264 (June 15, 2020). The proposed rule would also amend regulations regarding asylum, statutory withholding of removal, and withholding and deferral of removal under the regulations. *Id.*

The following discussion describes the provisions of the final rule, which is substantially the same as the NPRM, and summarizes the changes made in the final rule.

A. Authority and Legal Framework

The Departments are publishing this final rule pursuant to their respective authorities under the Immigration and Nationality Act (''INA'') as amended by the Homeland Security Act of 2002 (''HSA''), Public Law 107–296, 116 Stat. 2135.

The INA, as amended by the HSA, charges the Secretary ''with the administration and enforcement of this chapter [titled ''Immigration and Nationality''] and all other laws relating to the immigration and naturalization of aliens'' and granted the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the immigration and nationality laws. INA 103(a)(1) and (3), 8 U.S.C. 1103(a)(1) and (3); *See* HSA, sec. 1102, 116 Stat. at 2273–74; Consolidated Appropriations Resolution of 2003, Public Law 108–7, sec. 105, 117 Stat. 11, 531.

The HSA charges the Attorney General with ''such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were [previously] exercised by [EOIR], or by the Attorney General with respect to [EOIR] . . . .'' INA 103(g)(1), 8 U.S.C. 1103(g)(1); *see* 6 U.S.C. 521; HSA, sec. 1102, 116 Stat. at 2274.

Furthermore, the Attorney General is authorized to ''establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' INA 103(g)(2), 8 U.S.C. 1103(g)(2); HSA, sec. 1102, 116 Stat. 2135, 2274.

B. Changes in the Final Rule

Through the NPRM, the Departments sought to satisfy a basic tenet of asylum law: To assert a ''government's right and duty to protect its own resources and citizens, while aiding those in true need of protection from harm.'' 85 FR at 36265 (citations omitted). To achieve this dual aim, the Departments proposed numerous amendments to the DHS and DOJ regulations.[1] After carefully reviewing all of the comments received on the NPRM, the Departments are making the following changes to the final rule.

This final rule makes thirteen non-substantive changes to the regulatory provisions in the proposed rule, some of which were noted by commenters. First, the final rule corrects a typographical error—*i.e.* ''part'' rather than ''party''—in 8 CFR 208.30(e)(2)(ii), which was proposed to read, ''Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another *party* of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so'' (emphasis added). Second, the Departments added the word ''for'' to correct the form name ''Application for Asylum and for Withholding of Removal'' at 8 CFR 208.31(g)(2), 1208.30(g)(2)(iv)(B), and 1208.31(g)(2). Third, the Departments are replacing the word ''essential'' with the word ''material'' in 8 CFR 208.20(c)(1) and 1208.20(c)(1), consistent with the stated intent of the NPRM.

Fourth, the Departments are making stylistic revisions to 8 CFR 208.15(a)(1) and 1208.15(a)(1), including breaking them into three subparagraphs, to make them easier to follow and to reduce the risk of confusion. Fifth, the Departments

[1] In addition to the amendments outlined in more detail herein, the Departments also proposed additional minor amendments for clarity, such as replacing references to the former Immigration and Naturalization Service with references to DHS where appropriate (*see, e.g.,* 8 CFR 208.13(b)(3)(ii)) or replacing forms listed by form number with the form's name (*see, e.g.,* 8 CFR 1003.42(e)). The Departments also further reiterate the full explanation and justifications for the proposed changes set out in the preamble to the NPRM. 85 FR at 36265–88.

are editing the temporal language in 8 CFR 208.15(a)(3)(i) and (ii) and 1208.15(a)(3)(i) for clarity and consistency with similar language in 8 CFR 208.15(a)(2) and 1208.15(a)(2). The edited language clarifies the relevant temporal scope to read ''after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States'' in lieu of the language in the NPRM. Sixth, the Departments are striking the parenthetical phrase ''(''rogue official'')'' in 8 CFR 208.18(a)(1) and 1208.18(a)(1). Relatedly, they are replacing the remaining uses of the phrase ''rogue official'' in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with its definition, ''public official who is not acting under color of law.'' [2] Seventh, the Departments are adding the clarifying phrase ''as defined in section 212(a)(9)(B)(ii) and (iii) of the Act'' to 8 CFR 208.13(d)(2)(i)(D) and 1208.13(d)(2)(i)(D) consistent with the intent of the NPRM. Eighth, the Departments are clarifying the language in 8 CFR 208.1(g) and 1208.1(g) to alleviate apparent confusion and improve consistency with the intent of the NPRM regarding the use of stereotypes as evidence for an asylum claim. A bald statement that a country or its denizens have a particular cultural trait that causes citizens, nationals, or residents of that country to engage in persecution is evidence lacking in probative value and has no place in an adjudication.

Ninth, the Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(a) and (b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT,[3] and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d), (e) and 1208.6(d), (e), and the Departments see no reason not to conform the other paragraphs in that section for consistency. Tenth, and relatedly, the Departments are making edits to 8 CFR 208.6(a), (b), (d) and (e) and 8 CFR 1208.6(a) and (b), (d), and (e) to make clear that applications for refugee admission pursuant to INA 207(c)(1), 8 U.S.C. 1157(c)(1), and 8 CFR part 207 are subject to the same information disclosure provisions as similar applications for asylum, withholding of removal under the INA, and protection under the regulations implementing the CAT. The Departments already apply the disclosure provisions to such applications as a matter of policy and see no basis to treat such applications differently than those for protection filed by aliens already in or arriving in the United States. Eleventh, the Departments are amending 8 CFR 208.13(d)(2)(ii) to reflect that, operationally, DHS may refer or deny an asylum application, depending on the circumstances of the applicant. *See* 8 CFR 208.14. Twelfth, the Departments are correcting 8 CFR 1208.30(g)(1)(i), (ii) to reflect that asylum officers issue determinations, not orders. *See* 8 CFR 208.30(e).

Thirteenth, EOIR is making a conforming change to 8 CFR 1244.4(b) to align it with the both the appropriate statutory citation and the corresponding language in 8 CFR 244.4(b). Aliens described in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), including those subject to the firm resettlement bar contained in INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), are ineligible for Temporary Protected Status. That statutory ineligibility ground is incorporated into regulations in both chapter I and chapter V of title 8; however, while the title I provision, 8 CFR 244.4(b), cites the correct statutory provision—INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi)—the title V provision, 8 CFR 1244.4(b), maintains an outdated reference to an incorrect statutory provision. *Compare* 8 CFR 244.4(b) (referencing INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A)), *with* 8 CFR 1244.4(b) (referencing former INA 243(h)(2), 8 U.S.C. 1253(h)(2)).

The Departments are also making four non-substantive changes in the final rule to correct regulatory provisions that were inadvertently changed or deleted in the proposed rule or that introduced an unnecessary redundancy. First, the final rule reinserts language relating to DHS's ability to reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge, which was inadvertently removed from 8 CFR 1208.30(g)(2)(iv)(A) in the NPRM. The final rule reinserts that language in 8 CFR 208.30(g)(2)(i); it pertains to a DHS procedure and, thus, appropriately belongs in chapter I, rather than chapter V, of title 8.

Second, the final rule strikes the regulatory text changes proposed to 8 CFR 103.5. Those changes were not discussed in the preamble to the NPRM and were inadvertently included in the NPRM's proposed regulatory text.

Third, the final rule reinserts the consideration—of-novel-or-unique-issues language in 8 CFR 208.30(e)(4) that was inadvertently proposed to be removed in the NPRM, with modifications to account for changes in terminology adopted via this final rule (specifically, ''[i]n determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.'').

Fourth, this final rule removes the following sentence from the proposed 8 CFR 208.30(e)(4): ''An asylum officer's determination will not become final until reviewed by a supervisory asylum officer.'' Nearly identical text already exists in 8 CFR 208.30(e)(8) and would be repetitive to include in 8 CFR 208.30(e)(4).

In response to issues raised by commenters or to eliminate potential confusion caused by the drafting in the NPRM, the Departments are making five additional changes to the NPRM in the final rule. First, the Departments are amending the waiver provision in 8 CFR 208.1(c) and 1208.1(c) related to claims of ineffective assistance of counsel to provide an exception for egregious conduct on the part of counsel. As discussed, *infra,* the Departments believe that cognizable ineffective assistance of counsel claims in the context of failing to assert a particular social group should be extremely rare. If a particular social group is not asserted because the alien did not tell his or her counsel about it, then there has been no ineffective assistance on the part of counsel. If the alien did provide his or her counsel with a particular social group and counsel elected not to present it as a strategic choice, then there is no basis to reopen the proceedings. *See Matter of B–B-,* 22 I&N Dec. at 310 (''subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen''). Nevertheless, the Departments recognize there may be *sui generis* situations in which ''egregious circumstances'' may warrant reopening due to ineffective assistance of counsel in this context, provided that appropriate procedural requirements for such a claim are observed. Thus, the Departments are adding such an

[2] The NPRM did not use the term ''rogue official'' in 8 CFR 1208.16(b)(3)(iv); rather it referred to ''officials acting outside their official capacity.'' The discrepancy regarding this phrasing between 8 CFR 208.16(b)(3)(iv) 8 CFR 1208.16(b)(3)(iv) in the NPRM was inadvertent, and the Departments are correcting it accordingly in both regulations in the final rule.

[3] *See* UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

exception to the final rule, consistent with existing case law. *See id.* (''The respondents opted for a particular strategy and form of relief, and although they might wish to fault their former attorney and recant that decision, they are nonetheless bound by it, unless they can show egregious conduct on counsel's part.''); *see also Matter of Velasquez,* 19 I&N Dec. 377, 377 (BIA 1986) (concession of attorney is binding on an alien absent egregious circumstances).

Second, the Departments are amending the language in 8 CFR 208.1(e) and 1208.1(e) regarding when threats may constitute persecution to clarify that particularized threats of severe harm of an immediate and menacing nature made by an identified entity or person may constitute persecution, though the Departments expect that such cases will be rare. This revision, as discussed *infra,* is consistent with existing case law. *See Duran-Rodriguez* v. *Barr,* 918 F.3d 1025, 1028 (9th Cir. 2019) (''death threats alone can constitute persecution'' but ''they constitute 'persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm' '' (citation omitted)). As noted, threats ''combined with confrontation or other mistreatment'' are likely to be persecution; however, ''cases with threats *alone,* particularly anonymous or vague ones, rarely constitute persecution.'' *Id.* (citation omitted) (emphasis added); *see also Juan Antonio* v. *Barr,* 959 F.3d 778, 794 (6th Cir. 2020) (threats alone amount to persecution only when they are ''of the most immediate and menacing nature'' (citation omitted)).

Third, in recognition of commenters' concerns and the reality that aliens under the age of 18, especially very young children, may not have decisional independence regarding an illegal entry into the United States, the Departments are amending 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. The Departments do not believe that a similar exception is warranted in 8 CFR 208.13(d)(1)(ii) and (iii), and 1208.13(d)(1)(ii) and (iii), however. For (d)(1)(ii) to apply to an alien under the age of 18, that alien must have filed an asylum application in the United States, notwithstanding any language barriers or other impediments; thus, there is no reason to assume categorically that such an alien could not have filed an application for protection in another country. Consequently, the Departments find that no age exemption is warranted in 8 CFR 208.13(d)(1)(ii) and 1208.13(d)(1)(ii). Further, as discussed, *infra,* there is no reason that an alien of any age would need to use fraudulent documents to enter the United States in order to seek asylum. Accordingly, no age exemption is warranted in 8 CFR 208.13(d)(1)(iii) and 1208.13(d)(1)(iii). Even without age exemptions, the Departments note that these discretionary factors do not constitute bars to asylum and that adjudicators may appropriately consider an applicant's age in assessing whether a particular application warrants being granted as a matter of discretion.

Fourth, in response to commenters' concerns about the applicable effective date of the frivolousness provisions in 8 CFR 208.20 and 1208.20, the Departments have clarified the language in those provisions. The amendments to those provisions provided in this rule apply only to asylum applications filed on or after the effective date of the rule. The current definition of ''frivolousness'' will continue to apply to asylum applications filed between April 1, 1997, and the effective date of the rule.

Fifth, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), the Departments are deleting language in the former regarding an alien's opportunity to account for issues with a claim. The intent of the NPRM, expressed unequivocally in the proposed addition of 8 CFR 208.20(d) and 1208.20(d), was clear that adjudicators would not be required to provide ''multiple opportunities for an alien to disavow or explain a knowingly frivolous application.'' 85 FR at 36276. The Departments inadvertently retained language from the current rule in the proposed additions of 8 CFR 208.20(b) and 1208.20(b), however, that was in tension with that intent. *Compare, e.g.,* 8 CFR 208.20(b) (proposed) (''Such finding [of frivolousness] will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.''), *with* 8 CFR 208.20(d) (proposed) (''If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolous finding.''). Accordingly, in the final rule, the Departments are deleting the sentence from 8 CFR 208.20(b) and 1208.20(b) regarding an alien's opportunity to address issues with his or her claim after receiving the statutory warning regarding the knowing filing of a frivolous asylum application to avoid any residual confusion on the point.

The following discussion describes the provisions of the final rule, which are substantially the same as the NPRM, and also incorporates the changes made in the final rule summarized above.

C. Provisions of the Final Rule

1. Expedited Removal and Screenings in the Credible Fear Process

1.1. Asylum-and-Withholding-Only Proceedings for Aliens With Credible Fear

DOJ is amending 8 CFR 1003.1, 8 CFR 1003.42(f), 8 CFR 1208.2, 8 CFR 1208.30, and 8 CFR 1235.6—and DHS is amending 8 CFR 208.2(c), 8 CFR 208.30(e)(5) and (f), and 8 CFR 235.6(a)(1)—so that aliens who establish a credible fear of persecution, a reasonable possibility of persecution, or a reasonable possibility of torture and accordingly receive a positive fear determination would appear before an immigration judge for ''asylum-and-withholding-only'' proceedings under 8 CFR 208.2(c)(1) and 8 CFR 1208.2(c)(1). Such proceedings would be adjudicated in the same manner that currently applies to certain alien crewmembers, stowaways, and applicants for admission under the Visa Waiver Program, among other categories of aliens who are not entitled by statute to proceedings under section 240 of the Act, 8 U.S.C. 1229a. *See* 8 CFR 208.2(c)(1)(i)–(viii), 1208.2(c)(1)(i)–(viii).[4] Additionally, to ensure that these claims receive the most expeditious consideration possible, the Departments are amending 8 CFR 208.5 and 8 CFR 1208.5 to require DHS to make available appropriate applications and relevant warnings to aliens in its custody who have expressed a fear in the expedited removal process and received a positive determination. The Departments believe that this change would bring the proceedings in line with the statutory objective that the expedited removal process be streamlined and efficient.

[4] In addition, DOJ proposed a technical correction to 8 CFR 1003.1(b), which establishes the jurisdiction of the BIA, to correct the reference to 8 CFR 1208.2 in paragraph (b)(9) and ensure that the regulations accurately authorize BIA review in ''asylum-and-withholding-only'' proceedings.

1.2. Consideration of Precedent in Credible Fear Determinations

DOJ is adding language to 8 CFR 1003.42(f) to specify that an immigration judge will consider applicable legal precedent when reviewing a negative fear determination. This instruction would be in addition to those currently listed in 8 CFR 1003.42 to consider the credibility of the alien's statements and other facts of which the immigration judge is aware. These changes would codify in the regulations the current practice and provide a clear requirement to immigration judges that they must consider and apply all applicable law, including administrative precedent from the Board of Immigration Appeals (''BIA''), decisions of the Attorney General, decisions of the Federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits, and decisions of the Supreme Court.

1.3. Remove and Reserve DHS-Specific Procedures From DOJ Regulations

DOJ is removing and reserving the following provisions in chapter V of 8 CFR: 8 CFR 1235.1, 8 CFR 1235.2, 8 CFR 1235.3, and 8 CFR 1235.5. When the Department first incorporated part 235 into 1235, it stated that ''nearly all of the provisions * * * affect bond hearings before immigration judges.'' Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9823, 9826 (Feb. 28, 2003). Upon further review, the Department determined that these sections regard procedures that are specific to DHS's examinations of applicants for admission as set forth in 8 CFR 235.1, 8 CFR 235.2, 8 CFR 235.3, and 8 CFR 235.5, and do not need to be duplicated in the regulations for EOIR in Chapter V, except for the provisions in 8 CFR 1235.4, relating to the withdrawal of an application for admission, and 8 CFR 1235.6, relating to the referral of cases to an immigration judge.

In comparison to the NPRM, this final rule is making an additional technical amendment by updating the outdated reference to ''the Service'' in 8 CFR 1235.6(a)(1)(ii) to read ''DHS.''

1.4. Reasonable Possibility Standard for Statutory Withholding of Removal and Torture-Related Fear Determinations

The Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to clarify and raise the statutory withholding of removal screening standard and the torture-related screening standard under the CAT regulations for aliens in expedited removal proceedings and stowaways. Specifically, the Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof in credible fear screenings from a significant possibility that the alien can establish eligibility for statutory withholding of removal to a reasonable possibility that the alien would be persecuted because of his or her race, religion, nationality, membership in a particular social group, or political opinion. *See* 8 CFR 208.16, 208.30(e)(2), 1208.16. Similarly, for aliens expressing a fear of torture, the Departments are amending 8 CFR 208.30 and 8 CFR 1208.30 to raise the standard of proof from a significant possibility that the alien is eligible for withholding or deferral of removal under the CAT regulations to a reasonable possibility that the alien would be tortured in the country of removal. *See* 8 CFR 208.18(a), 208.30(e)(3), 1208.18(a); 85 FR at 36268. Consistent with INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), the asylum eligibility screening standard (a significant possibility that the alien could establish eligibility for asylum) currently applied in credible fear screenings remains unchanged. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). By clarifying and applying the ''reasonable possibility'' standard to the statutory withholding of removal screening and the torture-related screening under the CAT regulations, the alien's screening burdens would become adequately analogous to the merits burdens, where the alien's burdens for statutory withholding of removal and protections under the CAT regulations are higher than the burden for asylum.

The Departments are also amending 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to refer to the screenings of aliens in expedited removal proceedings and of stowaways for statutory withholding of removal as ''reasonable possibility of persecution'' determinations and the screening for withholding and deferral of removal under the CAT regulations as ''reasonable possibility of torture'' determinations, in order to avoid confusion between the different standards of proof.

In conjunction with the edits to DHS's regulation in 8 CFR 208.30, DOJ is amending 8 CFR 1208.30. Currently, after an asylum officer determines that an alien lacks a credible fear of persecution or torture, the regulation provides that an immigration judge in EOIR reviews that determination under the credible fear (''significant possibility'') standard. 8 CFR 208.30(g), 1208.30(g). DHS's ''reasonable possibility'' screening standard for statutory withholding of removal and CAT protection claims is a mismatch with EOIR's current regulation, which does not provide for a reasonable possibility review process in the expedited removal context. Therefore, DOJ is modifying 8 CFR 1208.30(g) to clarify that credible fear of persecution determinations (*i.e.,* screening for asylum eligibility) would continue to be reviewed under a ''credible fear'' (significant possibility) standard, but screening determinations for eligibility for statutory withholding of removal and protection under the CAT regulations would be reviewed under a ''reasonable possibility'' standard.

Additionally, to clarify terminology in 8 CFR 208.30(d)(2), mention of the Form M–444, Information about Credible Fear Interview in Expedited Removal Cases, is replaced with mention of relevant information regarding the ''fear determination process.'' This change clarifies that DHS may relay information regarding screening for a reasonable possibility of persecution and a reasonable possibility of torture, in addition to a credible fear of persecution.

DHS is also revising the language in 8 CFR 208.30(e)(1) to interpret the ''significant possibility'' standard that Congress established in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v).

In comparison to the NPRM, this final rule is correcting a typographical error—*i.e.* ''part'' rather than ''party''—in 8 CFR 208.30(e)(2)(ii). The sentence now reads: ''Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so[.]'' In addition, this final rule adds the word ''for'' to correct the form name ''Application for Asylum and for Withholding of Removal'' at 8 CFR 1208.30(g)(2)(iv)(B). This final rule also reinserts language allowing DHS to reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge, which was inadvertently removed from 8 CFR 1208.30(g)(2)(iv)(A) in the NPRM. The final rule reinserts that language in 8 CFR 208.30(g)(2)(i) because it pertains to a DHS procedure and, thus, appropriately belongs in chapter I, rather than chapter V, of title 8.

1.5. Amendments to the Credible Fear Screening Process

The Departments further amend 8 CFR 208.30, 8 CFR 1208.30, and 8 CFR 1003.42 to make several additional technical and substantive amendments regarding fear interviews, determinations, and reviews of determinations. The Departments amend 8 CFR 208.30(a) and 8 CFR 1208.30(a) to clearly state that the respective sections describe the exclusive procedures applicable to applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, 8 U.S.C. 1182(a)(6)(C) or 1182(a)(7), and receive ''credible fear'' interviews, determinations, and reviews under section 235(b)(1)(B) of the Act, 8 U.S.C. 1225(b)(1)(B).

DHS is clarifying the existing ''credible fear'' screening process in 8 CFR 208.30(b), which states that if an alien subject to expedited removal indicates an intention to apply for asylum or expresses a fear of persecution or torture, or a fear of return, an inspecting officer shall not proceed further with removal until the alien has been referred for an interview with an asylum officer, as provided in section 235(b)(1)(A)(ii) of the Act, 8 U.S.C. 1225(b)(1)(A)(ii). The rule also states that the asylum officer would screen the alien for a credible fear of persecution and, as appropriate, a reasonable possibility of persecution and a reasonable possibility of torture, and conduct an evaluation and determination in accordance with 8 CFR 208.9(c), which is consistent with current policy and practice. These proposals aim to provide greater transparency and clarity with regard to fear screenings.

DHS is also including consideration of internal relocation in the context of 8 CFR 208.30(e)(1)–(3), which outline the procedures for determining whether aliens have a credible fear of persecution, a reasonable possibility of persecution, and a reasonable possibility of torture. Considering internal relocation in the ''credible fear'' screening context is consistent with existing policy and practice, and the regulations addressing internal relocation at 8 CFR 208.16(c)(3)(ii) and 8 CFR 1208.16(c)(3)(ii) (protection under the CAT regulations); 8 CFR 208.13(b)(1)(i)(B) and 8 CFR 1208.13(b)(1)(i)(B) (asylum); and 8 CFR 208.16(b)(1)(i)(B) and 8 CFR 1208.16(b)(1)(i)(B) (statutory withholding). The regulatory standard that governs consideration of internal relocation in the context of asylum and statutory withholding of removal adjudications is different from the standard that considers internal relocation in the context of protection under the CAT regulations. *See generally Maldonado* v. *Lynch,* 786 F.3d 1155, 1163 (9th Cir. 2015) (noting the marked difference between the asylum and CAT regulations concerning internal relocation).

In addition, the Departments are adding asylum and statutory withholding eligibility bar considerations in 8 CFR 208.30(e)(1)(iii) and (e)(2)(iii), and 8 CFR 1003.42(d). Currently, 8 CFR 208.30(e)(5)(i) provides that if an alien, other than a stowaway, is able to establish a credible fear of persecution or torture but also appears to be subject to one or more of the mandatory eligibility bars to asylum or statutory withholding of removal, then the alien will be placed in section 240 proceedings. The Departments are amending 8 CFR 208.30 to apply mandatory bars to applying for or being granted asylum at the credible fear screening stage for aliens in expedited removal proceedings and for stowaways, such that if a mandatory bar to applying for or being granted asylum applies, the alien would be unable to show a significant possibility of establishing eligibility for asylum. In 8 CFR 208.30(e)(5), DHS requires asylum officers to determine (1) whether an alien is subject to one or more of the mandatory bars to being able to apply for asylum under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), or the bars to asylum eligibility under section 208(b)(2) of the Act, 8 U.S.C. 1158(b)(2), including any eligibility bars established by regulation under section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C); and (2) if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under the CAT regulations. If a mandatory bar to asylum applies, the alien will then be screened only for statutory withholding of removal or withholding or deferral of removal under the CAT regulations. If the alien is subject to a mandatory bar to asylum that is also a mandatory bar to statutory withholding of removal, then the alien will be screened only for deferral of removal under the CAT regulations. An alien who could establish a credible fear of persecution or reasonable possibility of persecution but for the fact that he or she is subject to one of the bars that applies to both asylum and statutory withholding of removal would receive a negative fear determination, unless the alien could establish a reasonable possibility of torture, in which case he or she would be referred to the immigration court for asylum-and-withholding-only proceedings. In those proceedings, the alien would have the opportunity to raise whether he or she was correctly identified as being subject to the bar(s) to asylum and withholding of removal and also pursue protection under the CAT regulations.

Additionally, under 8 CFR 208.30(e)(5), DHS has used a ''reasonable fear'' standard (identical to the ''reasonable possibility'' standard enunciated in this rule) in procedures related to aliens barred from asylum under two interim final rules issued by the Departments,[5] as described in 8 CFR

[5] On July 16, 2019, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(4) or 1208.13(c)(4) who enter, attempt to enter, or arrive in the United States across the southern land border on or after such date, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, will be found ineligible for asylum (and, because they are subject to this bar, not be able to establish a credible fear of persecution) unless they qualify for certain exceptions. *See* Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019). On July 24, 2019, the U.S. District Court for the Northern District of California enjoined the Departments ''from taking any action continuing to implement the Rule'' and ordered the Departments ''to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Barr,* 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019). On August 16, 2019, the U.S. Court of Appeals for the Ninth Circuit issued a partial stay of the preliminary injunction so that the injunction remained in force only in the Ninth Circuit. *E. Bay Sanctuary Covenant* v. *Barr,* 934 F.3d 1026, 1028 (9th Cir. 2019). On September 9, 2019, the district court then reinstated the nationwide scope of the injunction. *E. Bay Sanctuary Covenant* v. *Barr,* 391 F. Supp. 3d 974 (N.D. Cal. 2019). Two days later, the Supreme Court stayed the district court's injunction. *Barr* v. *East Bay Sanctuary Covenant,* 140 S. Ct. 3 (2019). On July 6, 2020, the Ninth Circuit affirmed the district court's injunction. *E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020). Additionally, on June 30, 2020, the interim final rule was vacated by the D.C. District Court in *Capital Area Immigrants' Rights (''CAIR'') Coalition, et al.* v. *Trump,* 19–cv–02117 (D.D.C. 2020) and *I.A., et al.* v. *Barr,* 19–cv–2530 (D.D.C. 2020).

On November 9, 2018, the Departments issued an interim final rule providing that certain aliens described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) who entered the United States in contravention of a covered Presidential proclamation or order are barred from eligibility for asylum. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018). On December 19, 2018, the U.S. District Court for the Northern District of California enjoined the Departments ''from taking any action continuing to implement the Rule'' and ordered the Departments ''to return to the pre-Rule practices for processing asylum applications.'' *E. Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018). On February 28, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the injunction. *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242, 1284 (9th Cir. 2020). The Departments in this rule do not make any

208.13(c)(3)–(4). The Departments include technical edits in 8 CFR 208.30(e)(5), to change ''reasonable fear'' to ''reasonable possibility'' to align the terminology with the other proposed changes in this rule. Similarly, DOJ makes technical edits in 8 CFR 1208.30(g)(1) and 8 CFR 1003.42(d)—both of which refer to the ''reasonable fear'' standard in the current version of 8 CFR 208.30(e)(5)—to change the ''reasonable fear'' language to ''reasonable possibility.'' These edits are purely technical and would not amend, alter, or impact the standard of proof applicable to the fear screening process and determinations, or review of such determinations, associated with the aforementioned bars.

Additionally, in 8 CFR 208.2(c)(1), 8 CFR 1208.2(c)(1), 8 CFR 235.6(a)(2), and 8 CFR 1235.6(a)(2), the Departments include technical edits to replace the term ''credible fear of persecution or torture'' with ''a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture'' to mirror the terminology used in proposed 8 CFR 208.30 and 8 CFR 1208.30. Moreover, in 8 CFR 1208.30(g)(2)(iv)(C), DOJ makes a technical edit to clarify that stowaways barred from asylum and both statutory and CAT withholding of removal may still be eligible for deferral of removal under the CAT regulations.

The Departments further amend 8 CFR 208.30(g) and 8 CFR 1208.30(g)(2), which address procedures for negative fear determinations for aliens in the expedited removal process. In 8 CFR 208.30(g)(1), the Departments treat an alien's refusal to indicate whether he or she desires review by an immigration judge as declining to request such review. Also, in 8 CFR 208.31, the Departments treat a refusal as declining to request review within the context of reasonable fear determinations.

In comparison to the NPRM, this final rule adds the word ''for'' to correct the form name to ''Application for Asylum and for Withholding of Removal'' at 8 CFR 208.31(g)(2) and 1208.31(g)(2). This final rule also reinserts language concerning novel or unique issues in 8 CFR 208.30(e)(4) that was inadvertently proposed to be removed in the NPRM, with modifications to account for changes in terminology adopted via this final rule. The language now reads: ''In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.'' Also, this final rule removes one sentence from the proposed 8 CFR 208.30(e)(4)—''An asylum officer's determination will not become final until reviewed by a supervisory asylum officer''—because similar text already exists in 8 CFR 208.30(e)(8) and it would be repetitive to include it in 8 CFR 208.30(e)(4).

2. Amendments Related to the Filing Requirements and Elements for Consideration of Form I–589, Application for Asylum and for Withholding of Removal

2.1. Frivolous Applications

The Departments amend both 8 CFR 208.20 and 1208.20 regarding determinations that an asylum application is frivolous. *See* INA 208(d)(6), 8 U.S.C. 1158(d)(6) (providing that an alien found to have ''knowingly made a frivolous application for asylum'' is ''permanently ineligible for any benefits'' under the Act). The Departments propose the new standards in order to ensure that manifestly unfounded or otherwise abusive claims are rooted out and to ensure that meritorious claims are adjudicated more efficiently so that deserving applicants receive benefits in a timely fashion.

The Departments clarify the meaning of ''knowingly'' by providing that ''knowingly'' requires either actual knowledge of the frivolousness or willful blindness toward it. 8 CFR 208.20(a)(2), 1208.20(a)(2). The Departments also amend the definition of ''frivolous.'' 8 CFR 208.20, 208.20(c)(1)–(4), 1208.20, 1208.20(c)(1)–(4). Under the new definition, if knowingly made, an asylum application would be properly considered frivolous if the adjudicator were to determine that it included a fabricated material element; that it was premised on false or fabricated evidence; that it was filed without regard to the merits of the claim; or that it was clearly foreclosed by applicable law. The definition aligns with the Departments' prior understandings of frivolous applications, including applications that are clearly unfounded, abusive, or involve fraud, and the Departments believe the definition would better effectuate the intent of section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), to discourage applications that make patently meritless or false claims.

In addition, the Departments allow asylum officers adjudicating affirmative asylum applications to make findings that aliens have knowingly filed frivolous asylum applications and to refer the cases on that basis to immigration judges (for aliens not in lawful status) or to deny the applications (for aliens in lawful status). 8 CFR 208.20(b), 1208.20(b). For an alien not in lawful status, a finding by an asylum officer that an asylum application is frivolous would not render an alien permanently ineligible for immigration benefits unless an immigration judge or the BIA subsequently makes a finding of frivolousness upon de novo review of the application. Asylum officers would apply the same definition used by immigration judges and the BIA under this rule. *Id.* This change would allow U.S. Citizenship and Immigration Services (''USCIS'') to more efficiently root out frivolous applications, deter frivolous filings, and reduce the number of frivolous applications in the asylum system. Additionally, an asylum officer who makes a finding of frivolousness would produce a record on that issue for an immigration judge to review. Further, the proposed change is consistent with congressional intent to ''reduce the likelihood that fraudulent or frivolous applications will enable deportable or excludable aliens to remain in the U.S. for substantial periods.'' S. Rep. No. 104–249, at 2 (1996).

The Departments clarify that, as long as the alien has been given the notice of the consequences of filing a frivolous application, as required by section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A), the adjudicator need not give the alien any additional or further opportunity to account for any issues prior to the entry of a frivolousness finding. 8 CFR 208.20(d), 1208.20(d). The Departments have determined that this provision is sufficient to comply with the Act's requirements, and that there is no legal or operational justification for providing additional opportunities to address aspects of a claim that may warrant a frivolousness finding. The Departments believe the current regulatory framework, which provides that an EOIR adjudicator may only make a frivolous finding if he or she ''is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim,'' has not successfully achieved the Departments' goal of preventing knowingly frivolous applications that delay the adjudication of other asylum applications that may merit relief.

As this rule would overrule *Matter of Y–L–,* 24 I&N Dec. 151 (BIA 2007), and revise the definition of ''frivolous,'' adjudicators would not be required to

amendments that would implement the rules at issue in the aforementioned cases.

provide opportunities for applicants to address discrepancies or implausible aspects of their claims if an applicant had been provided the warning required by INA 208(d)(4)(A) (8 U.S.C. 1158(d)(4)(A)).

In order to ameliorate the consequences of knowingly filing a frivolous application in appropriate cases, however, the Departments include a mechanism that would allow certain aliens in removal proceedings to withdraw, with prejudice, their applications by disclaiming the applications; accepting an order of voluntary departure for a period of no more than 30 days; withdrawing, also with prejudice, all other applications for relief or protection; and waiving any rights to file an appeal, motion to reopen, and motion to reconsider. 8 CFR 208.20(f), 1208.20(f). In such instances, the aliens would not be subject to a frivolousness finding and could avoid the penalties associated with such a finding. In addition, the regulation does not change current regulatory language that makes clear that a frivolousness finding does not bar an alien from seeking statutory withholding of removal or protection under the CAT regulations. Finally, the Departments clarify that an application may be found frivolous even if the application was untimely. 8 CFR 208.20(e), 1208.20(e).

In comparison to the NPRM, this final rule updates the frivolousness language in 8 CFR 208.20 and 8 CFR 1208.20 to further clarify that the new frivolousness standards only apply prospectively to applications filed on or after the effective date of this final rule. This final rule also replaces the word ''essential'' with the word ''material'' in 8 CFR 208.20(c)(1) and 1208.20(c)(1), consistent with the stated intent of the NPRM. Finally, to avoid confusion and potential conflict between the proposed language of 8 CFR 208.20(b) and 1208.20(b) and 8 CFR 208.20(d) and 1208.20(d), this final rule deletes the following sentence from proposed 8 CFR 208.20(b) and 1208.20(b): ''Such finding will only be made if the asylum officer is satisfied that the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.''

2.2. Pretermission of Applications

DOJ adds a new paragraph (e) to 8 CFR 1208.13 to clarify that immigration judges may pretermit and deny an application for asylum, statutory withholding of removal, or protection under the CAT regulations if the alien has not established a prima facie claim for relief or protection under the applicable laws and regulations. *See Matter of E–F–H–L–,* 27 I&N Dec. 226 (A.G. 2018); *see also Matter of A–B–,* 27 I&N Dec. 316, 340 (A.G. 2018) (''Of course, if an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group * * *—an immigration judge or the Board need not examine the remaining elements of the asylum claim.''). Other immigration applications are subject to pretermission when legally insufficient, and the INA and current regulations do not require asylum to be treated any differently. Such a decision would be based on the Form I–589 application itself and any supporting evidence. Under this rule, an immigration judge may pretermit an asylum application in two circumstances: (1) Following an oral or written motion by DHS, and (2) sua sponte upon the immigration judge's own authority. Provided the alien has had an opportunity to respond, and the immigration judge considers any such response, a hearing would not be required for the immigration judge to make a decision to pretermit and deny the application. In the case of the immigration judge's exercise of his or her own authority, parties would have at least ten days' notice before the immigration judge would enter such an order. A similar timeframe would apply if DHS moves to pretermit, under current practice. *See* EOIR, *Immigration Court Practice Manual* at D–1 (Aug. 2, 2018), *https://www.justice.gov/eoir/page/file/1084851/download.*

2.3. Particular Social Group

The Departments adopt amendments to codify long-standing standards from case law regarding the cognizability of particular social groups and to provide clarity, allow for uniform application, and reduce the time necessary to evaluate claims involving particular social groups. These requirements would aid efficient litigation and avoid gamesmanship and piecemeal litigation.

Specifically, the Departments codify the requirements that (1) a particular social group must be (a) composed of members who share a common immutable characteristic, (b) defined with particularity, and (c) socially distinct in the society in question; (2) the group must exist independently of the alleged persecutory acts; and (3) the group must not be defined exclusively by the alleged harm. 8 CFR 208.1(c), 1208.1(c). Additionally, the Departments list nine, non-exhaustive circumstances that, if a particular social group consisted of or was defined by, would not generally result in a favorable adjudication. *Id.* Further, the Departments adopt several procedural requirements regarding the alien's responsibility to define the particular social group. *Id.*

In comparison to the NPRM, this final rule amends the waiver provision in 8 CFR 208.1(c) and 1208.1(c) related to claims of ineffective assistance of counsel based on a failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge to provide an exception for egregious conduct on the part of counsel. The Departments believe that cognizable ineffective assistance of counsel claims in the context of failing to assert a particular social group should be extremely rare. Nevertheless, the Departments recognize there may be unique situations in which ''egregious conduct'' on the part of counsel may warrant reopening in this context, provided that appropriate procedural requirements for such a claim are observed.

2.4. Political Opinion

The Departments adopt amendments to define ''political opinion'' and provide other guidance for adjudicators regarding applications for asylum or statutory withholding of removal premised on the applicant's political opinion. These amendments would provide additional clarity for adjudicators and better align the regulations with statutory requirements and general understanding that a political opinion is intended to advance or further a discrete cause related to political control of the state.

Specifically, the Departments define ''political opinion'' for the purposes of applications for asylum or for statutory withholding of removal as an opinion expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. 8 CFR 208.1(d), 1208.1(d). Additionally, the Departments adopt a list of potential definitional bases for a political opinion that would not, in general, support a favorable adjudication: A political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. *Id.* Finally, consistent with section 101(a)(42) of the Act, 8 U.S.C.

1101(a)(42), the Departments provide that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, would be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or be subject to persecution for such failure, refusal, or resistance would be deemed to have a well-founded fear of persecution on account of political opinion. *Id.*

2.5. Persecution Definition

Given the wide range of cases interpreting ''persecution'' for the purposes of the asylum laws, the Departments are adding a new paragraph to 8 CFR 208.1 and 1208.1 to define ''persecution'' and to better clarify what does and does not constitute persecution given the extreme and severe nature of harm required. The Departments believe that these changes would better align the relevant regulations with the high standard Congress intended for the term ''persecution.'' *See Fatin* v. *INS,* 12 F.3d 1233, 1240 n.10, 1243 (3d Cir. 1993).

Specifically, this rule provides that persecution requires ''an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control.'' 8 CFR 208.1(e), 1208.1(e). The Departments further clarify that persecution does not include, for example: (1) Every instance of harm that arises generally out of civil, criminal, or military strife in a country; (2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional; (3) intermittent harassment, including brief detentions; (4) threats with no actions taken to carry out the threats; (5) non-severe economic harm or property damage; or (6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or likely would be applied to an applicant personally. *See id.*

In comparison to the NPRM, this final rule amends the language in 8 CFR 208.1(e) and 1208.1(e) regarding when threats alone may constitute persecution to clarify that particularized threats of severe harm of an immediate and menacing nature made by an identified entity may constitute persecution. The Departments expect that such cases will be rare. *See, e.g., Duran-Rodriguez* v. *Barr,* 918 F.3d at 1028 (explaining that ''death threats alone can constitute persecution'' but ''constitute persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm'' (quotation marks and citation omitted)).

2.6. Nexus

The Departments add paragraph (f) to both 8 CFR 208.1 and 1208.1 to provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five protected grounds. This proposal would further the expeditious consideration of asylum and statutory withholding claims by bringing clarity and uniformity to this issue.

Specifically, the Departments are adopting the following eight non-exhaustive circumstances, each of which is rooted in case law, that would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant's inability to demonstrate persecution on account of a protected ground: (1) Interpersonal animus or retribution; (2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue; (3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state; (4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations; (5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence; (6) criminal activity; (7) perceived, past or present, gang affiliation; and (8) gender. 8 CFR 208.1(f)(1)–(8), 1208.1(f)(1)–(8). At the same time, the regulation would not foreclose that, at least in rare cases, such circumstances could be the basis for finding nexus, given the fact-specific nature of this determination.

2.7. Stereotype Evidence

In order to make clear that pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim, the Departments bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes are offered in support of an alien's claim. 8 CFR 208.1(g), 1208.1(g).

In comparison to the NPRM, the final rule clarifies the language in 8 CFR 208.1(g) and 1208.1(g) to alleviate apparent confusion and improve consistency with the intent of the NPRM regarding the use of stereotypes as an evidentiary basis for an asylum claim. In the final rule, bald statements that a country or its denizens have a particular cultural trait that causes citizens, nationals, or residents of that country to engage in persecution is evidence lacking in probative value and has no place in an adjudication.

2.8. Internal Relocation

The Departments are adopting amendments to 8 CFR 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), and 1208.16(b)(3) regarding the reasonableness of internal relocation because the Departments determined that the current regulations inadequately assess the relevant considerations in determining whether internal relocation is possible, and if possible, whether it is reasonable to expect the asylum applicant to relocate. The Departments adopt a more streamlined presentation in the regulations of the most relevant factors for adjudicators to consider in determining whether internal relocation is a reasonable option. This clarification would assist adjudicators in making more efficient adjudications and would bring the regulatory burdens of proof in line with baseline assessments of whether types of persecution generally occur nationwide.

Specifically, the Departments amend the general guidelines regarding determinations of the reasonableness of internal relocation to specify that adjudicators should consider the totality of the circumstances. 8 CFR 208.13(b)(3), 1208.13(b)(3). In addition, the Departments amend the list of considerations for adjudicators including, inter alia, an instruction that adjudicators consider ''the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.'' *Id.* The Departments also adopt a presumption that for applications in which the persecutor is not a government or government-sponsored actor, internal relocation would be reasonable unless the applicant demonstrates by a

preponderance of the evidence that it would not be. 8 CFR 208.13(b)(3)(iii), 1208.13(b)(3)(iii). This presumption would apply regardless of whether an applicant has established past persecution. For ease of administering these provisions, the Departments also provide examples of the types of individuals or entities who are private actors. 8 CFR 208.13(b)(3)(iv), 1208.13(b)(3)(iv).[6]

2.9. Discretionary Factors

Asylum is a discretionary form of relief, and the Departments provide general guidelines on factors for adjudicators to consider when determining whether or not an alien merits the relief of asylum as a matter of discretion. 8 CFR 208.13(d), 1208.13(d). Specifically, the Departments provide three factors that adjudicators must consider when determining whether an applicant merits the relief of asylum as a matter of discretion: (1) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country; (2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and (3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country. 8 CFR 208.13(d)(1), 1208.13(d)(1). The adjudicator must consider all three factors, if relevant, during every asylum adjudication. If one or more of these factors were found to apply to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.

In addition, the Departments provide nine additional adverse factors that, if applicable, would ordinarily result in the denial of asylum as a matter of discretion. 8 CFR 208.13(d)(2)(i), 1208.13(d)(2)(i). Specifically, the Departments list the following factors for the adjudicator to consider: (1) Whether an alien has spent more than 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States, 8 CFR 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A);[7] (2) whether the alien transited through more than one country prior to arrival in the United States, 8 CFR 208.13(d)(2)(i)(B), 1208.13(d)(2)(i)(B);[8] (3) whether the applicant would be subject to a mandatory asylum application denial under 8 CFR 208.13(c), 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty, 8 CFR 208.13(d)(2)(i)(C) 1208.13(d)(2)(i)(C); (4) whether the applicant has accrued more than one year of unlawful presence in the United States prior to filing an application for asylum, 8 CFR 208.13(d)(2)(i)(D), 1208.13(d)(2)(i)(D); (5) whether the applicant, at the time he or she filed the asylum application, had failed to timely file or to timely file an extension request of any required Federal, state, or local tax returns; failed to satisfy any outstanding Federal, state, or local tax obligations; or has income that would generate tax liability but that has not been reported to the Internal Revenue Service, 8 CFR 208.13(d)(2)(i)(E), 1208.13(d)(2)(i)(E); (6) whether the applicant has had two or more prior asylum applications denied for any reason, 8 CFR 208.13(d)(2)(i)(F), 1208.13(d)(2)(i)(F); (7) whether the applicant has previously withdrawn an asylum application with prejudice or been found to have abandoned an asylum application, 8 CFR 208.13(d)(2)(i)(G), 1208.13(d)(2)(i)(G); (8) whether the applicant previously failed to attend an interview with DHS regarding his or her application, 8 CFR 208.13(d)(2)(i)(H), 1208.13(d)(2)(i)(H);[9] and (9) whether the applicant was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen within one year of the change in country conditions, 8 CFR 208.13(d)(2)(i)(I), 1208.13(d)(2)(i)(I); *see also* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii); 8 CFR 1003.2(c)(3)(ii), 1003.23(b)(4)(i).

This rule provides that if the adjudicator were to determine that any of these nine circumstances applied during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial or referral of asylum would result in an exceptional and extremely unusual hardship to the alien. 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii).

In comparison to the NPRM, this final rule adds the clarifying phrase ''as defined in section 212(a)(9)(B)(ii) and (iii) of the Act'' to 8 CFR 208.13(d)(2)(i)(D) and 1208.13(d)(2)(i)(D) consistent with the intent of the NPRM. In addition, this final rule amends 8 CFR 208.13(d)(1)(i) and 1208.13(d)(1)(i) to reflect that an unlawful or attempted unlawful entry into the United States by an alien under the age of 18 will not be considered as a significant adverse discretionary factor in considering a subsequent asylum application filed by such an alien. Further, the final rule amends 8 CFR 208.13(d)(2)(ii) to reflect that, operationally, DHS may refer or deny an asylum application, depending on the circumstances of the applicant. *See* 8 CFR 208.14.

2.10. Firm Resettlement

Due to the increased availability of resettlement opportunities and the interest of those genuinely in fear of persecution in attaining safety as soon as possible, the Departments revise the definition of firm resettlement that applies to asylum adjudications at 8 CFR 208.15 and 1208.15.[10] These

[6] Because the issue of internal relocation arises in the context of applications for both asylum and statutory withholding of removal, the Departments are amending the relevant regulations related to applications for statutory withholding of removal for the same reasons discussed herein they are amending the regulations related to asylum applications. *See* 8 CFR 208.16(b)(3) and 1208.16(b)(3).

[7] The Departments, however, provided exceptions for aliens who demonstrate that (1) they applied for and were denied protection in such country, (2) they are a trafficking victim as set out as 8 CFR 214.11, or (3) such country was at the time the alien transited not a party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 8 CFR 208.13(d)(2)(i)(A)(*1*)–(*3*), 1208.13(d)(2)(i)(A)(*1*)–(*3*).

[8] The Departments, however, provided the same exceptions described above. *See* 8 CFR 208.13(d)(2)(i)(B)(*1*)–(*3*), 1208.13(d)(2)(i)(B)(*1*)–(*3*).

[9] The Departments included exceptions if the alien shows by the preponderance of the evidence that either exceptional circumstances prevented the alien from attending the interview or that the interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview. 8 CFR 208.13(d)(2)(i)(H)(*1*)–(*2*), 1208.13(d)(2)(i)(H)(*1*)–(*2*).

[10] As the Departments noted in the proposed rule, 85 FR at 36286 n.41, 43 countries have signed the Refugee Convention since 1990. In particular, resettlement opportunities in Mexico, one of the most common transit countries for aliens coming to the United States, have increased significantly in recent years. For example, the UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID–19 pandemic—which strongly

changes recognize the increased availability of resettlement opportunities and that an alien fleeing persecution would ordinarily be expected to seek refuge at the first available opportunity where there is no fear of persecution or torture. Further, the changes would ensure that the asylum system is used by those in need of immediate protection rather than those who chose the United States as their destination for other reasons and then relied on the asylum system to reach that destination.

Specifically, the Departments identify three circumstances under which an alien would be considered firmly resettled: (1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and (i) received or was eligible for any permanent legal immigration status in that country, (ii) resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist), or (iii) resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country; (2) the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or (3) (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States. 8 CFR 208.15(a)(1)–(3), 1208.15(a)(1)–(3).

The Departments further provide that the issue of whether the firm resettlement bar applies arises ''when the evidence of record indicates that the firm resettlement bar may apply,'' and specifically allows both DHS and the immigration judge to first raise the issue based on the record evidence. 8 CFR 208.15(b), 1208.15(b). Finally, the Departments specify that the firm resettlement of an alien's parent(s) would be imputed to the alien if the resettlement was prior to the alien turning 18 and the alien resided with the parents at the time of the firm resettlement unless the alien could not have derived any legal immigration status or any nonpermanent legal immigration status that was potentially indefinitely renewable from the parent. *Id.*

In comparison to the NPRM, this final rule analyzes the components of 8 CFR 208.15(a)(1) and 1208.15(a)(1), breaks it into three subparagraphs, and changes the syntax, all for easier readability and to avoid confusion. The changes in the final rule are stylistic and do not reflect an intent to make a substantive change from the NPRM. This final rule also changes the temporal language in 8 CFR 208.15(a)(3)(i) and (ii) and 1208.15(a)(3)(i) and (ii) for clarity and consistency with similar language in 8 CFR 208.15(a)(2) and 1208.15(a)(2). The changes clarify the relevant temporal scope to read ''after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States'' in lieu of the language in the NPRM. Finally, as discussed above, the rule corrects a related outdated statutory cross-reference in 8 CFR 1244.4(b).

2.11. ''Public Officials''

The Departments are revising 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) to provide further guidance for determining what sorts of officials constitute ''public officials,'' including whether an official such as a police officer is a public official for the purposes of the CAT regulations if he or she acts in violation of official policy or his or her official status. Specifically, in comparison to the NPRM, this final rule strikes the parenthetical phrase ''(''rogue official'')'' in 8 CFR 208.18(a)(1) and 1208.18(a)(1). Relatedly, this final rule replaces the remaining uses of the phrase ''rogue official'' in 8 CFR 208.16(b)(3)(iv), 208.18(a)(1), and 1208.18(a)(1) with the definition, ''public official who is not acting under color of law.'' As recently noted by the Attorney General in *Matter of O–F–A–S–,* 28 I&N Dec. 35, 38 (A.G. 2020), ''continued use of the 'rogue official' language by the immigration courts going forward risks confusion, not only because it suggests a different standard from the 'under color of law' standard, but also because 'rogue official' has been interpreted to have multiple meanings.''

In addition, the Departments clarify (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (*i.e.,* under ''color of law'') and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law does not constitute a ''pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,'' even if such actions cause pain and suffering that could rise to the severity of torture. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1). This amendment clarifies that the requirement that the individual be acting in an official capacity applies to

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suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g.,* Shabia Mantoo, *Despite pandemic restrictions, people fleeing violence and persecution continue to seek asylum in Mexico,* U.N. High Commissioner for Refugees (Apr. 28, 2020), *https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html* (''While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.''). Asylum and refugee claims filed in Mexico increased 33 percent in the first three months of 2020 compared to the same period in 2019, averaging almost 6000 per month. *Id.* Asylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year. U.N. High Commissioner for Refugees, *Fact Sheet* (Apr. 2019), *https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf.* Overall, ''[a]sylum requests have doubled in Mexico each year since 2015.'' Congressional Research Serv., *Mexico's Immigration Control Efforts* (Feb. 19, 2020), *https://fas.org/sgp/crs/row/IF10215.pdf.* Moreover, some private organizations acknowledge that asylum claims in Mexico have recently ''skyrocket[ed],'' that ''Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,'' and that ''Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,'' including for those ''who are deciding where to seek asylum [*i.e.* between Mexico and the United States].'' Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* (Nov. 2019), *https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf.* Moreover, the Mexican Constitution was amended in 2011 to include the specific right to asylum and further amended in 2016 to expand that right. *See* Mex. Const. Art. 11 (''Every person has the right to seek and receive asylum. Recognition of refugee status and the granting of political asylum will be carried out in accordance with international treaties. The law will regulate their origins and exceptions.''). In fact, the grounds for seeking and obtaining refugee status under Mexican law are broader than the grounds under U.S. law. As in the United States, individuals in Mexico may seek refugee status as a result of persecution in their home countries on the basis of race, religion, nationality, gender, membership in a social group, or political opinion. *Compare* 2011 Law for Refugees, Complementary Protection, and Political Asylum (''LRCPPA''), Art. 13(I), *with* INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i). However, individuals in Mexico may also seek refugee status based on ''generalized violence'' and ''massive violation of human rights.'' *See* 2011 LRCPPA, Art. 13(II). In short, resettlement opportunities are unquestionably greater now than when the regulatory definition of ''firm resettlement'' was first implemented, and those changes warrant revisions to that definition accordingly.

both a ''public official,'' such as a police officer, and an ''other person,'' such as an individual deputized to act on the government's behalf. *Id.*

The Departments also clarify the definition of ''acquiescence of a public official'' so that, as several courts of appeals and the BIA have recognized, ''awareness''—as used in the CAT ''acquiescence'' definition—requires a finding of either actual knowledge or willful blindness. 8 CFR 208.18(a)(7), 1208.18(a)(7). The Departments further clarify in this rule that, for purposes of the CAT regulations, ''willful blindness'' means that ''the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.'' *Id.*

Additionally, the Departments clarify that acquiescence is not established by prior awareness of the activity alone, but requires an omission of an act that the official had a duty to do and was able to do. 8 CFR 208.18(a)(7), 1208.18(a)(7).

2.12. Information Disclosure

The Departments are making changes to 8 CFR 208.6 and 8 CFR 1208.6 to clarify that information may be disclosed in certain circumstances that directly relate to the integrity of immigration proceedings, including situations in which there is suspected fraud or improper duplication of applications or claims. Specifically, the Departments provide that to the extent not already specifically permitted, and without the necessity of seeking the exercise of the Attorney General's or Secretary's discretion under sections 1208.6(a) and 208.6(a), respectively, the Government may disclose all relevant and applicable information in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a Federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; during an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or Federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse. 8 CFR 208.6(d)(1)(i)–(iv), 1208.6(d)(1)(i)–(vi). Finally, the Departments provide that nothing in 8 CFR 208.6 or 1208.6 should be construed to prohibit the disclosure of information in or relating to an application for asylum, statutory withholding of removal, and protection under the CAT regulations among specified government employees or where a government employee or contractor has a ''good faith and reasonable'' belief that the disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime. 8 CFR 208.6(e), 1208.6(e).

The Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT, and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d) and 1208.6(d), and the Departments see no reason not to conform the other paragraphs in that section for consistency.

2.13. Severability

Given the numerous and varied changes proposed in the NPRM, the Departments are adding severability provisions in 8 CFR parts 208, 235, 1003, 1208, 1212, and 1235. *See* 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). Because the Departments believe that the provisions of each part would function sensibly independent of other provisions, the Departments make clear that the provisions are severable so that, if necessary, the regulations can continue to function without a stricken provision.

3. Other

In comparison to the NPRM, this final rule strikes the regulatory text changes proposed at 103.5 because those changes were inadvertently included in the NPRM's proposed regulatory text.

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the NPRM closed on July 15, 2020, with more than 87,000 comments received. Organizations, including non-government organizations, legal advocacy groups, non-profit organizations, religious organizations, unions, congressional committees, and groups of members of Congress, submitted 311 comments, and individual commenters submitted the rest. Most individual comments opposed the NPRM.

Many if not most comments opposing the NPRM either misstate its contents, provide no evidence (other than isolated or distinguishable anecdotes) to support broad speculative effects, are contrary to facts or law, or lack an understanding of relevant immigration law and procedures. As the vast majority of comments in opposition fall within one of these categories, the Departments offer the following general responses to them, supplemented by more detailed, comment-specific responses in Section II.C of this preamble.

Many comments oppose the NPRM because they misstate, in hyperbolic terms, that it ends or destroys the asylum system or eliminates the availability of humanitarian protection in the United States. The NPRM does nothing of the kind. The availability of asylum is established by statute, INA 208, 8 U.S.C. 1158, and an NPRM cannot alter a statute.[11] Rather, the NPRM, consistent with the statutory authority of the Secretary and the Attorney General, adds much-needed guidance on the many critical, yet undefined, statutory terms related to asylum applications. Such guidance not only improves the efficiency of the system as a whole, but allows adjudicators to focus resources more effectively on potentially meritorious claims rather than on meritless ones. In short, the NPRM enhances rather than degrades the asylum system.

Many comments misstate that the NPRM creates a blanket rule denying asylum based on its addition of certain definitions—*e.g.,* particular social group, political opinion, nexus, and persecution. Although the rule provides definitions for these terms and examples of situations that generally will not meet those definitions, the rule also makes clear that the examples are generalizations, and it does not categorically rule out types of claims based on those definitions. In short, the rule does not contain the blanket prohibitions that some commenters ascribe to it.

Many comments assert that the NPRM targets certain nationalities, groups, or types of claims and is motivated by a nefarious or conspiratorial animus, particularly an alleged racial animus. The Departments categorically deny an improper motive in promulgating the NPRM. Rather, the animating principles of the NPRM were to provide clearer guidance to adjudicators regarding a number of thorny issues that have

[11] For similar reasons, the NPRM cannot—and does not—alter the general availability of withholding of removal under the Act or protection under the CAT.

created confusion and inconsistency; to improve the efficiency and integrity of the overall system; to correct procedures that were not working well, including the identification of meritless or fraudulent claims; and to reset the overall asylum adjudicatory framework in light of numerous—and often contradictory or confusing—decisions from the Board and circuit courts. The Departments' positions are rooted in law, as explained in the NPRM. In short, the Departments have not targeted any particular groups or nationalities in the NPRM or in the provisions of this final rule.[12] Rather, the Departments are appropriately using rulemaking to provide guidance in order to streamline determinations consistent with their statutory authorities. *See Heckler* v. *Campbell,* 461 U.S. 458, 467 (1983) (''The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. . . . A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding.'') (citation omitted); *see also Lopez* v. *Davis,* 531 U.S. 230, 243–44 (2001) (''[E]ven if a statutory scheme requires individualized determinations, which this scheme does not, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority. . . . The approach pressed by Lopez—case-by-case decision-making in thousands of cases each year—could invite favoritism, disunity, and inconsistency.'') (citations and internal quotations omitted).

Many, if not most, commenters asserted that the rule was ''arbitrary and capricious,'' though nearly all of those assertions were ultimately rooted in the fact that the rule did not adopt the commenters' policy preferences rather than specific legal deficiencies. The Departments have considered all comments and looked at alternatives. The Departments understand that many, if not most, commenters opposing the rule believe that most asylum applications are meritorious and, thus, would prefer that more applications for asylum be granted; that border restrictions should be loosened; and that the Departments, as a matter of forbearance or discretion, should decline to enforce the law when doing so would be beneficial to aliens. For all of the reasons discussed in the NPRM, and reiterated herein, the Departments decline to adopt those positions.

The Departments further understand that many if not most commenters have a policy preference for the status quo over the proposed rule changes. The Departments have been forthright in acknowledging the changes, but have also explained the reasoning behind those changes, including the lack of clarity in key statutory language and the resulting cacophony of case law that leads to confusion and inconsistency in adjudication. The Departments acknowledge changes in positions, where applicable have provided good reasons for the changes; they believe the changes better implement the law; and they have provided a ''reasoned analysis'' for the changes, which is contained in the NPRM and reiterated herein in response to the comments received. In short, the rule is not ''arbitrary and capricious'' under existing law. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

Finally, many commenters assert that various provisions of the NPRM are inconsistent with either Board or circuit-court precedents. The Departments may engage in rulemaking that overrules prior Board precedent, and as noted in the NPRM, 85 FR at 36265 n.1, to the extent that some circuits have disagreed with the Departments' interpretations of ambiguous statutory terms in the past, the Departments' new rule would warrant reevaluation in appropriate cases under well-established principles of administrative law. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 982 (2005) (hereinafter ''*Brand X*''); *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–844 (1984). Moreover, '' 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations.'' *Scialabba* v. *Cuellar de Osorio,* 573 U.S. 41, 56–57 (2014) (plurality op.) (quoting *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999)).

Consequently, for the reasons explained in the NPRM and herein, prior Board and circuit court decisions do not restrict the Departments to the extent asserted by most commenters. Further, as also discussed, *infra,* and recognized by commenters, much of the relevant circuit court case law points in different directions and offers multiple views on the issues in the NPRM. There is nothing inappropriate about the Departments seeking to improve the consistency, clarity, and efficiency of asylum adjudications, and to bring some reasonable order to the dissonant views on several important-but-contested statutory issues. *See, e.g., Fed. Express Corp.* v. *Holowecki,* 552 U.S. 389, 403 (2008) (''We find no reason in this case to depart from our usual rule: Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives.'').

Overall, and as discussed in more detail below, the Departments generally decline to adopt the recommendations of comments that misinterpret the NPRM, offer dire and speculative predictions that lack support, are contrary to facts or law, or otherwise lack an understanding of relevant law and procedures.

B. Comments Expressing Support for the Proposed Rule

Comment: At least two organizations and other individual commenters expressed general support for the rule. Some commenters noted the need for regulatory reform given the current delays in asylum adjudication and said the rule is a move in the right direction. Other commenters indicated a range of reasons for their support, including a desire to limit overall levels of immigration, a belief that many individuals who claim asylum are instead simply seeking better economic opportunities, or a belief that asylum seekers or immigration representatives abuse the asylum system.

Commenters stated that the rule will aid both adjudicators and applicants. For example, one individual and organization explained that:

> [T]hese proposals will give aliens applying for protection ample notice and motivation to file complete and adequately reasoned asylum applications in advance of the merits hearing, which will protect the rights of the alien, assist the IJ in completing the case in a timely manner, and aid the ICE attorney in representing the interests of the government.

Response: The Departments note and appreciate these commenters' support for the rule.

[12] Asylum claims are unevenly distributed among the world's countries. *See* EOIR, *Asylum Decision Rates by Nationality* (July 14, 2020), *https://www.justice.gov/eoir/page/file/1107366/download.* Thus, to the extent that the NPRM affects certain groups of aliens more than others, those effects are a by-product of the inherent distribution of claims, rather than any alleged targeting by the Departments. *See also DHS* v. *Regents of Univ. of Cal.,* 140 S.Ct. 1891, 1915–16 (2020) (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of racial animus, invidious discrimination, or an equal protection violation).

C. Comments Expressing Opposition to the Proposed Rule

1. General Opposition

1.1. General Immigration Policy Concerns

Comment: Many commenters expressed a general opposition to the rule, and noted that, although they may not be commenting on every aspect of the rule, a failure to comment on a specific provision does not mean that the commenter agrees with a provision. Commenters stated that the rule would ''destroy'' the U.S. asylum system and would result in the denial of virtually all asylum applications. Instead, commenters recommended that the current regulations remain in place. Moreover, commenters stated that the rule conflicts with America's values and deeply rooted policy of welcoming immigrants and refugees. Commenters asserted that the rule would damage the United States' standing in the world. Commenters explained that the United States should be promoting values of freedom and human rights, and that immigration benefits the United States both economically and culturally. Commenters asserted that the rule provides inadequate legal reasoning and is inappropriately motivated by the administration's animus against immigrants.

Response: The rule is not immoral, motivated by racial animus, or promulgated with discriminatory intent. Instead, the rule is intended to help the Departments better allocate limited resources in order to more expeditiously adjudicate meritorious asylum, statutory withholding of removal, and CAT protection claims. For example, placing aliens who receive a positive credible fear screening into asylum-and-withholding-only proceedings will lessen the strain on the immigration courts by limiting the focus of such proceedings and thereby streamlining the process. Similarly, applying certain asylum bars and raising the standards for statutory withholding of removal and CAT protection will help screen out non-meritorious claims during the credible fear screening, which will allow the Departments to devote their limited resources to adjudicating claims that are more likely to be meritorious. Likewise, allowing immigration judges to pretermit asylum applications that are not prima facie eligible for relief will allow judges to use limited hearing time to focus on cases with a higher chance of being meritorious. The rule's expanded definition of frivolousness will also help to deter specious claims that would otherwise require the use of limited judicial resources. The rule's additional guidance regarding certain definitions (such as particular social groups, political opinion, persecution, and acquiescence, among others), as well as enumerated negative discretionary factors, will provide clarity to adjudicators and the parties and make the adjudicatory process more efficient and consistent.

These changes do not ''destroy'' the U.S. asylum system, prevent aliens from applying for asylum, or prevent the granting of meritorious claims, contrary to commenters' claims. The asylum system remains enshrined in both statute and regulation. Rather, the changes are intended to harmonize the process between the relevant Departments, provide more clarity to adjudicators, and allow the immigration system to more efficiently focus its resources on adjudicating claims that are more likely to be meritorious. In doing so, the rule will help the Departments ensure that the asylum system is available to those who truly have ''nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. 119, 122 (BIA 2013) (internal citations omitted).

1.2. Issuance of Joint Regulations

Comment: At least one commenter expressed a belief that it is inappropriate for DHS (characterized by the commenter as the immigration prosecutors) and DOJ (characterized by the commenter as the immigration adjudicators) to issue rules jointly because the agencies serve different roles and missions within the immigration system. The commenter stated that the issuance of joint regulations calls into question the agencies' independence from each other.

Response: The HSA divided, between DHS and DOJ, some immigration adjudicatory and enforcement functions that had previously been housed within DOJ. *See* INA 103, 8 U.S.C. 1103 (setting out the powers of the Secretary and Under Secretary of DHS and of the Attorney General); *see also* HSA, sec. 101, 116 Stat. at 2142 (''There is established a Department of Homeland Security, as an executive department of the United States . . . .''). However, the Departments disagree that issuing joint regulations violates the agencies' independence in the manner suggested by commenters. Instead, the DHS and DOJ regulations are inextricably intertwined, and the Departments' roles are often complementary. *See, e.g.,* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (providing for immigration judge review of asylum officers' determinations regarding certain aliens' credible fear claims); *see* also 8 CFR 208.30 and 1208.30 (setting out the credible fear procedures, which involve actions before both DHS/USCIS and DOJ/EOIR). Because officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum, it is appropriate for the Departments to coordinate on regulations like the proposed rule that affect both agencies' equities in order to ensure consistent application of the immigration laws.

1.3. Impact on Particular Populations

Comment: Commenters asserted that the proposed regulation is in conflict with American values and that it would deny due process to specific populations—including women, LGBTQ asylum seekers, and children. Commenters similarly expressed concerns that the proposed regulation would lead to the denial of virtually all applications from those populations, which, commenters asserted, would place them in harm's way.

Commenters asserted that the elimination of gender-based claims would be particularly detrimental to women and LGBTQ asylum-seekers. Commenters asserted that the proposed rule would ''all but ban'' domestic-violence-based and gang-based claims. Commenters noted that courts have found that such claims can be meritorious.

Response: The Departments disagree that the rule is contrary to American values. The United States continues to fulfill its international commitments in accordance with the Refugee Act of 1980,[13] evidenced by United Nations High Commissioner for Refugees (''UNHCR'') data on refugee resettlement confirming that the United States was the top country for refugee resettlement in 2019, as well as 2017 and 2018. *See* UNHCR, *Resettlement at a Glance (January–December 2019), https://www.unhcr.org/protection/resettlement/5e31448a4/resettlement-fact-sheet-2019.html.* Further, since the Refugee Act was passed, the United States has admitted more than three million refugees and granted asylum to more than 721,000 individuals. *See* UNHCR, *Refugee Admissions, https://www.state.gov/refugee-admissions/.* In Fiscal Year (''FY'') 2019 alone, the Departments approved nearly 39,000 asylum applications. EOIR, *Asylum Decision Rates,* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1248491/download* (listing 18,836 grants); USCIS, *Number of Service-wide Forms Fiscal*

[13] *See infra* Section II.C.6.8 for further discussion on this point.

Year To- Date, *https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY19Q4.pdf* (listing 19,945 grants). This rule does not affect the United States' long-standing commitment to assisting refugees and asylees from around the world.

The rule does not deny due process to any alien. As an initial matter, courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin* v. *Mukasey,* 538 F.3d 143, 156–57 (2d Cir. 2008); *Ticoalu* v. *Gonzales,* 472 F.3d 8, 11 (1st Cir. 2006) (citing *DaCosta* v. *Gonzales,* 449 F.3d 45, 49–50 (1st Cir. 2006)). Still, the statute and regulations provide for certain basic procedural protections—such as notice and an opportunity to be heard—and the rule does not alter those basic protections. *See LaChance* v. *Erickson,* 522 U.S. 262, 266 (1998) (''The core of due process is the right to notice and a meaningful opportunity to be heard.''); *see also Lapaix* v. *U.S. Att'y Gen.,* 605 F.3d 1138, 1143 (11th Cir. 2010) (''Due process requires that aliens be given notice and an opportunity to be heard in their removal proceedings.''). Aliens in removal proceedings will continue to be provided a notice of the charges of removability, INA 239(a)(1), 8 U.S.C. 1229(a)(1), have an opportunity to present the case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), and have an opportunity to appeal, 8 CFR 1003.38. Aliens in asylum-and-withholding-only proceedings will continue to be provided notice of referral for a hearing before an immigration judge, 8 CFR 1003.13 (defining ''charging document'' used by DHS to initiate non-removal, immigration proceedings before an immigration judge), to have an opportunity to be heard by an immigration judge, 8 CFR 1208.2(c), and have an opportunity to appeal, 8 CFR 1003.1(b)(9). Nothing in the proposed regulations alters those well-established procedural requirements.

The generalized concern that the rule will categorically deny asylum to classes of persons, such as women or LGBTQ asylum-seekers—and thus put those persons in harm's way—is unsupported, speculative, and overlooks the case-by-case nature of the asylum process. The rule provides more clarity to adjudicators regarding a number of difficult issues—*e.g.* persecution, particular social group, and nexus—in order to improve the consistency and quality of adjudications, but it establishes no categorical bars to domestic-violence-based or gang-based claims, and no categorical bars based on the class or status of the person claiming asylum; instead, asylum cases turn on the nature of the individual's claim. Moreover, in accordance with its non-refoulement obligations, the United States continues to offer statutory withholding of removal and CAT protection. Although this rule amends those forms of relief, the amended relief continues to align with the provisions of the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, and the CAT, such that eligible aliens will not be returned to places where they may be subjected to persecution or torture.

The portion of the rule that draws the objection above does not categorically ban or eliminate any types of claims, including those posited by the commenters. In relevant part, the rule codifies a long-standing test for determining the cognizability of particular social groups and sets forth a list of common fact patterns involving particular-social-group claims that generally will not meet those long-standing requirements. *See* 85 FR at 36278–79; *see also* 8 CFR 208.1(f)(1), 1208.1(f)(1). At the same time, the Departments recognized in the NPRM that ''in rare circumstances,'' items from the list of common fact patterns ''could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination.'' 85 FR at 36279. Thus, the NPRM explicitly stated that the rule did not ''foreclose'' any claims; the inquiry remains case-by-case.

2. Expedited Removal and Screenings in the Credible Fear Process

2.1. Asylum-and-Withholding-Only Proceedings for Aliens With Credible Fear

Comment: One organization stated that the rule would deprive individuals who have established a credible fear from being placed into full removal proceedings under section 240 of the Act, 8 U.S.C. 1229a. Another organization claimed that the rule, ''effectively destroys due process rights of asylum seekers'' as it would prevent these individuals from contesting removability where there are ''egregious due process violations,'' defects in the Notice to Appear, or competency concerns.

One organization stated that the rule is contrary to congressional intent because there is no statutory prohibition against placing arriving asylum seekers into complete section 240 proceedings, and at least one organization claimed that this intent is supported by the legislative history. One organization expressed its disagreement with the rule's citation to *Matter of M–S–,* 27 I&N Dec. 509 (A.G. 2019), 85 FR at 36267 n.9, contending that if Congress intended to ''strip asylum-seekers of their due process rights, it would have expressly said so.'' Another organization stated that the rule is ''[a]rbitrary and capricious,'' noting that the proposed policy is a ''dramatic change'' from decades of practice but claiming the Departments offer ''no discussion'' as to why it is necessary.

One organization emphasized that ''asylum-only proceedings,'' are limited in scope and both parties are prohibited from raising ''any other issues.'' The organization alleged that the NPRM did not include any data regarding the number of asylum seekers who are placed in section 240 proceedings after passing a credible fear interview, or the number of respondents in these proceedings who are granted some form of relief besides asylum or withholding of removal. Because of this, the organization claimed that the rule ''does not provide adequate justification'' for the proposed change.

Another organization claimed the rule ''pre-supposes'' that asylum seekers would not be eligible for other forms of immigration relief. The organization noted that many individuals who are apprehended at the border as asylum applicants may also be victims of human trafficking or serious crimes committed within the United States. The organization stated that Congress has recognized the unique assistance that victims of human trafficking and victims of crimes potentially eligible for U visas are able to provide to Federal law enforcement, claiming this is the reason the S visa, T visa, and U visa programs were created. The organization asserted that if the Departments ''cut off'' access to a complete section 240 proceeding, they will essentially ''tie the hands'' of law enforcement. Another organization expressed concern that the rule would prevent survivors of gender-based and LGBTQ-related violence in expedited removal proceedings from applying for protection under the Violence Against Women Act (''VAWA'') or the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (''TVPRA'').

One organization contended that there is little efficiency in abandoning removability determinations in removal proceedings, arguing that ''[i]n the overwhelming majority of cases, the pleadings required to establish removability take 30 seconds.'' The organization argued that Congress

would not have chosen to sacrifice competency and accuracy to save such a short amount of time. Another organization criticized the rule's statement that ''referring aliens who pass a credible fear for section 240 proceedings runs counter to [the] legislative aims'' of a quick expedited removal process, 85 FR at 36267, arguing that this justification is ''faulty at best and baseless at worst.'' One organization claimed that administrative efficiency is aided by the availability of a broad range of reliefs because respondents placed in full removal proceedings often qualify for a simpler form of relief, allowing courts to omit many of these complexities.

One organization noted that, in the expedited removal context, decisions are made by Customs and Border Protection (''CBP'') officers. The organization expressed concern about the risk of error in permitting an enforcement officer to act as both ''prosecutor and judge,'' particularly when the officer's decisions are not subject to appellate review. The organization also noted the rule's reference to the ''prosecutorial discretion'' of DHS in removal proceedings and argued that this discretion does not include the authority to create new types of proceedings. Instead, the organization contended that this discretion is confined to decisions surrounding the determination of whether to pursue charges. Another organization emphasized that, while DHS has the discretion to place an individual without documentation directly into section 240 proceedings instead of expedited removal, this discretion is ''initial,'' and does not continue once the individual has established fear (as the individual must then be referred for full consideration of his or her claims). The organization disagreed with the rule's assertion, 85 FR at 36266, that the current practice of placing applicants with credible fear into section 240 proceedings ''effectively negat[es]'' DHS's prosecutorial discretion.

The organization further disagreed with the Departments' claim that ''[b]y deciding that the [individual] was amenable to expedited removal, DHS already determined removability,'' 85 FR at 36266, contending this ''overreaches.'' The organization noted that, pursuant to section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), a DHS inspector does have initial discretion to place an applicant into expedited removal proceedings if it is determined that the person ''is inadmissible under section 1182(a)(6)(C) or 1182(a)(7);'' however, the organization emphasized that this is not the ultimate determination for applicants who establish credible fear, as DHS cannot continue to seek expedited removal at this point.

One organization stated that, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, Div. C, 110 Stat. 3009, 3009–546, it created two specific removal procedures: Expedited removal proceedings in section 235 of the Act, 8 U.S.C. 1225, and regular removal proceedings in section 240 of the Act, 8 U.S.C. 1229a. The organization asserted that section 240 proceedings are the ''exclusive'' admission and removal proceedings ''unless otherwise specified'' in the Act, 8 U.S.C. 1229a(a)(3). The organization also noted Congress's specification that certain classes of citizens should not be placed in full removal proceedings, noting the exclusion of persons convicted of particular crimes (INA 240(a)(3), 8 U.S.C. 1229a(a)(3)); INA 238(a)(1), 8 U.S.C. 1228(a)(1)) as well as the prohibition of visa waiver program participants from contesting inadmissibility or removal except on the basis of asylum (INA 217(b), 8 U.S.C. 1187(b)). The organization also noted that, within the expedited removal statute itself, Congress specifically excluded stowaways from section 240 proceedings (INA 235(a)(1), 8 U.S.C. 1225(a)(2)); in contrast, Congress considered asylum seekers to be applicants for admission under section 235(a)(1) of the Act, 8 U.S.C. 1225(a)(1), and did not similarly exclude them (*see* INA 235(b), 8 U.S.C. 1225(b)). The organization concluded that the plain text of the INA ''precludes the agencies' claim that they are free to make up new procedures to apply to arriving asylees'' *(citing Henson* v. *Santander Consumer USA, Inc.,* 137 S. Ct. 1718, 1723 (2017)). The organization claimed that IIRIRA's legislative history ''unanimously confirms'' this conclusion, citing the conference report by the Joint Committee from the House and the Senate in support of its assertion. *See* H.R. Rep. No. 104–828 at 209 (1996). The organization also emphasized that, after twenty-three years of placing applicants with credible fear into section 240 proceedings, ''Congress has never suggested that the agencies got that wrong.''

Another organization emphasized that Congress only authorized expedited removal for a specific category of noncitizens and that, at the time this determination was made, the class was confined to individuals arriving at ports of entry. The organization argued that Congress did not intend to deter individuals who have ''cleared the hurdle of establishing a credible fear of persecution.'' Another organization argued that the credible fear screening ''creates an exit'' from expedited removal proceedings, emphasizing that those who establish credible fear are effectively ''screened out'' of expedited removal proceedings (INA 235(b)(1)(B)(ii)–(iii), 8 U.S.C. 1225(b)(1)(B)(ii)–(iii)). One organization expressed particular concern that ''the president has announced an intention to expand expedited removal to the interior of the United States,'' noting that noncitizens who have been in the United States for up to two years are more likely to have other forms of relief to pursue.

Response: The Departments disagree with commenters that the INA requires aliens who are found to have a credible fear to be placed in full removal proceedings pursuant to section 240 of the Act, 8 U.S.C. 1229(a). The expedited removal statute states only that ''the alien shall be detained for further consideration of the application for asylum,'' but is silent on the type of proceeding. INA 235(b)(1)(B)(ii) 8 U.S.C. 1225(b)(1)(B)(ii). This silence is notable as Congress expressly required or prohibited the use of full removal proceedings elsewhere in the same expedited removal provisions. *Compare* INA 235(b)(2)(A), 8 U.S.C. 1225(b)(2)(A) (explicitly requiring certain aliens not eligible for expedited removal to be placed in section 240 removal proceedings), *with* INA 235(a)(2), 8 U.S.C. 1225(a)(2) (explicitly prohibiting stowaways from being placed in section 240 removal proceedings).[14] As explained in the NPRM, the former Immigration and Naturalization Service (''INS'') interpreted this ambiguous section to place aliens with positive credible fear determinations into section 240 removal proceedings. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312 (Mar. 6, 1997). However, it is the Departments' view that the better interpretation is to place aliens with positive credible fear determinations into limited asylum-and-withholding-only proceedings. This is consistent with the statutory language that the

[14] The Departments note that section 240(a)(3) of the Act (8 U.S.C. 1229a(a)(3)), which makes removal proceedings the ''exclusive'' procedure for inadmissibility and removability determinations, is inapplicable here because DHS has already determined inadmissibility as part of the expedited removal process. *See* INA 235(b)(1)(A)(i) (8 U.S.C. 1225(b)(1)(A)(i)).

alien is entitled to a further proceeding related to the alien's ''application for asylum,'' and not a full proceeding to also determine whether the alien should be admitted or is otherwise entitled to various immigration benefits. INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii).

This interpretation also best aligns with the overall purpose of the expedited removal statute to provide a streamlined and efficient removal process for certain aliens designated by Congress.[15] *See generally* INA 235, 8 U.S.C. 1225; *cf. DHS* v. *Thuraissigiam,* 140 S.Ct. 1959, 1966 (2020) (''As a practical matter . . . the great majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.''). Further, contrary to commenters' claims, placing aliens into asylum-and-withholding-only proceedings is not inconsistent with the purposes of the credible fear statute. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The credible fear process was designed to ensure that aliens subject to expedited removal are not summarily removed to a country where they may face persecution on account of a protected ground or torture. This rule maintains those protections by ensuring that an alien with a positive credible fear finding receives a full adjudication of their claim in asylum-and-withholding-only proceedings.

Regarding commenters' concerns about due process in asylum-and-withholding-only proceedings, the Departments note that the rule provides the same general procedural protections as section 240 removal proceedings. *See* 85 FR at 36267 (''These 'asylum-and-withholding-only' proceedings generally follow the same rules of procedure that apply in section 240 proceedings . . . .''); *accord* 8 CFR 1208.2(c)(3)(i) (''Except as provided in this section, proceedings falling under the jurisdiction of the immigration judge pursuant to paragraph (c)(1) or (c)(2) of this section [*i.e.,* asylum-and-withholding-only proceedings] shall be conducted in accordance with the same rules of procedure as proceedings conducted under 8 CFR part 1240, subpart A [*i.e.,* removal proceedings].''). Moreover, just as in removal proceedings, aliens will be able to appeal their case to the BIA and Federal circuit courts, as necessary. Finally, DOJ has conducted asylum-and-withholding-only proceedings for multiple categories of aliens for years already, 8 CFR 1208.2(c)(1) and (2), with no alleged systemic concerns documented about the due process provided in those proceedings.

The Departments agree with the commenter who noted that removability determinations are typically brief for those aliens subject to expedited removal who subsequently establish a credible fear and are placed in removal proceedings. The Departments believe that comment further supports the placement of such aliens in asylum-and-withholding-only proceedings since ''in the overwhelming majority of cases,'' there is no need for a new removability determination that would otherwise be called for in removal proceedings.

The Departments disagree with commenters that section 240 removal proceedings are more efficient than asylum-and-withholding-only proceedings or that more data is required to align asylum-and-withholding-only proceedings with the statutory language of INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), especially when there was little analysis—and no data offered—to support placing aliens with positive credible fear determinations in removal proceedings in the first instance. *See* 85 FR at 36266 (stating that the 1997 decision to place such aliens in removal proceedings was made with limited analysis, other than to note that the statute was silent on the type of proceeding that could be used). Most aliens subject to the expedited removal process are, by definition, less likely to be eligible for certain other forms of relief due to their relatively brief presence in the United States. *See, e.g.,* INA 240A(b)(1), 8 U.S.C. 1229b(b)(1) (cancellation of removal for certain non-permanent residents requires ten years of continuous physical presence); INA 240B(b)(1)(A), 8 U.S.C. 1229c(b)(1)(A) (voluntary departure at the conclusion of proceedings requires an alien to have been physically present in the United States for at least one year prior to the service of a notice to appear). In particular, they are less likely to be eligible for the simplest form of relief, voluntary departure, because either they are arriving aliens, INA 240B(a)(4), 8 U.S.C. 1229c(a)(4), or they are seeking asylum, 8 CFR 1240.26(b)(1)(i)(B) (requiring the withdrawal of claims for relief in order to obtain pre-hearing voluntary departure), or they have not been physically present in the United States for at least one year prior to being placed in proceedings, INA 240B(b)(1)(A), 8 U.S.C. 1229c(b)(1)(A). Further, immigration judges often adjudicate multiple forms of relief in a single removal proceeding—in addition to asylum, withholding of removal, or CAT claims—and those additional issues generally only serve to increase the length of the proceedings. Although there may be rare scenarios in which aliens subject to expedited removal are eligible for a form of relief other than asylum, the Departments believe that interpreting the statute to place aliens with positive credible-fear determinations into more limited asylum-and-withholding-only proceedings properly balances the need to prevent aliens from being removed to countries where they may face persecution or torture with ensuring the efficiency of the overall adjudicatory process.

The Departments also disagree with comments that the placement of aliens who have passed a credible fear review in asylum-and-withholding-only proceedings will somehow ''tie the hands'' of law enforcement regarding an alien's eligibility for certain visas. The rule has no bearing on an alien's ability to provide assistance to law enforcement, and the adjudication of applications for S-, T-, and U-visas occurs outside of any immigration court proceedings.[16] *See generally* 8 CFR 214.2(t) (S-visa adjudication process), 214.11 (T-visa adjudication process), 214.14 (U-visa adjudication process).

Commenters also mischaracterize the Departments' policy reliance on DHS's prosecutorial discretion authority, claiming that the Departments are relying on this discretion as the legal authority for placing aliens with positive credible fear determinations into asylum-and-withholding-only proceedings. However, it is the expedited removal statute that provides the authority, *see* INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii), not DHS's prosecutorial discretion. In the NPRM, the Departments noted that it made better policy sense to place aliens with positive credible fear determinations into asylum-and-withholding-only proceedings; placing aliens in section 240 proceedings after a credible fear determination ''effectively negates DHS's original discretionary decision.'' 85 FR at 36266.

The Departments acknowledge commenters' concerns about CBP processing aliens for expedited removal and the exercise of prosecutorial discretion, but those issues are beyond

[15] The Departments note that any comments regarding the potential expansion of expedited removal is outside the scope of this rule. *Cf.* Designating Aliens for Expedited Removal, 84 FR 35409 (July 23, 2019).

[16] The Departments note that S-visa recipients are already subject to withholding-only proceedings. INA 214(k)(3)(C), 8 U.S.C. 1184(k)(3)(C); 8 CFR 236.4(d), (e) and 1208.2(c)(2)(vi).

the scope of the rule. Moreover, the rule does not affect DHS's use of prosecutorial discretion, nor does it alter any other statutory authority of CBP.

2.2. Consideration of Precedent When Making Credible Fear Determinations in the ''Credible Fear'' Process

Comment: One organization stated that the rule would ''unnecessarily narrow'' the law that immigration judges must consider in the context of a credible fear review, restricting them to the circuit court law in their own jurisdiction. The organization alleged that this ''makes little sense'' because individuals seeking a credible fear review will often have their asylum claim adjudicated in a jurisdiction with different case law than the jurisdiction where their credible fear claim is reviewed. As an example, one organization suggested that an asylum seeker apprehended in Brownsville, Texas, in the Fifth Circuit, could subsequently have his or her asylum claim heard in an immigration court located within another circuit's jurisdiction. Because of this, the organization urged asylum officers and immigration judges to consider all case law when determining the possibility of succeeding on the claim, ''[r]egardless of the location of the credible fear determination.''

One organization claimed the rule could require asylum officers to order the expedited removal of an applicant who has shown an ability to establish asylum eligibility under section 208 of the Act, 8 U.S.C. 1158, in another circuit or district, which the organization alleged is contrary to section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v). The organization also claimed this portion of the rule is ''flatly contrary'' to the decision in *Grace* v. *Whitaker,* 344 F. Supp. 3d 96 (D.D.C. 2018) (hereinafter ''*Grace I*''), *overruled in part, Grace* v. *Barr,* 965 F.3d 883 (D.C. Cir. 2020), holding that the same provision in USCIS guidance was contrary to the INA. The organization quoted *Grace I,* 344 F. Supp. 3d 96 in which the court stated that ''[t]he government's reading would allow for an [individual's] deportation, following a negative credible fear determination, even if the [individual] would have a significant possibility of establishing asylum under section 1158 during his or her removal proceeding. Thus, the government's reading leads to the exact opposite result intended by Congress.'' *Id.* at 140. The organization also claimed the rule violates *Brand X* because it exceeds the Departments' ''limited ability to displace circuit precedent on a specific question of law to which an agency decision is entitled to deference'' (citing *Grace I,* 344 F. Supp. 3d at 136). Another organization alleged that the Departments offer no explanation for the policy change, claiming there is ''no discernable reason'' for it other than to ''limit the possibility of favorable case law in another jurisdiction.''

One organization noted that well-settled USCIS policy holds that, in the case of a conflict or question of law, ''generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard'' regardless of where the credible fear interview is held. The organization claimed that this policy is in line with congressional intent, quoting a statement from Representative Smith that ''[l]egal uncertainty must, in the credible fear context, adhere to the applicant's benefit.'' The organization alleged that the NPRM fails to note or explain this departure from practice.

Response: The Departments decline to respond to comments centering on an asylum officer's consideration of precedent as that issue was not addressed in this rule, and further disagree with commenters that immigration judges are currently required to consider legal precedent from all Federal circuit courts in credible fear proceedings. DOJ has not issued any regulations or guidance requiring immigration judges to use a ''most favorable'' choice of law standard in credible fear review proceedings. *See, e.g.,* 8 CFR 1003.42.

Moreover, the statute is silent as to this choice of law question. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). Due to this ambiguity, the Departments are interpreting the statute to require immigration judges to apply the law of the circuit in which the credible fear review proceeding is located. This better comports with long-standing precedent affirming the use of the ''law of the circuit'' standard in immigration proceedings. *See Jama* v. *ICE,* 543 U.S. 335, 351 n.10 (2005) (''With rare exceptions, the BIA follows the law of the circuit in which an individual case arises . . . .'' (citations omitted)); *Ballesteros* v. *Ashcroft,* 452 F.3d 1153, 1157 (10th Cir. 2006) (explaining that an immigration judge ''should analyze removability and relief issues using only the decisions of the circuit in which he or she sits . . . since it is to that circuit that any appeal from a final order of removal must be taken''). It will also provide clarity to immigration judges conducting credible fear reviews, particularly on issues in which there is conflicting circuit court precedent.

Further, contrary to commenters' assertions, in most cases the immigration judge conducting the credible fear review in person will be in the same circuit in which the full asylum application in asylum-and-withholding only proceedings would be adjudicated if the judge finds the alien has a credible fear.[17] Aliens in this posture are subject to detention by DHS. *Thuraissigiam,* 140 S.Ct. at 1966 (''Whether an applicant [subject to expedited removal] who raises an asylum claim receives full or only expedited review, the applicant is not entitled to immediate release.''). As a result, unless DHS moves the alien to a detention facility in a different circuit, the case would likely remain in the same jurisdiction. Requiring the immigration judge to review nationwide circuit case law would only create inefficiencies in a credible fear review process that Congress intended to be streamlined. *See* INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III) (requiring immigration judge review to be completed ''as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days'' after the asylum officer's determination).

Moreover, the Departments have reviewed the statutory mandate in the credible fear context and note that a rule requiring evaluation of a claim using law beyond that of a particular circuit could produce perverse outcomes contrary to the statute. For example, an alien could be found to have a ''significant possibility'' of establishing eligibility for asylum under section 208 of the Act even though binding law of the circuit in which the application would be adjudicated precludes the alien from any possibility of establishing eligibility for asylum. Such an absurd result would be both contrary to the statutory definition of a credible fear, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v), and would further burden the system with claims that were known to be unmeritorious at the outset. The Departments decline to adopt a course of action that would lead to results inconsistent with the statute.

Moreover, adopting the uniform rule proposed by the Departments would ameliorate otherwise significant operational burdens—burdens that would be inconsistent with Congress's

[17] Even in situations in which an immigration judge conducts the review from a different location—*e.g.* by telephone or by video teleconferencing—in a different circuit, the rule provides a clear choice of law principle to apply.

goal of establishing an efficient expedited removal system. Without it, asylum officers and immigration judges around the country would potentially have to consider and apply a shifting patchwork of law from across the country, and this obligation would undermine the stated statutory aim of expedited removal: To remove aliens expeditiously.

The Departments' choice-of-law rule in this context is reasonable. The most natural choice-of-law principle is the rule that the law of the circuit where the interview is conducted governs. That is the principle embraced by DOJ in adjudicating the merits of asylum claims, *Matter of Anselmo,* 20 I&N Dec. 25, 31 (BIA 1989) (''We are not required to accept an adverse determination by one circuit . . . as binding throughout the United States.''), as well as by circuit courts. For example, where the law governing an agency's adjudication is unsettled, an agency generally is required to acquiesce only in the law of the circuit where its actions will be reviewed; while ''intracircuit acquiescence'' is generally required, ''intercircuit acquiescence'' is not. *See Johnson* v. *U.S. R.R. Ret. Bd.,* 969 F.2d 1082, 1093 (D.C. Cir. 1992). Because the circuits may disagree on the law, requiring acquiescence with every circuit would charge the Departments with an impossible task of following contradictory judicial precedents. *See Nat'l Envtl. Dev. Ass'n Clean Air Project* v. *EPA,* 891 F.3d 1041, 1051 (D.C. Cir. 2018); *see also Grant Med. Ctr.* v. *Hargan,* 875 F.3d 701, 709 (D.C. Cir. 2017).

Intercircuit nonacquiescence principles are especially important where there is ''venue uncertainty,'' meaning the agency cannot know at the time it issues its decision in which circuit that decision will be reviewed. In those situations, an agency has discretion in its choice of law, though it must be candid about its nonacquiescence. *See Grant Med. Ctr.,* 875 F.3d at 707. The rule's choice-of-law provision in this context is fully consistent with the Board's long-standing approach and the administrative-law principles embraced by circuit courts. At the time of the credible-fear screenings by an asylum officer, the only circuit with a definite connection to the proceedings is the circuit where the screening of the alien takes place. The location of the alien at the time of the credible fear determination will be the determinative factor as to which circuit's law applies. Applying that circuit's law is an objective, reasonable, administrable, and fair approach to credible-fear screening.

In *Grace* v. *Barr,* the D.C. Circuit affirmed an injunction of USCIS's implementation of a ''law of the circuit'' policy in credible fear proceedings. 965 F.3d 883 (D.C. Cir. 2020) (hereinafter ''*Grace II*''). However, in that case, the court affirmed an injunction based on USCIS's failure to explain the basis of its ''law of the circuit'' policy and expressly declined to decide whether the substance of such a policy—if explained more fully—would be contrary to law. *Id.* at 903. Here, as detailed above, the Departments have explained the necessity of codifying a law of the circuit policy in credible fear proceedings before immigration judges and, to that end, are interpreting an ambiguous statutory provision, INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v) (defining ''credible fear of persecution'' by reference to eligibility for asylum), in which the Departments are entitled deference. *See Chevron, U.S.A., Inc.,* 467 U.S. at 844 (holding that, when interpreting an ambiguous statute, ''a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency'').

2.3. Remove and Reserve DHS-Specific Procedures From DOJ Regulations

Comment: In the context of discussing the DOJ's removal of DHS-specific provisions from 8 CFR part 1235, at least one commenter expressed concern that the rule would eliminate or make more difficult the parole authority at 8 CFR 235.3(c).

Response: Following the enactment of the HSA, EOIR's regulations were transferred to or duplicated in a newly created chapter V of 8 CFR, with related redesignations. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 9824, 9830, 9834 (Feb. 28, 2003); *see also* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 FR 10349 (Mar. 5, 2003). DOJ transferred parts of the Code of Federal Regulations that pertained exclusively to EOIR from chapter I to chapter V; duplicated parts of the Code of Federal Regulations that related to both the INS and EOIR, which were included in both chapters I and V; and made technical amendments to both chapters I and V. For example, DOJ duplicated all of part 235 in the newly created 8 CFR part 1235 because the Department determined that ''nearly all of the provisions of this part affect bond hearings before immigration judges.'' 68 FR at 9826. The Departments anticipated further future adjustments and refinements to the regulations in the future ''to further refine the adjudicatory process.'' 68 FR at 9825.

Upon further review, however, DOJ has determined that 8 CFR 1235.1, 1235.2, 1235.3, and 1235.5 are not needed in 8 CFR chapter V because they concern procedures specific to DHS's examination of applicants for admission and are outside the purview of DOJ's immigration adjudicators. *See* 85 FR at 36267. In order to prevent confusion and reduce the chance of future inconsistencies with 8 CFR 235.1, 235.2, 235.3, and 235.5, which are not amended, the rule removes and reserves 8 CFR 1235.1, 1235.2, 1235.3, and 1235.5. Finally, in response to the commenter's particular concern, the Departments note that DOJ does not make parole determinations, and DHS's parole authority in 8 CFR 235.3(c) is both unaffected by this rule and outside the scope of the rulemaking generally.

2.4. Reasonable Possibility as the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations for Aliens in Expedited Removal Proceedings and Stowaways

Comment: One organization noted that the rule would require that those applying for withholding of removal to prove a ''reasonable fear'' of persecution, which is a higher standard than that required for asylum. The organization suggested that the drafters of the rule were targeting individuals who are ineligible for asylum and are thus applying for withholding of removal only. The organization noted that a large number of refugees may meet this criteria due to the administration's ''unsuccessful attempts'' to impose additional asylum restrictions on individuals entering the United States outside a port of entry, as well as those arriving at the southern border after passing through third countries, if they did not apply for asylum and have their application(s) rejected in one of those countries.

One commenter alleged that the rule would ''greatly increase the burden'' of individuals eligible only for withholding of removal or protection under CAT to succeed in initial interviews and present their cases before an immigration judge. The commenter noted that the rule would require asylum seekers who would be subject to a bar on asylum, including those subject to the ''transit ban'' found at 8 CFR 208.13(c)(4)(ii), to meet the heightened standard in order to have their cases heard before an immigration judge. The commenter alleged that the rule would ''essentially eliminate'' the

''significant possibility'' standard set forth by Congress in the INA and replace it with a ''reasonable possibility'' standard which is much harder for asylum seekers to meet. One organization claimed that, as a result, ''[m]eritorious asylum seekers will be screened out of the asylum system—a reality Congress expressly prohibited.''

One organization claimed that Congress intended to set a low screening standard for the credible fear process in order to aid eligible asylum seekers and alleged that the NPRM fails to provide justification for raising this standard. The organization expressed concern that asylum officers lack the resources to ''jump'' from applying the ''significant possibility'' standard to the ''reasonable possibility'' standard during a brief interview and also emphasized that noncitizens are more likely to obtain counsel in immigration court than in the initial screening process. One commenter stated that the rule, ''[u]nrealistically and unconscionably'' heightens the standard individuals must meet upon arrival at the border and limits the protections for individuals who ''have or would be tortured.''

One organization emphasized that the ''reasonable possibility'' standard is essentially the same burden of proof used when adjudicating an asylum application in a full immigration hearing. The organization claimed, however, that individuals seeking a fear determination will almost always have less evidence and less time to present their case than individuals in court. As a result, the organization alleged that the standard of proof in fear determinations should be lower than that used in immigration court hearings. Another organization criticized the Departments' assertion that raising the screening bar is necessary to ''align'' the screening with the burden of proof in the merits proceeding for each type of relief. The organization disagreed, noting that asylum officers must already consider the merits burden of proof when screening for fear under existing law, as they must determine whether there is a ''significant possibility'' that an applicant ''could be eligible'' for each type of potential relief. The commenter asserted that this necessarily entailed a consideration of the burden of proof to establish eligibility for those forms of relief. As a result, the higher screening burden ''serves only to require more and stronger evidence before the merits stage, and at a moment when applicants are least likely to be able to amass it.''

One organization noted that many credible fear applicants are ''profoundly traumatized, exhausted, terrified,'' and unfamiliar with the legal process, and emphasized that these individuals will not have time to gather their thoughts or collect evidence to support ''highly fact-specific inquiries'' at an interview screening. Another organization stated that asylum-seekers are screened in ''exceedingly challenging circumstances,'' as well as in cursory interviews over the telephone. One organization specifically alleged that the Departments failed to consider how trauma affects the fear screening process, emphasizing research showing that trauma affects demeanor in ways that could ''easily affect credibility'' (nervousness, inability to make eye contact, etc.). At least one organization expressed particular concern for LGBTQ asylum seekers, and another organization emphasized that arriving applicants are unrepresented, unlikely to understand U.S. legal standards, and may be fearful or reluctant to discuss their persecution with authorities.

One organization claimed the Departments have offered no evidence that the current procedure of using one standard to screen for any claim for relief complicates or delays the expedited removal process, alleging that this argument is not supported by government data. The organization noted that the number of individuals removed through expedited removal has increased fairly steadily over the years, stating that 43 percent of removals during 2018 were through the expedited removal process and that this proportion has not changed over the past decade. The organization also asserted there is no evidence that ''requiring asylum officers to evaluate varying claims relating to the same group of facts with three different screens would be simpler,'' claiming this would actually make the determination more complicated.

The organization also disagreed with the Departments' suggestion that DOJ's language in a previous rule ''imposing the higher burden to a particular group in a previous rule supports their rationale'' (citing 85 FR at 36270). The organization emphasized that, in the previous rule, DOJ applied a higher screening standard strictly to individuals ''subject to streamlined administrative removal processes for aggravated felons under section 238(b) of the Act and for [people] subject to reinstatement of a previous removal order under section 241(a)(5) of the Act.'' Regulation Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999). The organization claimed DOJ specifically distinguished that group as different from the ''broad class'' of arriving individuals subject to expedited removal, stating that the Departments offer no explanation for why this ''broad class'' can now be treated as a ''narrowly defined class whose members can raise only one claim.'' The organization also accused the Departments of failing to explain what authority they used to add to and raise the statutory burden of proof in Congress's ''carefully described credible fear procedures.'' INA 235(b), 8 U.S.C. 1225(b).

One organization noted that a U.S. district court vacated the ''third country asylum ban regulations'' on June 30, 2020, *see Capital Area Immigrants' Rights Coalition* v. *Trump,*— F.Supp.3d—, 2020 WL 3542481 (D.D.C. 2020) and also noted that the Ninth Circuit upheld a previous injunction against the rule on July 6, 2020, *see E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020). The organization also referred to a separate rule that it claimed attempted to ban asylum for individuals entering the United States without inspection and noted that this rule was ''blocked'' by two separate district courts. *See E. Bay Sanctuary Covenant* v. *Trump,* 354 F.Supp.3d 1094 (N.D. Cal 2018); *O.A.* v. *Trump,* 404 F. Supp. 3d 109 (D.D.C. 2019). The organization noted that, based on these cases, it is unclear who would be eligible for withholding of removal or CAT only. The organization concluded by emphasizing that Congress created the credible fear standard as a safeguard due to ''the life or death nature of asylum,'' and described the proposed higher evidentiary standard as ''cruelly irresponsible.''

Response: In general, commenters appear to have confused multiple rulemakings, as well as the existing legal differences between and among asylum, statutory withholding of removal, and protection under the CAT regulations. The Departments decline to adopt the commenters' positions to the extent they are based on inaccurate or confused understandings of the proposed rule and of the legal distinctions between and among asylum, statutory withholding of removal, and protection under the CAT regulations.

Contrary to commenters' claims, the change of the credible fear standards for statutory withholding and protection under the CAT regulations are unrelated to the Departments' other asylum-related regulatory efforts, which are outside the scope of this rule, and the current change is not intended to ''target'' aliens that are not subject to those previous asylum regulations. *See, e.g.,* Asylum Eligibility and Procedural

Modifications, 84 FR 33829 (July 16, 2019); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018). Further, the change in standards has no bearing on how any alleged trauma is assessed during the screening process by either asylum officers or immigration judges. Adjudicators in both Departments have conducted these assessments for many years and are trained and well-versed in assessing the credibility of applicants, including accounting for any alleged trauma that may be relevant.

As discussed in the NPRM, Congress did not require the same eligibility standards for asylum, statutory withholding of removal, and protection under the CAT in the ''credible fear'' screening process. *See* 85 FR at 36268–71. In fact, the INA does not include any references to statutory withholding of removal or protection under the CAT regulations when explaining the ''credible fear'' screening process. *See* INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B); *see also* The Foreign Affairs Reform and Restructuring Act of 1998 (''FARRA''), Public Law 105–277, 112 Stat. 2681–822.

Instead, the Departments have the authority to establish procedures and standards for statutory withholding of removal and protection under the CAT. *See* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (''The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens * * *.''); INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); FARRA, Public Law 105–277, sec. 2242(b), 112 Stat. at 2681–822 (providing that ''the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3'' of CAT).

Using this authority, the Departments believe that, rather than being ''unrealistic[ ]'' or ''unconscionabl[e]'' as commenters claim, raising the standards of proof to a ''reasonable possibility'' during screening for statutory withholding of removal and protection under the CAT regulations better aligns the initial screening standards of proof with the higher standards used to determine whether aliens are in fact eligible for these forms of protection when applying before an immigration judge. Further, as explained in the NPRM, this higher standard will also serve to screen out more cases that are unlikely to be meritorious at a full hearing, which will allow the overburdened immigration system to focus on cases more likely to be granted. And, contrary to commenters' claims, the NPRM did not claim that the use of a single ''significant possibility'' standard complicates or delays the expedited removal process.

The Departments recognize that a higher screening standard may make it more difficult to receive a positive fear determination. However, the Departments disagree with commenters that raising the screening standard for statutory withholding of removal and CAT protection will require aliens to submit significantly stronger documentary evidence. At the credible fear interview stage, these claims rest largely on the applicant's testimony, which does not require any additional evidence-gathering on the applicant's part. *See, e.g.,* 8 CFR 208.30(d), 208.30(e)(2) (describing the interview and explicitly requiring the asylum officer to make a credible fear determination after ''taking into account the credibility of the statements made by the alien in support of the alien's claim'').

In addition, the Departments have long used the ''reasonable possibility'' standard for reasonable fear determinations made under 8 CFR 208.31 and 8 CFR 1208.31, which cover certain classes of aliens who are ineligible for asylum but who are eligible for statutory withholding of removal and protection under the CAT regulations. *See* 8 CFR 208.31(a), 208.31(c), 1208.31(a), 1208.31(c).[18] By changing the standard in credible fear interviews for statutory withholding and CAT protection, asylum officers will process such claims under the same standard, providing additional consistency. Moreover, asylum officers receive significant training and the Departments have no concerns that they will be able to properly apply the standards set forth in this rule. *See* 8 CFR 208.1(b) (ensuring training of asylum officers).

In short, it is both illogical and inefficient to screen for three potential forms of protection under the same standard when two of those forms have an ultimately higher burden of proof. The Departments' rule harmonizes the screening of the various applications consistent with their respective ultimate burdens and ensures that non-meritorious claims are more quickly weeded out, allowing the Departments to focus more of their resources on claims likely to have merit.

2.4.1. Specific Concerns With ''Significant Possibility'' Standard

Comment: One commenter claimed the rule would make it much harder for asylum seekers subject to expedited removal to have their asylum requests ''fully considered'' by an immigration judge. The commenter noted that Congress intentionally set a low standard—''significant possibility''—for the credible fear interview in order to prevent legitimate refugees from being deported; one organization noted that this standard was designed to ''filter out economic migrants from asylum seekers.'' Commenters argued that the rule's redefinition of the ''significant possibility'' standard as ''a substantial and realistic possibility of succeeding'' contradicts the language Congress set forth in section 235(b)(1)(B)(v) of the Act, 8 U.S.C. 1225(b)(1)(B)(v) and is thus ''ultra vires.''

One organization argued that the legislative history confirms Congress's intent to protect ''bona fide'' asylum seekers. The organization cited the Judiciary Committee report to the House version of the bill that stated that ''[u]nder this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution'' and that ''the asylum officer should attempt to elicit all facts relevant to the applicant's claim.'' The organization included a statement from Senator Orrin Hatch noting that ''[t]he conference report struck a compromise'' and the standard adopted was ''intended to be a low screening standard for admission into the usual full asylum process.''

Finally, one organization stated that there is no ''sliding scale for legal standards based on the volume of cases,'' emphasizing that national security is irrelevant to the appropriate legal standard for credible fear. The organization claimed that raising the standard in order to ''better secure the homeland'' contradicts the clear meaning of the statute and is ''ultra vires.''

Response: Again, commenters appear to have confused the existing legal differences between and among asylum, statutory withholding of removal, and CAT protection, and the Department declines to adopt the commenters' positions to the extent they are based on inaccuracies or misstatements of law.

The rule does not change the ''significant possibility'' standard in credible fear interviews for asylum claims, which is set by statute. *See* INA

[18] Commenters raised concerns about analogizing the use of the ''reasonable possibility'' screening standard in 8 CFR 208.31 and 1208.31, which applies only to certain categories of aliens. However, the Departments referenced those regulations here and in the NPRM merely to show that the ''reasonable possibility'' standard has long existed in other contexts. *See, e.g.,* 85 FR at 36270.

235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As a result, asylum claims will continue to be processed under the ''significant possibility'' standard in credible fear interviews. Instead, the rule only changes the standard to a ''reasonable possibility'' for statutory withholding of removal and CAT protection claims. Congress did not address the standards for these claims in credible fear interviews and instead explicitly focused on asylum claims. *See generally* INA 235(b), 8 U.S.C. 1225(b)(1)(B) (describing asylum interviews). Therefore, the Departments are within their authority to change these standards, as the use of a ''reasonable possibility'' standard does not contradict the ''significant possibility'' language in the statute, which only applies to asylum claims. *See generally* INA 103(a)(1), 8 U.S.C. 1103(a)(1) (''The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . .''); INA 103(g)(2), 8 U.S.C. 1103(g)(2) (''The Attorney General shall establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.'').

Moreover, in response to commenters' concerns about the ''significant possibility'' asylum standard in credible fear proceedings, the Departments note that this change does not raise the standard; instead, it merely codifies existing policy and practice in order to provide greater clarity and transparency to adjudicators and affected parties. USCIS already uses the ''significant possibility'' definition in screening whether an asylum-seeker has established a credible fear of persecution. *See* Memorandum from John Lafferty, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations 2 (Feb. 28, 2014).

This definition is also consistent with Congress's intent to create ''a low screening standard for admission into the usual full asylum process,'' 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Senate Judiciary Committee Chairman Orrin Hatch), and with the statutory text. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). For example, the ''significant possibility'' standard does not require a showing that it is more likely than not that the applicant can meet their asylum burden in immigration court. Instead, the standard merely requires the applicant establish ''a substantial and realistic possibility of succeeding'' on their asylum claim, which in turn requires a showing of as little as a 10 percent chance of persecution on account of a protected ground. *See I.N.S.* v. *Cardoza-Fonseca,* 480 U.S. 421, 431–32 (1987). This additional language will help adjudicators and affected parties to ensure that the proper screening standard is used in the credible fear process.

2.5. Proposed Amendments to the Credible Fear Screening Process

Comment: One organization claimed that the rule would essentially combine the credible fear interview with the merits hearing and require an asylum officer to do both simultaneously. The organization contended that this would leave applicants who turn themselves in to CBP with no time to prepare and ''essentially no chance of success.'' The organization emphasized that individuals arriving at the border are often ''exhausted, stressed out, or ill,'' noting the high probability that an individual will be physically, emotionally, or mentally unfit for an interview that ''may determine whether he and his family lives or dies.'' The organization claimed this situation has been aggravated by the COVID–19 pandemic.

One organization stated that some individuals fleeing persecution and torture ''bypass CBP'' because they lack knowledge about asylum or believe they will be treated unfairly. The organization noted that some of these individuals prepare asylum applications on their own (either prior or subsequent to apprehension by ICE) and emphasized that these cases, which fall ''outside the established procedures,'' are far more difficult to regulate. The organization contended that, if the credible fear and merits interviews are combined, poor asylum or CAT protection seekers will be incentivized to evade CBP in order to try and obtain help preparing an application. The organization emphasized that if the Departments replace the existing procedure with one that is ''essentially impossible for many deserving people to use,'' their jobs will become more difficult and their efforts less efficient.

One organization expressed concern regarding the specific language in proposed 8 CFR 208.30(d)(1), claiming that it ''does not pass either simple humanity or due process.'' The organization conceded that the language of existing 8 CFR 208.30(d)(1) is identical, but claimed this ''does not excuse the proposed provision.'' Instead, the organization claimed the language should read as follows: ''[i]f the [asylum] officer conducting the interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer *shall* reschedule the interview.''

One organization also emphasized that the rule would require asylum officers to consider bars to asylum, including the internal relocation bar,[19] during initial fear screenings. The organization alleged that the rule seems to build off the ''Asylum and Internal Relocation Guidance'' issued by USCIS, which the organization claimed was posted last summer ''without going through an NPRM.'' Another organization claimed that this portion of the rule is ''contrary to law and existing practice,'' noting that section 235(b) of the Act, 8 U.S.C. 1225(b), requires asylum officers to determine whether there is a ''significant possibility'' that an applicant could establish eligibility for asylum in some future proceeding. One organization emphasized that most credible fear applicants are unrepresented and have difficulty understanding the complex internal relocation analysis, noting that asylum seekers would likely need to include detailed country conditions materials in support of their claims. In addition, the organization claimed that adding ''an additional research burden'' on asylum officers would be inefficient.

One organization noted that the rule would require asylum officers to determine whether an applicant is subject to one of the mandatory bars under section 208(a)(2)(B)–(D) of the Act, 8 U.S.C. 1158(a)(2)(B)–(D), and, if so, whether the bar at issue is also a bar to statutory withholding of removal and withholding of removal under CAT. The organization emphasized that each of the mandatory bars involves intensive legal analysis and claimed that requiring asylum officers to conduct this analysis during a screening interview would result in ''the return of many asylum seekers to harm's way.''

Another organization claimed this portion of the rule is ''unworkable,'' noting that the mandatory bars are heavily litigated and often apply differently from circuit to circuit. The organization alleged that the new

[19] The Departments note that the possibility of internal relocation is not a mandatory bar to asylum. Rather, it is part of the underlying asylum eligibility determination and could rebut a presumption of a well-founded fear after a finding of past persecution, or be a reason to find that the applicant does not have a well-founded fear of persecution. As it is still a consideration during the credible fear screening, the Departments address the comment in the response below.

credible-fear analysis would require asylum officers to exceed their statutory authority and would violate due process by mandating fact-finding in a procedure that does not provide applicants with notice or the opportunity to respond with evidence. One organization claimed that ''countless asylum-seekers could be erroneously knocked out of the process based on hasty decisions, misunderstandings, and limited information,'' noting that the existing rule ''errs in favor of review.''

The organization also expressed concern that the rule would require asylum officers to treat an individual's silence as a reason to deny an immigration judge's review of a negative credible fear interview. The organization emphasized that many asylum seekers do not understand what is happening when they receive a negative credible fear determination from an asylum officer and do not know what it means to seek review by an immigration judge; as a result, many asylum seekers ''will simply not answer the question.'' The organization noted that many of these individuals are still ''tired and traumatized'' from their journey, and some have been separated from their families.

The organization noted that, historically, asylum officers have been required to request immigration judge review on behalf of individuals who remain silent; however, the organization alleged that the rule would ''reverse existing policy'' and require officers to indicate that unresponsive individuals do not want review. The organization noted that the NPRM does not include data on how many asylum seekers succeed in their credible fear claims before an immigration judge without specifically making a request to an asylum officer; nor does the rule contain data on how many immigration judge reviews are ''expeditiously'' resolved after the judge explains the asylum seeker's rights and the individual chooses not to pursue review. The organization claimed that its concerns are enhanced by the decision to allow CBP officers, rather than fully trained USCIS asylum officers, to conduct credible fear interviews. One organization emphasized that it is unreasonable to assume that asylum seekers who decline to expressly request further review are declining review by an independent agency. The organization stated that ''[a]bsent a clear waiver of the opportunity for review by an independent agency, it is reasonable to assume that asylum seekers arriving at our borders wish to pursue all available avenues of relief.''

One organization noted a statement from Senator Patrick Leahy, which introduced a newspaper article that expressed concern that an unenacted early version of IIRIRA ''gives virtually final authority to immigration officers at 300 ports of entry to this country.'' 142 Cong. Rec. S4461 (daily ed. May 1, 1996) (statement of Senator Patrick Leahy). The organization also alleged that ''[g]iving one agency unfettered power to decide whether an asylum seeker ever has a day in court goes against the intent of Congress.''

Response: In general, most of the commenters' concerns are speculative and fail to account for the fact-specific and case-by-case nature of the interviews and reviews in question. Moreover, their concerns tacitly question the competence, integrity, and professionalism of the adjudicators conducting interviews and reviews—professionals who are well-trained and experienced in applying the relevant law in the context of these screenings and reviews.

The suggestion that aliens genuinely seeking refuge regularly evade officials of the very government from whom they seek refuge is unsupported by evidence. Nothing in the rule restricts or prohibits any organization from providing assistance to any alien; instead, the rule's focus is on assisting adjudicators with clearer guidance and more efficient processes.

Additionally, many of the commenters failed to acknowledge the multiple layers of review inherent in the screening process, which reduces the likelihood of any errors related to consideration of the facts of the claim or application of relevant law. *See Thuraissigiam,* 140 S.Ct. at 1965–66 (''An alien subject to expedited removal thus has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.''). To the extent that commenters mischaracterized the rule, provided comments that are speculative or unfounded, suggested that the Departments should not follow the law, or ignored relevant procedural protections that already address their concerns, the Departments decline to adopt such comments.

The Departments disagree that this rule combines the credible fear interview with a full hearing on an asylum application, or that the credible fear interview represents the ''final'' adjudication of an asylum application. This rule maintains the same ''significant possibility'' standard for asylum officers in conducting a credible fear interview with respect to screening the alien for eligibility for asylum, and any alien who is found to have a credible fear is referred to an immigration judge for asylum-and-withholding-only proceedings for consideration of the relief application. *See* 8 CFR 208.30(g). This rule does not change the fundamental structure of the credible fear process. Instead, during the credible fear interview, the rule additionally requires the asylum officer to consider internal relocation and relevant asylum bars as part of his or her determination, and separately to treat the alien's failure to request a review of a negative fear determination as declining the request.

Regarding commenters' concerns about unrepresented aliens having difficulty with the internal relocation analysis in the credible fear process, the Departments note that aliens are able to consult with a person of their choosing prior to their credible fear interview and have that person present during the interview. *See* 8 CFR 208.30(d)(4). Considering internal relocation in the credible fear screening context is consistent with existing policy and practice. *See* 85 FR 36272. Moreover, there is no reason to believe that an alien, in the course of providing testimony regarding the facts of his or her claim, cannot also provide testimony about his or her ability to internally relocate; in fact, in many cases, an alien's relocation is already part of the narrative provided in support of the alien's overall claim. In addition, the Departments disagree that requiring asylum officers to consider internal relocation is inefficient. To the contrary, as current practice requires such issues to be adjudicated in section 240 removal proceedings, screening out cases subject to internal relocation before requiring a lengthier proceeding before an immigration judge is inherently more efficient. It also has a further salutary effect of increasing the ability of adjudicators to address meritorious claims in a more timely manner. Lastly, contrary to commenters' assertions, this rule is unrelated to USCIS guidance on internal relocation, and any issues relating to such guidance are outside the scope of this rule.

Regarding commenters' concerns about requiring asylum officers to determine whether certain asylum bars apply during the credible fear interview, the Departments note that asylum officers are well trained in asylum law and are more than capable of determining whether long-standing statutory bars apply, especially in the credible fear screening context. INA

235(b)(1)(E), 8 U.S.C. 1235(b)(1)(E) (defining an asylum officer as one who ''has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under [INA 208, 8 U.S.C. 1158], and . . . is supervised by an officer who [has had similar training] and has had substantial experience adjudicating asylum applications.''); *see generally* 8 CFR 208.1(b) (covering training of asylum officers).

Moreover, the statute requires asylum officers to determine whether ''the alien could establish eligibility for asylum under section 1158 of this title,'' which would by extension include the application of the bars listed in section 1158 that are a part of this rule. *See* INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Further, asylum officers already assess whether certain bars may apply to applications in the credible fear context—they simply do not apply them under current regulations. *See* Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* at 10 (Feb. 2020), *https://www.gao.gov/assets/710/704732.pdf* (''In screening noncitizens for credible or reasonable fear . . . . [a] USCIS asylum officer is to determine if the individual has any bars to asylum or withholding of removal that will be pertinent if the individual is referred to immigration court for full removal proceedings.''); U.S. Citizenship and Immigr. Serv., *Lesson Plan on Credible Fear of Persecution and Torture Determinations* at 31 (2019), *https://fingfx.thomsonreuters.com/gfx/mkt/11/10239/10146/2019%20training%20document%20for%20asylum%20screenings.pdf* (''Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.''). Lastly, responding to commenters' concerns that such determinations would be ''final,'' this rule does not change the existing process allowing for an immigration judge to review any negative fear determination, which would include any bar-related negative fear determination. 8 CFR 208.30(g); *see also Thuraissigiam,* 140 S.Ct. at 1965–66 (''An alien subject to expedited removal . . . has an opportunity at three levels to obtain an asylum hearing, and the applicant will obtain one unless the asylum officer, a supervisor, and an immigration judge all find that the applicant has not asserted a credible fear.'').

Regarding commenters' concerns that aliens do not understand the credible fear process and, therefore, will refuse to indicate whether they want an immigration judge to review their negative fear finding, the Departments first note that if an alien requests asylum or expresses a fear of return, the alien is given an M–444 notice, Information about Credible Fear Interview, which explains the credible fear process and the right to an attorney at no cost to the U.S. Government. It would be unusual for an alien who has already undergone an interview, relayed a claim of fear, answered questions from an asylum officer about his or her claim, and continued to maintain that he or she has a genuine fear of being returned to his or her country of nationality to then—at the next step—be unaware of the nature of the process when asked whether he or she wishes to have someone else review the claim. The Departments further note that regulations require the asylum officer to ask aliens whether they wish to have an immigration judge review the negative credible fear decision. *See* 8 CFR 208.30(g) (requiring the asylum officer to ''provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I–869''). And the relevant form states, ''You may request that an Immigration Judge review this decision.'' *See* Form I–869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge.

These procedures provide explicit informational protections to individuals in the credible fear process, and treating refusals as affirmative requests only serves to create unnecessary and undue burdens on the immigration courts. Although the Departments do not maintain data on how many individuals refuse to request immigration judge review of a negative fear finding, the Departments believe it is reasonable to require an individual to answer affirmatively when being asked by an asylum officer if the individual wishes to have their negative fear finding reviewed.

In response to a commenter's concern about 8 CFR 208.30(d)(1), which allows an asylum officer to reschedule a credible fear interview under certain circumstances, the Departments note that this rule does not change any language in that subparagraph and, therefore, any comments regarding that subparagraph are outside the scope of this rule.

3. Form I–589, Application for Asylum and for Withholding of Removal, Filing Requirements

3.1. Frivolous Applications

3.1.1. Allowing Asylum Officers To Make Frivolousness Findings

Comment: Commenters expressed a range of concerns regarding the proposed changes to allow DHS asylum officers to make frivolousness findings and deny applications or refer applications to an immigration judge on that basis. 85 FR at 36274–75.

Commenters expressed concerns about asylum officers' training and qualifications to make frivolousness findings. For example, at least one commenter noted that these DHS officers are not required to earn law degrees. Another organization disagreed with the NPRM's assertion that asylum officers are qualified to make frivolousness determinations because of their current experience making credibility determinations, emphasizing that ''credibility and frivolous determinations differ significantly.'' At least one organization noted that the applicant has the burden of proof in a credibility determination while the government bears the burden of proof in a frivolousness determination.

At least one organization emphasized that this authority is currently only vested in immigration judges and the BIA, and commenters expressed concern that allowing asylum officers to make frivolousness findings improperly changes the role of asylum officers in the asylum system. For example, one organization claimed that allowing asylum officers to make frivolousness determinations ''improperly changes their role from considering humanitarian relief, to being an enforcement agent.'' Commenters noted a law professor's statement that ''allowing asylum officers to deny applications conflicts with a mandate that those asylum screenings not be adversarial.'' Suzanne Monyak, *Planned Asylum Overhaul Threatens Migrants' Due Process,* LAW 360 (June 12, 2020), *https://www.law360.com/access-to-justice/articles/1282494/planned-asylum-overhaul-threatens-migrants-due-process* (quoting Professor Lenni B. Benson).

Commenters suggested that the rule would not require USCIS to allow asylum applicants to address inconsistencies in their claims, alleging that individuals appearing in non-adversarial proceedings before a DHS officer would not be granted important procedural protections. One organization cited both the U.S. Court of

Appeals for the Second Circuit and the BIA to support its claim that a comprehensive opportunity to be heard makes sense in the frivolousness context, noting that immigration enforcement is not limited to initiating and conducting prompt proceedings that lead to removals at any cost. *Liu* v. *U.S. Dep't of Justice.,* 455 F.3d 106, 114 n.3 (2d Cir. 2006); *Matter of S–M–J–,* 21 I&N Dec. 722, 727, 743 (BIA 1997).

One organization stated that, although immigration judges would have de novo review of findings by asylum officers, an adverse finding is ''always part of the DHS toolbox'' in immigration court and is considered by immigration judges.

Response: As stated in the proposed rule, the Departments find that allowing asylum officers to make frivolousness findings in the manner set out in the proposed rule and adopted as final in this rule will provide many benefits to the asylum process, including ''strengthen[ing] USCIS's ability to root out frivolous applications more efficiently, deter[ing] frivolous filings, and ultimately reduc[][ing] the number of frivolous applications in the asylum system.'' 85 FR at 36275.

The Departments disagree with commenters' allegations that asylum officers are not qualified or trained to make frivolousness findings. Instead, all asylum officers receive significant specialized ''training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles'' and also receive ''information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations.'' 8 CFR 208.1(b). Moreover, there is no doubt that asylum officers are qualified to make significant determinations regarding asylum claims, including the most important determination—an adjudication on the merits regarding whether or not an alien has demonstrated eligibility for asylum. *See, e.g.,* 8 CFR 208.14(c) (''If the asylum officer does not grant asylum to an applicant after an interview . . . the asylum officer shall deny, refer, or dismiss the application . . . .''). Given asylum officers' authority and qualifications to make determinations on the underlying merits of asylum applications, the Departments find that they are clearly qualified to make subsidiary determinations such as frivolousness findings.[20]

Commenters are incorrect that the Departments analogized credibility determinations to frivolousness findings. *See* 85 FR at 36275. Instead, the Departments discussed asylum officers' credibility findings as background regarding the mechanisms currently used by asylum officers to approach questions similar to those involving frivolousness. *Id.* Nevertheless, the Departments disagree with commenters' implication that asylum officers should not be permitted to make frivolousness findings because the government bears the burden of proof. Not only does the statute not assign a burden of proof to the Departments regarding frivolousness findings, INA 208(d)(6), 8 U.S.C. 1158(d)(6), but for those not in lawful status, asylum officers' frivolousness findings are subject to de novo review by an immigration judge, and must simply be sufficiently supported.

Commenters are further incorrect that allowing asylum officers to make frivolousness findings improperly converts the USCIS affirmative application process from non-adversarial to adversarial. The purpose of the non-adversarial interview is to ''elicit all relevant and useful information bearing on the applicant's *eligibility for asylum*.'' 8 CFR 208.9(b) (emphasis added). There is nothing inherently contradictory—or adversarial—in eliciting all relevant and useful information regarding an applicant's eligibility for asylum and then determining, based on that information, that the applicant is ineligible for asylum because the applicant knowingly filed a frivolous application. Moreover, a nonadversarial process does not mean that the asylum officer simply has to accept all claims made by an alien as true; if that were the case, an asylum officer could never refer an application based on an adverse credibility determination. Further, equating the nonadversarial asylum interview process with a prohibition on finding an application to be frivolous is in tension with statutory provisions allowing adjudicators of asylum applications to consider, inter alia, ''candor'' and ''falsehoods'' in assessing an applicant's credibility. INA 208(b)(1)(B)(iii), 8 U.S.C. 1158(b)(1)(B)(iii).

In short, the Departments find that allowing asylum officers to make frivolousness findings does not conflict with the requirement that asylum officers conduct asylum interviews ''in a nonadversarial manner.'' 8 CFR 208.9(b). Instead, asylum officers will consider questions of frivolousness in the same manner that they consider other questions of the applicant's eligibility for asylum, such as whether the applicant has suffered past persecution or whether the applicant fears harm on account of a protected ground. Just as interview questions about these eligibility factors are appropriate topics for asylum officers in the current interview process, questions and consideration of frivolousness are similarly appropriate.

Regarding commenters' concerns about procedural protections for aliens who appear before an asylum officer for an interview, the Departments emphasize that both the proposed rule and this final rule prohibit a frivolousness finding unless the alien has been provided the notice required by section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A) of the consequences under section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), of filing a frivolous asylum application. *See* 8 CFR 208.20(d), 1208.20(d). This requirement complies with the Act, which does not require any further warning or colloquy in advance of a frivolousness finding. Accordingly, while commenters are correct that the rule does not require USCIS to allow asylum applicants to address inconsistencies prior to a frivolousness finding or follow any other delineated procedures, the Departments reiterate that, as stated in the proposed rule, the procedural requirements provided by the rule for a frivolousness finding comply with the Act's requirements. 85 FR at 36276–77.

Further, the Departments emphasize that, for aliens who lack legal status and who are referred to an immigration judge because the asylum officer did not grant asylum to the alien, *see* 8 CFR 208.14(c)(1), USCIS asylum officers' frivolousness findings are not given effect and are subject to an immigration judge's de novo review. 8 CFR 208.20(b). Accordingly, for most, if not all, aliens who may be subject to a frivolousness finding by an asylum officer, this further review is effectively the procedural protection called for by commenters, as the alien will be on

[20] Although not strictly applicable to asylum officers who adjudicate asylum applications under section 208 of the Act, the Departments note that the definition of an asylum officer in other contexts as one who ''has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications'' under section 208 and is supervised by someone who has had ''substantial experience'' adjudication asylum applications further supports the determination that asylum officers are well-qualified to make frivolousness determinations. INA 235(b)(1)(E) (8 U.S.C. 1225(b)(1)(E)).

notice regarding the possible frivolousness finding and should be prepared to and expect to explain the issues surrounding it.

The Departments agree with commenters that DHS trial attorneys in immigration court may provide arguments regarding frivolousness in any appropriate case. However, as also stated in the proposed rule, the possibility of frivolousness findings in immigration court alone has been insufficient to deter frivolous filings consistent with the congressional intent behind section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6). 85 FR at 36275. Allowing asylum officers to also consider and make determinations regarding whether an affirmative asylum applicant's application is frivolous provides efficiencies not available from consideration of questions of frivolousness by an immigration judge alone, including providing immigration judges with a more robust and developed written record regarding frivolousness. *Id.*

Finally, to the extent that commenters suggested the proposed changes should not be implemented because they would make it easier to detect asylum fraud and would harm aliens who submit fraudulent asylum applications, the Departments do not find such suggestions compelling enough to warrant deleting such changes. *See Angov* v. *Lynch,* 788 F.3d 893, 901, 902 (9th Cir. 2015) (noting ''an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated''). Cases involving asylum fraud are ''distressingly common,'' *id.* at 902, and the Departments are committed to ensuring the integrity of immigration proceedings by using all available statutory tools to root out such fraud.

3.1.2. Changes to the Definition of ''Frivolous''

Comment: Commenters expressed a range of concerns with the rule's changes to the definition of ''frivolous'' and the expanded scope of applications that could qualify as such. One commenter claimed the rule would make it easier for immigration judges and asylum officers to ''throw out'' asylum requests as frivolous.

At least one commenter noted that, prior to the enactment of section 208(d)(6) of the Act 8 U.S.C. 1158(d)(6), a frivolous asylum application was defined in the employment context as ''manifestly unfounded or abusive'' and ''patently without substance.'' 85 FR at 36274. The commenter concluded that lowering this standard is ''ultra vires and an abuse of discretion.''

Commenters noted that, to be considered frivolous, an application must have been ''knowingly made,'' and the individual must have been given notice at the time of filing pursuant to section 208(d)(4)(A) of the Act 8 U.S.C. 1158(d)(4)(A). Commenters expressed concern that the NPRM seeks to redefine the term ''knowingly'' to include ''willful blindness'' toward frivolousness. At least one organization expressed concern that the NPRM relies on *Global-Tech Appliances, Inc.* v. *SEB S.A.,* 563 U.S. 754, 769 (2011) to support its definition for ''knowingly,'' emphasizing that this case ''involved sophisticated litigants represented by attorneys familiar with the intricacies of American patent law'' and contending that it would be inappropriate to hold asylum seekers to this standard. Commenters stated that the NPRM does not adequately explain how ''willful blindness'' differs from recklessness or negligence.

At least one organization expressed concern that the rule removes the requirements that (1) a fabrication be deliberate; and (2) the deliberate fabrication be related to a material element of the case. The organization claimed the rule suggests that asylum seekers who are unaware that an ''essential element'' is fabricated would be permanently barred from immigration benefits. The organization noted that the NPRM does not define ''essential'' but instead focuses on ''fabricated material evidence,'' emphasizing that, given the variance of standards, courts have held that ''fabrication of material evidence does not necessarily constitute fabrication of a material element,'' quoting *Khadka* v. *Holder,* 618 F.3d 996, 1004 (9th Cir. 2010).

Another organization stated that while ''[f]alse and fabricated evidence is inappropriate,'' poor language skills and faulty memory can ''produce honest mistakes that look like falsification,'' emphasizing that the rule's definition of ''frivolous'' provides the Departments with ''numerous opportunities to pressure applicants.''

Commenters expressed particular concerns with the rule's changes so that an application that lacks merit or is foreclosed by existing law could result in a frivolousness finding, particularly because case law involving asylum is constantly changing. For example, at least one organization contended that the rule contradicts existing regulations regarding a representative's duty to advocate for his or her client, emphasizing that representatives are allowed to put forth ''a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.'' *See* 8 CFR 1003.102(j)(1). Similarly, commenters alleged that the imposition of a permanent bar on applicants who raise claims challenging existing law ''deters representatives from putting forth nuanced arguments,'' contending that a representative's ethical duty to make every argument on a client's behalf could potentially subject the client to the permanent bar. In addition, commenters argued that the ability of attorneys to make good faith arguments has been ''crucial to modifying and expanding the law,'' emphasizing that good faith arguments by representatives allow asylum seekers to pursue ''a claim to the full extent of the law.'' One organization stated that, by imposing penalties on individuals who make good faith attempts to seek protection ''in light of contrary law based on different jurisdictions,'' the rule ''undoes years of jurisprudence in this field.''

Commenters also emphasized that the rule would expand when the penalties for a frivolous filing may attach and would require individuals who wish to challenge a denial of asylum in Federal court to risk a finding that would bar any future immigration relief. One commenter alleged that, should an immigration judge find an application to be frivolous under the rule, the applicant would be ineligible for all forms of immigration relief simply for ''making a weak asylum claim.'' One organization expressed concern that, as a result, asylum seekers would not seek relief for fear of losing their case and being accused of submitting a frivolous application. One organization claimed that the rule's frivolousness procedure is designed to ''instill fear in applicants to keep them from applying.'' Another organization emphasized that expediency is ''inappropriate'' in the context of a determination that would ''subject the applicant to one of the harshest penalties in immigration law.'' Commenters otherwise emphasized the seriousness for applicants of frivolousness findings.

At least one organization called the rule ''exceptionally unfair,'' emphasizing that many asylum seekers are unrepresented and do not speak English, making it difficult for them to understand the complexities of ''the ever-evolving law.'' The organization noted that many asylum seekers fall prey to unscrupulous attorneys or notarios who file asylum applications for improper purposes, arguing that it is

entirely unfair to penalize applicants in these types of situations.

Finally, at least one organization claimed that the rule would increase the workload of immigration judges, as they would be forced to determine whether the legal arguments presented sought to ''extend, modify, or reverse the law'' or were merely foreclosed by existing law. The organization argued that, because of the burdens already placed on immigration judges, this expectation is unrealistic and ''adds another layer to the litigation of referred asylum cases'' in immigration court.

Response: In general, commenters on this point either mischaracterized or misstated the proposed rule or relied solely on a hypothetical and speculative ''parade of horribles'' that ignores the actual text and basis of the rule. Contrary to commenters' concerns, the Departments do not believe that the proposed rule allows immigration judges or asylum officers to treat legitimate asylum requests as frivolous. Instead, the rule establishes four limited grounds for a frivolousness finding: Applications that (1) contain a fabricated essential element; (2) are premised on false or fabricated evidence unless the application would have been granted absent such evidence; (3) are filed without regard to the merits of the claim; or (4) are clearly foreclosed by applicable law. 8 CFR 208.20(c)(1)–(4), 1208.20(c)(1)–(4). In addition, the rule provides that an alien ''knowingly files a frivolous asylum application if . . . [t]he alien filed the application with either actual knowledge, or willful blindness, of the fact that the application'' was one of those four types. 8 CFR 208.20(a)(2), 1208.20(a)(2).

These changes are not ultra vires or an abuse of discretion. The Departments emphasize that the regulations interpret and apply the INA itself, the relevant provisions of which postdate the regulation defining frivolous as ''manifestly unfounded or abusive.'' In addition, the INA does not define the term ''frivolous,'' *see* INA 208(d)(6), 8 U.S.C. 1158(d)(6), and the Departments possess the authority to interpret such undefined terms. *See* INA 103(a)(3), (g)(2), 8 U.S.C. 1103(a)(3), (g)(2); *see also Chevron,* 467 U.S. at 866 (''When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.''). The Departments believe that the prior regulatory definition artificially limited the applicability of the frivolous asylum bar because it did not fully address the different types of frivolousness, such as abusive filings, filings for an improper purpose, or patently unfounded filings.

Regarding the inclusion of willful blindness in determining what applications will be considered knowingly frivolous, the Departments reiterate that the inclusion of a willful blindness standard as part of a ''knowing'' action is consistent with long-standing legal doctrine:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. . . . It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts. . . .

Global-Tech Appliances, Inc., 563 U.S. at 766 (internal citations omitted);[21] *see also, e.g., United States* v. *Caraballo-Rodriguez,* 726 F.3d 418 (3d Cir. 2013) (noting that ''knowledge'' can be demonstrated by actual knowledge or willful blindness.); *United States* v. *Perez-Melendez,* 599 F.3d 31, 41 (1st Cir. 2010) (''Willful blindness serves as an alternate theory on which the government may prove knowledge.'').

The doctrine of willful blindness applies in many civil proceedings as well. *See Global-Tech Appliances,* 563 U.S. at 768 (''Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. 271(b).''). Given this background, if Congress did not wish to allow for willfully blind actions to satisfy the ''knowing'' requirement of section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), Congress could have expressly provided a definition of ''knowingly'' in the Act. *Cf. Perrin* v. *United States,* 444 U.S. 37, 42 (1979) (''A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'') (citations omitted). Due to Congress's silence, however, the Departments find that the inclusion of willful blindness, as it is generally interpreted, is a reasonable interpretation that better aligns the regulations with congressional intent to limit and deter frivolous applications.

Regarding the four grounds for finding an asylum application frivolous at 8 CFR 208.20(c) and 1208.20(c), the Departments emphasize that an application will not be found to be frivolous unless the alien knew, or was willfully blind to the fact, that the application met one of the four grounds. Accordingly, commenters are incorrect that an alien who does not know that an essential element is fabricated will be at risk of an immigration judge finding that his or her application is frivolous. Similarly, an alien who submits a claim that is clearly foreclosed by the applicable law but who, as noted by commenters, does not know that the claim is so clearly foreclosed, would not have his or her claim found frivolous on that basis.[22]

The Departments disagree that the rule will enable the Departments to ''pressure'' applicants who make mistakes of fact in the context of their application. Two of the bases related to fabricated elements or evidence, neither of which can be characterized appropriately as a mistake of fact. The other two bases go to the merits of the case or to applicable law, and neither of those turn on a mistake of fact.

One commenter expressed concern about the NPRM's proposed change, in the context of the definition of frivolous, from a fabricated ''material'' element to a fabricated ''essential'' element. The existing regulatory text provides that ''an asylum application is frivolous if any of its material elements is deliberately fabricated''; under the NPRM, an application that contained a fabricated ''essential element'' might have been found frivolous. The Departments acknowledge that the NPRM indicated that it was maintaining the prior definition of ''frivolous,'' which was premised on a fabricated ''material'' element, 85 FR at 36275, but then used the word ''essential'' in lieu of ''material'' in the proposed regulatory text itself. Although the Departments do not perceive a relevant difference between the two phrasings, they are reverting to the use of ''material'' in this context in the final rule to avoid any confusion.

[21] The Departments disagree with commenters' concerns that *Global-Tech* is an inappropriate case to cite given the complexity of the underlying dispute. Instead, this case provides a clear and concise summary of the willful blindness standard, which is separate and apart from the underlying facts or adjudication.

[22] As 85 percent of asylum applicants in immigration proceedings have representation, the likelihood of an alien alone knowingly making an argument that is foreclosed by law is relatively low as both a factual and legal matter. *See* EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.*

Finally, commenters were particularly concerned about the frivolousness grounds covering claims that lack merit or are foreclosed by existing law. However, commenters' concerns are not based on the actual rule. As explained in the NPRM, an unsuccessful claim does not mean that the claim is frivolous. *See* 85 FR at 36273–77. For example, arguments to extend, modify, or reverse existing precedent are not a basis for a frivolousness finding under the ''clearly foreclosed by applicable law'' ground. 85 FR at 36276. Similarly, as discussed *supra,* both the relatively low numbers of pro se asylum applicants in immigration court proceedings and the requirement that a frivolous asylum application be ''knowingly'' filed will likely make frivolousness findings uncommon for pro se aliens under the ''clearly foreclosed by applicable law'' ground. Moreover, the proposed definition is fully consistent with the long-standing definition of ''frivolous'' behavior as applied in the context of practitioner discipline. *See* 8 CFR 1003.102(j)(1) (''A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay.''). In other words, the bases for finding an asylum application frivolous do not limit ethical attorneys' conduct in the manner described by commenters.

As some commenters noted, however, some aliens may hire unscrupulous representatives or notarios who file applications for improper purposes. While the Departments are sympathetic to aliens who are victims of these unethical practices, the Departments note that, as described below in Section II.C.3.2 of this preamble, aliens must sign each asylum application attesting to the application's accuracy and acknowledging the consequences of filing a frivolous application; moreover, ''[t]he applicant's signature establishes a presumption that the applicant is aware of the contents of the application.'' 8 CFR 208.3(c)(2), 1208.3(c)(2). An alien may later file a motion to reopen premised on ineffective assistance of counsel [23] or pursue other subsequent avenues of redress against unscrupulous individuals, but the Departments find that an alien should not automatically be immune from the consequences of an asylum application he or she held out as accurate.[24] To offer such immunity would create moral hazard. It would encourage aliens not to read or familiarize themselves with the contents of their applications, thereby subverting both the efficiency and accuracy of asylum adjudications. Moreover, the requirement that a frivolous asylum application be ''knowingly'' filed also ensures that only genuinely culpable—or co-conspirator—aliens will face the full consequences associated with these unethical practices. *Cf. United States* v. *Phillips,* 731 F.3d 649, 656 (7th Cir. 2013) (''It is careless to sign a document without reading it, but it is a knowing adoption of its contents only if the signer is playing the ostrich game ('willful blindness'), that is, not reading it *because* of what she knows or suspects is in it.'').

The Departments disagree that the changes, including consideration of legal arguments regarding whether an asylum application was premised on a claim that was foreclosed by existing law, will increase the workload of immigration judges. As an initial point, immigration judges are already accustomed to both making frivolousness determinations and to assessing whether claims are foreclosed by applicable law; indeed, immigration judges are already required to apply precedent in asylum cases, even when a frivolousness finding is not at issue. Thus, the intersection of those two streams of decision making does not represent any additional adjudicatory burden. Further, the rule does not mandate that immigration judges make a determination in all cases, and many cases will not factually or legally lend themselves to a need to wrestle with close calls and complex determinations of whether an application was ''clearly foreclosed by applicable law'' due to the rest of the context of the application or the case. Finally, commenters also failed to consider that the direct inclusion of applications that are clearly foreclosed by applicable law as a possible basis for frivolousness findings may cause secondary efficiencies by disincentivizing the filing of meritless asylum applications in the first instance—applications that already take up significant immigration court resources.

3.1.3. Other Concerns With Regulations Regarding Frivolous Applications

Comment: Commenters expressed concern with the rule's changes to the procedural requirements that must be satisfied before an immigration judge may make a frivolousness finding. For example, commenters noted that the rule would allow immigration judges to make frivolousness findings without providing an applicant with additional opportunities to account for perceived issues with his or her claim. Similarly, an organization alleged that immigration judges would not have to provide an opportunity for applicants to meaningfully address the frivolousness indicators found by an asylum officer. Commenters stated that the rule conflicts with *Matter of Y–L–,* 24 I&N Dec. at 155, emphasizing that the NPRM only requires that applicants be provided notice of the consequences of filing a frivolous application. At least one organization claimed the rule, by not requiring immigration judges to first provide an opportunity to explain, assumes that ''applicants know what a judge would consider 'meritless' or implausible.'' The organization contested the NPRM's assertion that an asylum applicant ''already . . . knows whether the application is . . . meritless and is aware of the potential ramifications,'' claiming instead that applicants often lack a sophisticated knowledge of immigration law. *See* 85 FR at 36276.

Response: As stated in the proposed rule, the only procedural requirement Congress included in the Act for a frivolousness finding is the notice requirement at section 208(d)(4)(A) of the Act, 8 U.S.C. 1158(d)(4)(A). 85 FR at 36276. In addition, the asylum application itself provides notice that an application may be found frivolous and that a frivolousness finding results in significant consequences. *Id.* The law is clear on this point. *See, e.g., Niang* v. *Holder,* 762 F.3d 251, 254–55 (2d Cir. 2014) (''Because the written warning provided on the asylum application alone is adequate to satisfy the notice requirement under 8 U.S.C. 1158(d)(4)(A) and because Niang signed and filed his asylum application containing that warning, he received adequate notice warning him against filing a frivolous application.''). Thus, every alien who signs and files an asylum application has received the

[23] *See Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988) (setting out requirements for motions to reopen due to ineffective assistance of counsel allegations).

[24] The Departments further note that purposefully filing meritless asylum applications, including for the purposes of causing DHS to initiate removal proceedings, violates the EOIR rules of professional conduct and constitutes behavior that may result in professional sanctions. *See In re Bracamonte,* No. D2016–0070 (July 1, 2020), *https://www.justice.gov/eoir/page/file/1292646/download* (entering into a settlement agreement with a practitioner who ''acknowledges that it was improper to file asylum applications without an indicated basis for asylum or an indication as to any asylum claim, to cancel or otherwise advise clients to fail to appear for asylum interviews, and to not demonstrate a clear intention to pursue an asylum claim, in order to cause DHS to issue a Notice to Appear to his clients'').

notice required by section 208(d)(4)(A) of the INA, 8 U.S.C. 1158(d)(4)(A).

Accordingly, commenters are correct that the rule's changes allow immigration judges to make frivolousness findings without the procedural requirements required by the current regulation and attendant case law. But the regulation and case law are not required by the Act, and have not been successful in preventing the filing of frivolous applications. To the extent commenters are correct that the rule conflicts with *Matter of Y–L–,* that decision is premised on the existing regulatory language that the Departments are revising. Thus, as the Departments noted in the proposed rule, this rule would overrule *Matter of Y–L–* and any other cases that rely on the same reasoning or now-revised regulatory language. 85 FR at 36277.

Comment: At least one organization expressed its belief that DHS could institute frivolousness procedures more directly related to DHS's adjudication of employment authorization requests (''EADs''). For example, the commenter noted that there is ''no explanation'' for why DHS cannot simply conduct a prima facie review of an I–589 filing prior to granting an EAD application or scheduling the I–589 interview. The organization claimed that, if the concern is the time and expense dedicated to ''clearly fraudulent'' applications, DHS could devise a policy to screen for indicators that the application itself lacks merit or supporting documentation. The organization contended that DHS does this with other benefit applications and is not prohibited from issuing Requests for Evidence or Notices of Intent to Deny to affirmative asylum applicants prior to an interview.

Response: Although the Departments appreciate this comment and DHS may evaluate it further as an additional avenue to protect the integrity of the asylum adjudication process, the Departments find that the changes set out in the proposed rule better align with congressional intent and are more efficient than a secondary process tied to the adjudication of EADS. Divorcing the question of frivolousness from the underlying adjudication of the application itself would potentially undermine Congress's clear direction that aliens face consequences for filing frivolous asylum applications. INA 208(d)(6), 8 U.S.C. 1158(d)(6). Moreover, asylum officers and immigration judges, the officials in the asylum system who are trained to review and adjudicate applications for asylum, are best positioned to make the sorts of determinations that the commenter suggests should instead be made by the DHS officials adjudicating EAD requests.

Comment: At least one organization alleged that the rule, ''perhaps recognizing its own harshness,'' claims to ''ameliorate the consequences'' by allowing applicants to withdraw their application(s) before the court with prejudice, accept a voluntary departure order, and leave the country within 30 days. The organization contended that, rather than ameliorating the consequences of a frivolous filing, these measures essentially replicate them in severity and permanence.

Response: Despite commenters' concerns, the Departments emphasize that this option to avoid the consequences of a frivolousness finding is a new addition to the regulations and provides applicants with a safe harbor not previously available. The Departments believe that the conditions are strict but reasonable and fair when compared with the alternative: The severe penalty for filing a frivolous application, as recognized by Congress at section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6). Further, the Departments disagree that the consequences of withdrawing an application are of the same severity as a frivolousness finding because an alien who withdraws an application will be able to leave the United States without a removal order and seek immigration benefits from abroad, while an alien who is found to have submitted a frivolous application is ''permanently ineligible for any benefits'' under the Act. INA 208(d)(6), 8 U.S.C. 1158(d)(6).

Comment: One organization emphasized that, although the NPRM claims that broadening the definition of frivolous would root out ''unfounded or otherwise abusive claims,'' the NPRM does not include any evidence of large numbers of pending frivolous applications.

Response: Congress laid out consequences for filing a frivolous asylum application at section 208(d)(6) of the Act, 8 U.S.C. 1158(d)(6), demonstrating the importance of the issue. There is no precise data threshold for a regulation that implements a clear statutory priority. Moreover, Federal courts have recognized both the extent of asylum fraud and the fact that the Government does not catch all of it. *Angov,* 788 F.3d at 902 (''Cases involving fraudulent asylum claims are distressingly common. . . . And for every case where the fraud is discovered or admitted, there are doubtless scores of others where the petitioner gets away with it because our government didn't have the resources to expose the lie.''). Indeed, as the Departments noted in the NPRM, the prior definition did not adequately capture the full spectrum of claims that would ordinarily be deemed frivolous, 85 FR at 36274, making statistics based on the prior definition either misleading or of minimal probative value.

The Departments note the record numbers of asylum applications filed in recent years, including 213,798 in Fiscal Year 2019, up from the then-previous record of 82,765 in Fiscal Year 2016. EOIR, *Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* Given this significant increase in applications—which almost certainly means an increase in frivolous applications—and the corresponding increase in adjudications, the Departments believe it is important to ensure the regulations best reflect congressional intent and deter the submission of frivolous applications that delay the adjudication of meritorious cases.

Comment: Another organization expressed particular concern for children seeking asylum, noting that, although the TVPRA requires unaccompanied children's claims to be heard by asylum officers, the rule's expansion of a ''frivolous'' claim would result in the denial of meritorious claims for children who are unrepresented and ''unable to decipher complex immigration law.'' The organization contended that, because the rule would permit asylum officers who determine that a child's claim is ''frivolous'' to refer the case to immigration court without examining the merits of the claim, unaccompanied children ''would be forced into adversarial proceedings before an immigration judge in clear violation of the TVPRA and in a manner that would subject them to all of the harms attendant to adversarial hearings where there is no guarantee of representation.''

Similarly, at least one organization emphasized that the ''safety valve'' of allowing children to accept withdrawal conditions to avoid the consequences of a frivolousness finding is illusory, and may pressure children to waive valuable rights.

Response: Again, the Departments note that these concerns generally are not rooted in any substantive evidence and either mischaracterize or misstate the proposed rule. The Departments find the safeguards in place for allowing asylum officers to make a finding that an asylum application is frivolous are sufficient to protect unaccompanied alien children (''UAC'') in the application process. Even if an asylum officer finds an application is frivolous,

the application is referred to an immigration judge who provides review of the determination. The asylum officer's determination does not render the applicant permanently ineligible for immigration benefits unless the immigration judge or the BIA also make a finding of frivolousness. *Id.* Further, asylum officers and immigration judges continue to use child-appropriate procedures taking into account age, stage of language development, background, and level of sophistication.[25] Finally, to be found frivolous, an application must be knowingly filed as such, and the Departments anticipate that very young UACs will typically not have the requisite mental state to warrant a frivolousness finding.

Comment: At least one commenter appeared to express concern that the rule includes all applications submitted after April 1, 1997, as those which could potentially be deemed frivolous.

Response: To the extent the commenter is concerned about frivolous applications in general dating back to April 1, 1997, the Departments note that DOJ first implemented regulations regarding frivolous asylum applications on March 6, 1997, effective April 1, 1997. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 10312, 10344 (Mar. 6, 1997). The April 1, 1997 effective date was enacted by Congress in 1996 through IIRIRA. *See* IIRIRA, Public Law 104–208, sec. 604(a), 110 Stat. 3009, 3009–693. Thus, all asylum applications filed on or after April 1, 1997, have been subject to a potential penalty for frivolousness for many years.

The NPRM made clear, however, that the new regulatory definition of frivolous applies only to applications filed[26] on or after the effective date of the final rule. To provide further clarification on this point, the Departments made several non-substantive edits to the regulatory text at 8 CFR 208.20 and 8 CFR 1208.20 in the final rule to clarify the temporal applicability of the existing definition of frivolousness and the prospective application of the definition contained in the rule. Thus, the commenters apparent retroactivity concerns about the definition of a frivolous application have been addressed. For further discussion of the rule's retroactive applicability, *see* Section II.C.7 of this preamble.

3.2. Pretermission of Legally Insufficient Applications

3.2.1. Pretermission and the INA

Comment: Commenters stated that allowing immigration judges to pretermit applications conflicts with multiple sections of the INA and is not a ''reasonable'' interpretation of the INA.

Commenters cited section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), alleging that the phrase ''may apply for asylum'' should be broadly construed. Commenters also noted that the statute requires the establishment of a procedure for considering asylum applications. INA 208(d)(1), 8 U.S.C. 1158(d)(1). Commenters claimed that allowing for the pretermission of asylum applications does not satisfy this required procedure and is an ''unreasonable interpretation'' of the statute.

Commenters stated that the rule violates section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), which states that ''[t]he immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.'' Commenters stated that the rule violates this requirement by ''requiring immigration judges to abandon their essential function of examining the noncitizen about their application for relief.''

Similarly, commenters stated that the rule violates section 240(b)(4)(B) of the Act, 8 U.S.C. 1229a(b)(4)(B), which states that ''the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.'' Commenters believe the rule violates this provision because it denies aliens the ability to present and examine evidence on their own behalf, including their own credible testimony.

Finally, commenters stated that the rule violates section 240(c)(4) of the Act, 8 U.S.C. 1229a(c)(4), which states that, inter alia, ''the immigration judge shall weigh the credible testimony along with other evidence of record'' when determining whether an alien has met his or her burden of proof on an application for relief. INA 240(c)(4)(B), 8 U.S.C. 1229a(c)(4)(B).

Commenters also disagreed with the Departments that allowing pretermission of applications would not conflict with the legislative history of IIRIRA. *See* 85 FR at 36277 n.26 (noting statements in H.R. Rep. No. 104–469, part 1 (1996) regarding balancing the need for the alien to provide sufficient information on the application with the need for the alien's application to be timely). Commenters stated that the rule creates additional burdens for aliens with regard to submission and preparation of the Form I–589.

Response: Allowing pretermission of asylum applications in the manner set out in this rule does not violate the INA. As an initial point, the regulations have long allowed immigration judges to pretermit asylum applications when certain grounds for denial exist. *See* 8 CFR 1240.11(c)(3).[27] Additionally, courts have affirmed the pretermission of legally deficient asylum applications. *See, e.g., Zhu* v. *Gonzales,* 218 F. App'x 21, 23 (2d Cir. 2007) (''Here, the IJ alerted Zhu early in the proceedings that his asylum claim might be pretermitted if he failed to illustrate a nexus to a protected ground, and granted him a 30-day continuance in which to submit a brief addressing the nexus requirement. When Zhu had neither submitted a brief, nor requested an extension of the deadline, after nearly 60 days, the IJ acted within his discretion in pretermitting the asylum claim.''). As discussed further below, the pretermission of legally deficient asylum applications is consistent with existing law, and immigration judges already possess authority to take any action consistent with their authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, *id.* 1240.1(a)(1)(iv), and to regulate the course of a hearing, *id.* 1240.1(c). Accordingly, the authority of an immigration judge to pretermit an asylum application is well-established even prior to the proposed rule.[28]

[25] For further discussion of the intersection of the rule and the TVPRA, see section II.C.6.10.

[26] This includes applications filed in connection with a motion to reopen on or after the effective date of the rule or applications filed on or after the effective date of the rule after proceedings have been reopened or recalendared.

[27] The text of 8 CFR 1240.11(c)(3) references, *inter alia,* the mandatory denial of an asylum application pursuant to 8 CFR 1208.14. In turn, 8 CFR 1208.14(a) references 8 CFR 1208.13(c), which lists the specific grounds for the mandatory denial of an asylum application, including those listed in INA 208(a)(2) and (b)(2) (8 U.S.C. 1158(a)(2) and (b)(2)). Some of those grounds may require a hearing to address disputed factual issues, but some involve purely legal questions—*e.g.* INA 208(b)(2)(A)(ii) and (B)(i) (8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i)) (an alien convicted of an aggravated felony is ineligible for asylum)—and, thus, may be pretermitted without a hearing.

[28] The National Association of Immigration Judges (''NAIJ''), the union which formerly represented non-supervisory immigration judges, opposed the rule on general grounds but did not take a position on this specific provision. A. Ashley Tabadorr, *Comment by the National Association of Immigration Judges,* (July 15, 2020), *https://www.naij-usa.org/images/uploads/newsroom/*

Further, regarding sections 208(a)(1) and 208(d)(1) of the Act, 8 U.S.C. 1158(a)(1) and (d)(1), nothing in the rule regarding the pretermission of applications affects the ability of aliens to apply for asylum, and this rule adds to the already robust procedures in place for the consideration and adjudication of applications for asylum. Instead, pretermission establishes an efficiency for the adjudication of applications for asylum that have been submitted for consideration and is utilized in a similar fashion as summary decision is used in other DOJ immigration-related proceedings, *see* 28 CFR 68.38, and as summary judgment is used in Federal court proceedings, *see* Fed. R. Civ. P. 56.

Similarly, pretermission of asylum applications in the manner set out in this rule does not violate any provision of section 240 of the Act, 8 U.S.C. 1229a. First, section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1), authorizes immigration judges to ''interrogate, examine, and cross-examine the alien and any witnesses'' but does not establish a mandatory requirement for them to do so in every case on every application or issue. Further, it is settled law that immigration judges may pretermit applications for relief in other contexts. *See, e.g., Matter of J–G–P–,* 27 I&N Dec. 642, 643 (BIA 2019) (explaining that the immigration judge granted DHS's motion and pretermitted the respondent's application for cancellation of removal due to the respondent's disqualifying criminal conviction); *Matter of Moreno-Escobosa,* 25 I&N Dec. 114 (BIA 2009) (reviewing questions of eligibility for a waiver of inadmissibility under former section 212(c) of the Act (8 U.S.C. 1182(c) (1994)) following an immigration judge's pretermission of the respondent's application). Second, the rule allows the applicant a ''reasonable opportunity'' to present evidence on his or her own behalf before pretermission as an immigration judge would not pretermit an application without either the time expiring for the alien to respond to DHS's motion or the judge's notice. Similarly, the alien would be afforded the opportunity to present evidence, including written testimony, on their own behalf prior to an immigration judge's decision to pretermit an application, in accordance with section 240(b)(4)(B) and (c)(4) of the Act, 8 U.S.C. 1229a(b)(4)(B) and (c)(4).

Regarding the legislative history of IIRIRA, the Departments find that allowing pretermission in the manner set out in the proposed rule and this final rule does not conflict with the legislative history of IIRIRA. First, regarding the statement in the House report cited in the proposed rule, the Departments note that at that point, the House legislation would have imposed a 30-day filing deadline for asylum applications. *See* H.R. Rep. No. 104–469, pt. 1, at 259 (1996). Accordingly, the Departments find that congressional statements suggesting lower requirements for specificity in an asylum application were based on a concomitant suggestion that an application should be filed within 30 days and were correspondingly obviated by the longer one-year filing deadline ultimately enacted by IIRIRA. INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B). Second, there is no discussion in the IIRIRA conference report that similarly encourages a condensed application for the sake of expediency. *See generally* H.R. Rep. No. 104–828 (1996) (conference report). Finally, the Departments reiterate that, as stated in the proposed rule, the alien would only be expected to provide ''enough information to determine the basis of the alien's claim for relief and if such a claim could be sufficient to demonstrate eligibility.'' 85 FR at 36277 n.26. Indeed, the Departments expect that aliens who complete the Form I–589, Application for Asylum and for Withholding of Removal, in accordance with the instructions and provide all information requested by the form would provide sufficient information for the prima facie determination, just as it does in the context of a motion to reopen. *See INS* v. *Abudu,* 485 U.S. 94, 104 (1988) (''There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought.'') Further, an alien would be able to provide additional information as desired in response to the DHS motion or immigration judge notice regarding possible pretermission. In short, a requisite prima facie showing for an asylum application is not an onerous burden, and the Departments disagree with the commenter that allowing pretermission presents any additional mandatory burden on the alien beyond that which is already required by the asylum application itself.

3.2.2. Pretermission and the Regulations

Comment: Commenters stated that allowing pretermission of applications in the manner set out in the proposed rule violates the other regulatory provisions, including 8 CFR 1240.1(c), 8 CFR 1240.11(c)(3), and 8 CFR 1240.11(c)(3)(iii). Regarding 8 CFR 1240.1(c) (''The immigration judge shall receive and consider material and relevant evidence . . . .''), commenters noted that pretermission would foreclose consideration of an asylum seeker's testimony, which is often one of the most important pieces of evidence, as well as witness testimony. Regarding 8 CFR 1240.11(c)(3) (''Applications for asylum and withholding of removal so filed will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute.''), commenters emphasized the regulation's requirement that an immigration judge's decision be made ''after an evidentiary hearing'' and noted that the factual and legal issues in an asylum claim are often interconnected. Regarding 8 CFR 1240.11(c)(3)(iii) (''During the removal hearing, the alien shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf''), commenters stated that pretermission would deprive the alien of the opportunity to meet his or her burden of proof through testimony, which may be sufficient for the alien to sustain the burden of proof without corroboration.

Commenters stated that allowing pretermission would make into surplusage the provisions of the regulations regarding the authority of the immigration judge to consider evidence (8 CFR 1240.11(c) and control the scope of the hearing (c)(3)(ii)).

Response: Allowing pretermission of asylum applications that fail to demonstrate a prima facie claim for relief or protection in the manner set out in the proposed rule and this final rule does not violate other provisions of the Departments' regulations. As stated in the proposed rule, ''[n]o existing regulation requires a hearing when an asylum application is legally deficient.'' 85 FR at 36277. Commenters' arguments to the contrary misconstrue the regulatory framework. The Departments agree that an alien's testimony may be important evidence for a case. *See, e.g., Matter of Mogharrabi,* 19 I&N Dec. 439, 445 (BIA 1987) (''The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and

2020.07.15.00.pdf (''NAIJ's comment to the proposed rulemaking takes no position on what the law should be or how it is to be interpreted.''). Nevertheless, individual immigration judges have, on occasion, pretermitted legally-deficient asylum applications even prior to the issuance of the proposed rule.

coherent account of the basis for his fear.'').[29] But in cases where it is clear from the fundamental bases of the alien's claim that the claim is legally deficient and the alien will not be able to meet his or her burden of proof, regardless of the additional detail or specificity that the alien's testimony may provide, such testimony is not material or relevant and is not needed for the judge to be able to make a determination that the application is legally insufficient.[30]

Further, the rule does not conflict with the specific regulatory sections cited by the commenters. To the contrary, as discussed, *supra,* the rule is fully consistent with an immigration judge's existing authority to take any action consistent with their authorities under the law that is appropriate and necessary for the disposition of cases, 8 CFR 1003.10(b), to generally take any appropriate action consistent with applicable law and regulations, *id.* 1240.1(a)(1)(iv), and to regulate the course of a hearing, *id.* 1240.1(c). Further, the rule does not affect the instruction at 8 CFR 1240.1(c) for immigration judges to consider material and relevant evidence. If a case presents a prima facie claim, the case will proceed through the adjudicatory process consistent with current practice, including the submission and consideration of whatever material and relevant evidence is included in the record. Similarly, in that adjudication, the alien would be examined and allowed to present evidence and witnesses, consistent with 8 CFR 1240.11(c)(3)(iii). Finally, those applications that present a prima facie claim will proceed to an evidentiary hearing to resolve those factual and legal issues presented by the alien's claim. *See* 8 CFR 1240.11(c)(3). Accordingly, pretermission works to supplement the existing regulations; it does not conflict with them, nor does it render them surplusage.

3.2.3. Pretermission and BIA Case Law

Comment: Commenters stated that allowing immigration judges to pretermit and deny asylum applications violates *Matter of Fefe,* 20 I&N Dec. 116 (BIA 1989), and *Matter of Ruiz,* 20 I&N Dec. 91 (BIA 1989). Commenters disagreed with the Departments' distinguishing *Matter of Fefe* in the proposed rule by noting that the underlying regulations interpreted by the BIA in *Matter of Fefe* are no longer in effect. *See* 85 FR at 36277. Instead, commenters stated that both the BIA and the Federal courts have noted that the current regulations at 8 CFR 1240.11 are substantially similar to the regulations at issue in *Matter of Fefe. See Matter of E–F–H–L–,* 26 I&N Dec. 319, 323 (BIA 2014) (noting that the current regulatory ''language does not differ in any material respect from that in the prior regulations''), *vacated by* 27 I&N Dec. 226, 226 (A.G. 2018); *Oshodi* v. *Holder,* 729 F.3d 883, 898 (9th Cir. 2013) (''We reaffirm our holding, and the BIA's own rule, that an applicant's oral testimony is 'an essential aspect of the asylum adjudication process' and the refusal to hear that testimony is a violation of due process.'') (citing *Matter of Fefe,* 20 I&N Dec. at 118).

Response: As stated in the proposed rule, the Departments find that intervening changes to the regulations since its publication and the Attorney General's vacatur of *Matter of E–F–H–L–* have superseded the BIA's holding in *Matter of Fefe.* 85 FR at 36277. The BIA's statement in *Matter of E–F–H–L–* that the current regulations ''do not differ in any material respect'' from those in effect in 1989 was simply not accurate, and the Departments find that the regulations today create a substantively different framework for adjudications than the regulations in 1989. Notably, the earlier regulations contained a general requirement that all applicants be examined in person by an immigration judge or asylum officer prior to the application's adjudication. 8 CFR 208.6 (1988). Today, however, the regulations provide direct examples of times when no hearing on an asylum application is required: If no factual issues are in dispute and once the immigration judge has determined that the application must be denied pursuant to the mandatory criteria in 8 CFR 1208.14 or 1208.16. *See* 8 CFR 1240.11(c)(3) (''An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.'').

The procedures at 8 CFR part 208 at issue in *Matter of Fefe* were first amended in 1990. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 FR 30674 (July 27, 1990) (final rule); Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 53 FR 11300 (Apr. 6, 1988) (proposed rule). At that time, the Department clearly indicated that the purpose of the amendments[31] was to allow immigration judges and the BIA greater flexibility to ''limit the scope of evidentiary hearings . . . to matters that are dispositive of the application for relief.'' 53 FR at 11301. The Department of Justice explained that, ''[i]f it is apparent upon the record developed during a proceeding that the alien is clearly ineligible for asylum or withholding of deportation, the Immigration Judge will be permitted to forego a further evidentiary hearing on questions extraneous to the decision, thus avoiding unnecessary and time consuming factual hearings on nondispositive issues.'' *Id.*

Despite the BIA's statements opining on the similarity of 8 CFR 1240.11(c) and 8 CFR 236.3 and 242.17 (1988)—which, as stated elsewhere have been vacated by the Attorney General—the Departments find that there are clear procedural differences between a general requirement to conduct a hearing and regulations that establish clear exceptions to a hearing requirement. In short, the Board's decisions in *Matter of Fefe* and *Matter of E–F–H–L–,* in light of subsequent legal developments, simply do not stand for the propositions advanced by some commenters. *See Ramirez* v. *Sessions,* 902 F.3d 764, 771 n.1 (8th Cir. 2018) (''The current relevance of [*Matter of Fefe* and *Matter of E–F–H–L–*] is questionable. The regulations applied in *Matter of Fefe* were later rescinded and replaced. Further, *Matter of E–F–H–L–,* which reaffirmed *Matter of Fefe,* was vacated [by the Attorney General] after the petitioner withdrew his application.'').

[29] Nevertheless, despite commenters' statements, the Departments emphasize that while an alien's testimony *may* be sufficient to meet his or her burden of proof on its own, such testimony must be ''credible,'' ''persuasive,'' and refer to sufficient specific facts.'' INA 240(c)(4)(B) (8 U.S.C. 1229(c)(4)(B)). Otherwise, the immigration judge may determine that the alien should provide corroborative evidence unless the alien can demonstrate that he or she does not have and cannot reasonably obtain the evidence. *Id.; see also Matter of E–P–,* 21 I&N Dec. 860, 862 (BIA 1997) (a finding of credible testimony is not dispositive as to whether asylum should be granted).

[30] The Departments also note that an alien may proffer written testimony as part of his or her response to either the DHS motion or judge's notice regarding pretermission.

[31] The amended regulatory provisions at 8 CFR 236.3, which regarded exclusion proceedings, and 8 CFR 242.17, which regarded deportation proceedings, are the precursors to current regulatory sections 8 CFR 1240.33 and 8 CFR 1240.49. *Cf.* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 450 (Jan. 3, 1997) (discussing the relocation of ''old regulations which are still applicable to proceedings commenced prior to April 1, 1997 . . . to new parts of the regulations as separate subtopics''). Current 8 CFR 1240.11(c)(3) in turn follows this approach for the consideration of asylum applications during removal proceedings under section 240 of the Act (8 U.S.C. 1229a).

Further, even if the regulation conflicted with a prior interpretation by the BIA, the Attorney General, consistent with his authority to interpret the INA, may still issue the rule. INA 103(g), 8 U.S.C. 1103(g). The Departments are not bound by prior judicial interpretations of the Departments' own regulations, as such interpretations are not interpretations of the INA's statutory requirements.

Matter of Ruiz, is also distinguishable. There, the BIA held that an immigration judge could not require an alien who sought to reopen proceedings conducted in absentia to demonstrate a prima facie eligibility for asylum in conjunction with the motion to reopen. *Matter of Ruiz,* 20 I&N Dec. at 93. Instead, the BIA held that the alien must demonstrate a ''reasonable cause for his failure to appear.'' *Id.* But the change in the rule here—which allows immigration judges to pretermit and deny asylum applications that fail to demonstrate a prima facie claim for relief or protection—has no connection to what aliens must demonstrate in order to reopen a hearing conducted in absentia. The in absentia requirements are separately set out by the Act and regulations. *See* INA 240(b)(5)(C)(i)–(ii), 8 U.S.C. 1229a(b)(5)(C)(i)–(ii) (providing conditions for rescinding an in absentia removal order based on a motion to reopen); 8 CFR 1003.23(b)(4)(ii). There is no separate requirement to demonstrate further eligibility for any application for relief, consistent with *Matter of Ruiz.* Further, the equivalent statutory right to former section 236(a) of the Act, 8 U.S.C. 1226(a), which was at issue in *Matter of Ruiz,* is the alien's rights in a proceeding under section 240(b)(4) of the Act, 8 U.S.C. 1229(b)(4), which, as discussed above, are not violated by allowing an immigration judge to pretermit and deny applications that fail to demonstrate a prima facie claim for relief or protection.

3.2.4. Additional Concerns Regarding Pretermission

Comment: Multiple commenters expressed concern that the rule would allow immigration judges to dismiss asylum claims without a hearing, denying applicants the opportunity to appear in court and offer testimony. Commenters emphasized that the rule is ''extremely problematic'' from a due process perspective and violates aliens' Fifth Amendment due process rights. In support, commenters cited to case law discussing the right to testify and finding due process violations when that right is curtailed or limited. *See, e.g., Atemnkeng* v. *Barr,* 948 F.3d 231, 242 (4th Cir. 2020) (holding that there was a due process violation where the immigration judge deprived an asylum applicant of the opportunity to testify on remand). Commenters emphasized a quote from the chair of the American Immigration Lawyers Association's asylum committee stating that ''the pretermission authority was the most striking attack on due process in the proposal,'' and noting that some immigration judges already have denial rates of 90 percent or higher.

Response: The commenters appear to misconstrue both the nature of the rule and the difference between issues of fact and issues of law. None of the examples provided by commenters involved situations in which an immigration judge pretermitted an application as legally deficient; rather, they involve situations in which an immigration judge initially allowed testimony but then cut-off questioning—or, in one case, disallowed testimony altogether—following a remand. In other words, the posture of the examples cited by commenters is one in which an alien had already demonstrated a prima facie case, making those examples inapposite to the rule. Commenters did not provide any examples where a properly supported legal pretermission—by itself—was found to be a due process violation, nor did commenters explain how analogous summary-decision or summary-judgment provisions in other contexts—*e.g.* 28 CFR 68.38 or Fed. R. Civ. P. 56—remain legally valid even though they, too, curtail an individual's ability to testify or introduce evidence in proceedings. In short, the commenters' concerns appear unconnected to the actual text of the rule and the applicable law.

The Departments disagree that allowing immigration judges to pretermit and deny asylum applications that do not show a prima facie claim for relief would violate applicants' due process rights. The essence of due process is notice and an opportunity to be heard. *See LaChance,* 522 U.S. at 266. Nothing in the rule eliminates notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38.

In addition, the rule would not require or expect aliens to meet their ultimate burden of proof to avoid pretermission; instead, the alien must only (per one common definition of ''prima facie'') ''establish a fact or raise a presumption, unless disproved or rebutted.'' *Black's Law Dictionary* (11th ed. 2019); *cf. Tilija* v. *Att'y Gen.,* 930 F.3d 165, 171 (3d Cir. 2019) (''To establish a prima facie claim, the movant 'must produce objective evidence that, when considered together with the evidence of record, shows a reasonable likelihood that he is entitled to [asylum] relief.''' (citation omitted)). Further, the rule ensures the alien has an opportunity to respond to either the DHS motion or the judge's notice regarding pretermission and provide the court with additional argument or evidence, including proffered written testimony, in support of the alien's application.

Comment: Commenters emphasized that asylum seekers are vulnerable and often unrepresented and noted the low rates of representation for aliens in the Migrant Protection Protocols (''MPP'') in particular. Because many asylum seekers do not speak English, it is often difficult for them to navigate the complexities of the immigration system. Commenters specifically noted that it is hard for detained, unrepresented individuals to complete asylum applications because they are often required to use ''unofficial translators'' with whom they are not comfortable sharing personal information. Commenters stated that the immigration judge's consideration of an alien's response to the judge's notice or DHS motion regarding pretermission does not alleviate the commenters' concerns. Commenters argued that the same language barriers and other vulnerabilities would apply to both the response and the underlying Form I–589 application; thus, they contend, a response alone does not provide a ''meaningful opportunity'' to address misunderstandings or fully engage with the judge or DHS.

Response: As an initial point, the commenters' assertion of a low rate of representation is inaccurate. The Departments note that a large majority (85 percent at the end of FY2020) of those asylum seekers who are in proceedings before DOJ—and who, in turn, could have an immigration judge pretermit their asylum applications—are represented in proceedings. EOIR, *Adjudication Statistics: Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download.* Second, while the Departments agree with commenters that many asylum seekers' first or preferred language is a language other than English, the Departments find that it is reasonable to expect aliens to utilize translators or other resources in order to complete the Form I–589 application in accordance with the regulations and instructions, which

require that the form be completed in English. *See* 8 CFR 208.3(a), 1208.3(a) (noting that an applicant must file an I–589 ''in accordance with the instructions on the form''); Form I–589, Application for Asylum and for Withholding of Removal, Instructions, 5 (Sept. 10, 2019), *https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf* (''Your answers must be completed in English.''). Moreover, existing regulations already require that foreign-language submissions be translated into English, *see* 8 CFR 103.2(b)(3), 1003.33, so it is unclear how a non-English-speaking alien could submit evidence without a translator in any case.

The Departments thus disagree that aliens would be unable to answer the questions on the Form I–589 with enough specificity to make a prima facie claim for relief or protection. The Departments further note that aliens whose applications are deficient will be able to provide additional argument or evidence in response to either DHS's motion to pretermit or the judge's sua sponte notice. *See* 8 CFR 1208.13(e) (as amended). Despite commenters' concerns that this process is insufficient, this is the same process that is regularly used in immigration court, including other times when an alien's ability to seek a particular form of relief may be foreclosed by DHS filing a motion to pretermit. 85 FR at 36277.

Comment: Commenters stated that allowing immigration judges to pretermit applications would violate the duty of the immigration judge under the Act and the regulations to develop the record, particularly for cases where the alien appears pro se and for cases involving UACs. *See, e.g., Jacinto* v. *I.N.S.,* 208 F.3d 725, 734 (9th Cir. 2000) (''[U]nder the statute and regulations previously cited, and for the reasons we have stated here, immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel . . . .'').

Response: Allowing immigration judges to pretermit and deny asylum applications that do not demonstrate a prima facie claim for relief or protection does not violate the immigration judge's responsibility to develop the record. Instead, the rule comports with this duty by requiring immigration judges to provide notice and an opportunity to respond before pretermitting any application. Such notice should provide the parties with information regarding the judge's concerns, and should elicit relevant information in response. Similarly, in the context of DHS motions to pretermit, the immigration judge would consider the alien's response to the motion and may solicit additional information, if needed, for review.

Comment: Commenters stated that pretermission conflicts with adjudication guidance in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status,* which provides that, ''while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.'' UNHCR, *Handbook On Procedures and Criteria for Determining Refugee Status,* ¶ 196 (1979) (reissued Feb. 2019), *https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.* As a result, commenters stated that allowing immigration judges to pretermit and deny applications that do not demonstrate a prima facie claim does not meet the United States' international obligations and does not align with congressional intent to follow the Refugee Convention.

Response: Commenters' reliance on guidance from UNHCR is misguided. UNHCR's interpretations of (or recommendations regarding) the Refugee Convention and Protocol, including the UNHCR Handbook, are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 427 (1999). ''Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28 (citation and internal quotations omitted). Further, to the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it would apply only to statutory withholding of removal, which is the protection that implements Article 33 of the Convention. *Cf. R–S–C* v. *Sessions,* 869 F.3d 1176, 1188, n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''). And although the rule would allow pretermission of Form I–589 applications submitted for withholding of removal or CAT protection, such pretermission does not necessarily constrict or limit the population of aliens that may qualify for such protection. Instead, it simply provides an efficiency for the adjudication of those claims that do not demonstrate a baseline prima facie eligibility for relief.

Comment: Commenters emphasized that the rule forces the entire eligibility decision to be based on the Form I–589 and supporting documents, noting that this could be problematic if the applicant does not initially possess all of the necessary documentation. Commenters also claimed that pretermitting an application while the individual is still working to gather paperwork would be ''grossly unfair'' and contended that, if the rule is adopted, it must provide a ''working period'' after submission during which an application cannot be pretermitted. Commenters also noted that unrepresented individuals may have their applications terminated prior to finding representation who could help them supplement an application that was originally lacking or insufficient.

Other commenters noted that there are many cases that initially appear to lack eligibility but later qualify for asylum after testimony is taken and additional facts are uncovered. Commenters referenced *Matter of Fefe,* 20 I&N Dec. 116, and *Matter of Mogharrabi,* 19 I&N Dec. 443, noting that there are often discrepancies between the written and oral statements in an asylum application that can only be resolved through direct examination.

Response: Commenters again appear to misstate the rule, to misunderstand the difference between issues of fact and issues of law, and to misunderstand the difference between a prima facie legal showing and a full consideration of the merits of a case. The rule requires simply a prima facie case for relief; it does not require that every factual assertion be supported by additional corroborative evidence. If the alien's application for relief states sufficient facts that could support his or her claim for relief or protection, the immigration judge would not pretermit the application solely because some additional documentation is still being gathered.[32] Accordingly, the

[32] Many commenters raised this issue specifically for particular social group asylum claims, noting the fact-intensive nature of the social distinction element—*i.e.,* that it be recognized by the society in question—required for such groups. *See S.E.R.L.,* 894 F.3d at 556 (''And that must naturally be so, once it is given that social distinction involves proof of societal views. What those views are and how they may differ from one society to another are questions of fact''). The Departments recognize that situations in which particular social group asylum claims may be pretermitted due to a failure to make a prima facie showing of the social distinction element are likely to be rare. Nevertheless, the

Departments disagree that a minimum ''working period'' before which an application may not be pretermitted is needed.

Regarding applications that at first appear insufficient but are later bolstered through additional information, the Departments again emphasize that the rule provides the alien with the opportunity to respond to either the DHS motion or the judge's notice regarding pretermission. The Departments expect that such a response would be used to provide additional information, which the immigration judge would consider prior to making any final determination regarding pretermission. Moreover, in both *Matter of Fefe* and *Matter of Mogharrabi,* there was no question about whether the alien had stated a prima facie claim. In the former, the immigration judge raised doubts over the alien's credibility—not over the legal basis of the claim—that were not resolved because the alien did not testify. In the latter, the Departments see no indication that the alien could not have stated a prima facie claim.

Finally, an immigration judge may only pretermit an application that is legally deficient. Thus, the gathering of additional facts that do not bear on the legal cognizability of the claim—for example, gathering the specific names of every speaker at a political rally—is not required by the rule to avoid pretermission.

Comment: Commenters also criticized the 10-day notice period, claiming it is ''unreasonably short,'' especially considering the COVID–19 pandemic.

Response: The 10-day period is consistent with current EOIR practice, where it has worked well. *See* EOIR, *Immigration Court Practice Manual* at D–1 (July 2, 2020), *https://www.justice.gov/eoir/page/file/1258536/download.* The Departments disagree that the current COVID–19 situation affects the reasonableness of the 10-day deadline as filings can be submitted by mail and, in some locations, online. *See* EOIR, *Welcome to the EOIR Courts & Appeals System (ECAS) Information Page, https://www.justice.gov/eoir/ECAS.* Further, if an immigration court location is unexpectedly closed on the day of the deadline, the deadline is extended until the immigration court reopens. *See* EOIR, *PM 20–07: Case Management and Docketing Practices,* 2 n.1 (Jan. 31, 2020), *https://www.justice.gov/eoir/page/file/1242501/download.* Moreover, many non-detained hearings continue to be postponed due to COVID–19 rendering deadlines largely malleable until hearings resume.

Comment: Commenters alleged that the rule would result in a higher rate of pretermission for unrepresented individuals because these applicants would be unfamiliar with the ''magic language'' needed to survive a motion to pretermit. As a result, commenters claimed that the rule violates the Fifth and Sixth Amendments, and concurrently violates section 240(b)(4)(A) and (B) of the Act, 8 U.S.C. 1229a(b)(4)(A) and (B).[33]

Response: Commenters are incorrect that the rule violates an alien's right to counsel under section 240(b)(4)(A) of the Act, 8 U.S.C. 1229a(b)(4)(A), and the Sixth Amendment. First, section 240(b)(4)(A) of the Act, 8 U.S.C. 1229a(b)(4)(A), provides that aliens ''shall have the privilege of being represented, at no expense to the government, by counsel of the alien's choosing who is authorized to practice in such proceedings.'' No provision of this rule would limit an alien's ability to obtain representation as provided by the INA. Second, the Sixth Amendment right to counsel does not apply in immigration proceedings, which are civil, not criminal, proceedings. *See, e.g., Tawadrus* v. *Ashcroft,* 364 F.3d 1099, 1103 (9th Cir. 2004).[34]

Commenters are similarly incorrect that the rule violates the equal protection component of the Fifth Amendment's Due Process Clause because unrepresented aliens will be more likely to have asylum applications pretermitted than similarly situated represented aliens. First, commenters' concerns that the rule will have a disparate impact are speculative. Second, similar procedures in other civil proceedings—such as the summary decision procedures of 28 CFR 68.38 or summary judgment under the Federal Rules of Civil Procedure—do not violate the Fifth Amendment. Third, even if the commenters were correct that the rule has a discriminatory impact, the Departments find it would not violate the Fifth Amendment's equal protection guarantee because the rule does not involve a suspect classification or burden any fundamental right. *See Heller* v. *Doe,* 509 U.S. 312, 319 (1993) (holding that ''a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity'').

Allowing the pretermission of applications would enhance judicial efficiency by no longer requiring a full hearing for applications that are legally deficient on their face. There continue to be record numbers of both pending cases before EOIR[35] and asylum applications[36] filed annually. Accordingly, the Departments seek to most efficiently allocate EOIR's limited adjudicatory capacity in order to decide cases in a timely manner, including granting relief to aliens with meritorious cases as soon as possible. Accordingly, there is at least a rational basis for allowing pretermission of asylum applications in this manner. *Cf. DeSousa* v. *Reno,* 190 F.3d 175, 184 (3d Cir. 1995) (''[D]isparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. . . . Under this minimal standard of review, a classification is accorded 'a strong presumption of validity' and the government has no obligation to produce evidence to sustain its rationality.'' (internal citations omitted)).

Comment: Commenters also alleged that the pretermission of asylum applications is incompatible with federally established pleading standards

immutability and particularity requirements are not necessarily factbound—though they may be in discrete cases—and the failure of an alien to make a prima facie showing that a proposed particular social group consists of a characteristic that is immutable (or fundamental) or is defined with particularity may warrant pretermission of the claim in appropriate cases.

[33] Commenters did not provide further explanation regarding how the rule allegedly violates section 240(b)(4)(B) of the Act (8 U.S.C. 1229a(b)(4)(B)), which provides that: The alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter. This rule does not affect any procedures that relate to aliens' rights under this provision of the INA, and, accordingly, the Departments need not respond further to this point.

[34] Although the Sixth Amendment's right to counsel does not apply in immigration proceedings, some courts have held that a constitutional right to counsel in immigration proceedings applies as part of the Fifth Amendment's due process clause. *See, e.g., Arrey* v. *Barr,* 916 F.3d 1149, 1157 (9th Cir. 2019) (''Both Congress and our court have recognized the right to retained counsel as being among the rights that due process guarantees to petitioners in immigration proceedings.''). Nevertheless, neither the proposed rule nor this final rule violates such a right to counsel as the rule does not amend any procedures related to an alien's right to obtain counsel of his or her choosing at no government expense.

[35] EOIR, *Adjudication Statistics: Pending Cases* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1242166/download* (1,122,697 pending cases as of the second quarter of FY2020)

[36] EOIR, *Adjudication Statistics: Total Asylum Applications* (Apr. 15, 2020), *https://www.justice.gov/eoir/page/file/1106366/download* (120,495 asylum applications filed as of the second quarter of FY2020).

and ''would be an abrupt change from decades of precedent and practice before the immigration court.'' Commenters provided a hypothetical chain of events to illustrate this alleged violation of pleading standards and cited to *Braden* v. *Wal-Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir. 2009) (citing *Ashcroft* v. *Iqbal,* 556 U.S. 662, 678 (2009) and *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 554, 556 (2007)).

Response: The Federal Rules of Civil Procedure do not apply in immigration court. *See* Fed. R. Civ. P. 81 (setting out the applicability of the rules); *see also* 8 CFR part 1003, subpart C (setting out the immigration court rules of procedure). Accordingly, commenters' reliance on cases that interpret Rule 8(a) of the Federal Rules of Civil Procedure are not applicable to immigration court. Moreover, the commenters' comparisons to a pleading standard are inaccurate as the decision to pretermit an application is akin to a summary judgment decision, not a pleading determination. *Cf.* F.R. Civ. P. 56 (''The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.''). In order to ensure the immigration judge has as much information as possible about the underlying claim, the rule ensures the applicant has the opportunity to respond to the possible pretermission of his or her application, either as a response to a DHS motion to pretermit or a response to the immigration judge's notice of possible pretermission.

Comment: Commenters contended that the rule, in combination with the Immigration Court Performance Metrics, incentivizes immigration judges to pretermit asylum applications in order to fulfill case completion requirements.

Response: The Departments strongly disagree with the commenters' underlying premise, namely that immigration judges are unethical or unprofessional and decide cases based on factors other than the law and the facts of the cases. Immigration judges exercise ''independent judgment and discretion'' in deciding cases, 8 CFR 1003.10, and are expected to ''observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities,'' EOIR, *Ethics and Professionalism Guide for Immigration Judges* at 1 (2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.* Further, it is well-established that ''[t]he administrative process is entitled to a presumption of regularity,'' *Int'l Long Term Care, Inc.* v. *Shalala,* 947 F. Supp. 15, 21 (D.D.C. 1996), and commenters provide no evidence for the bald assertion that immigration judges will ignore applicable law and the evidence in each case simply in order to pretermit the case. *See also United States* v. *Chemical Found.,* 272 U.S. 1, 14–15 (1926) (''The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.''). To the contrary, in FY 2019, the first full FY after immigration judge performance measures went into effect, not only did most non-supervisory immigration judges working the full year meet the case completion measure without any difficulty, *see* EOIR, *Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019, https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019,* but complaints of immigration judge misconduct actually declined slightly from the prior FY, *see* EOIR, *Adjudication Statistics: Immigration Judge Complaints, https://www.justice.gov/eoir/page/file/1104851/download,* even though the total number of immigration judges increased 12 percent, *see* EOIR, *Adjudication Statistics: Immigration Judge Hiring, https://www.justice.gov/eoir/page/file/1242156/download.*

Allowing pretermission of Form I–589 applications that do not establish a prima facie claim for relief or protection under the law provides immigration judges with a mechanism to improve court efficiency by clarifying that there need not be a full merits hearing on those cases that present no legal questions for review, allowing them to devote more time to cases in which facts are at issue. There is no basis for the assumption that the rule would inappropriately incentivize immigration judges to pretermit applications solely to fulfill case-completion goals. As noted, *supra,* some immigration judges already pretermit legally deficient applications, and the Departments are unaware of any link between that action and performance metrics; in fact, immigration judges have pretermitted legally deficient asylum applications since at least 2012, *Matter of E–F–H–L–,* 26 I&N Dec. 319 (BIA 2014), which was several years before performance measures were implemented.

Moreover, assuming, *arguendo,* there were such an incentive, it would be counter-balanced by the performance measure for an immigration judge's remand rate. In other words, an immigration judge who improperly pretermitted applications in violation of the law solely in order to complete more cases would have those cases remanded by the Board on appeal which, in turn, would cause the immigration judge's remand rate to exceed the level set by the performance measures. In short, there is no legal, factual, or logical reason to believe that codifying an immigration judge's authority to pretermit legally deficient applications and the existence of immigration judge performance evaluations will incentivize immigration judges to violate the law in their decision making.

Comment: Commenters emphasized that asylum applications are governed by the law at the time of adjudication rather than the time of filing and expressed concern that the pretermission of applications for lack of a prima facie showing of eligibility forces immigration judges and asylum officers to become ''soothsayers.''

Response: Allowing immigration judges to pretermit and deny applications that do not present a prima facie claim for relief or protection does not conflict with this point. If the judge determines that pretermission is appropriate, that decision would be based on the law and regulations in place at that point, and the decision to pretermit is the adjudication of the application.

Comment: Commenters questioned the effect the rule will have on the asylum clock, especially if a decision affecting eligibility is abrogated by a higher court after an application was filed and pretermitted; one commenter expressed concern that the rule does not specify ''when in the process DHS or the judge can move.'' One commenter emphasized that ''[a]ny final rule which is eventually published should consider how the asylum clock will operate, and should provide clear instructions which attorneys and their clients can rely on.''

Response: The Departments note that USCIS recently published a final rule, Asylum Application, Interview, and Employment Authorization for Applicants, that eliminates the asylum clock.[37] However that rule is currently the subject of ongoing litigation and portions of the rule are subject to a preliminary injunction, as applied to two plaintiff organizations.[38] Regardless, as stated in the proposed rule, an immigration judge who

[37] 85 FR 38532, 39547.

[38] *Casa de Maryland* v. *Wolf,* No. 8:20–cv–02118–PX, 2020 WL 5500165, (D. Md. Sept. 11, 2020) (order granting preliminary injunction).

determines that an asylum application that fails to demonstrate prima facie eligibility for relief or protection under applicable law may ''pretermit and deny'' such application. *See* 8 CFR 1208.13(e). Accordingly, a decision to pretermit and deny would have the same asylum clock effects as any other denial of an asylum application by the immigration judge.

Comment: Commenters alleged that the rule would greatly decrease efficiency in the asylum process, as the number of cases in which a hearing is denied would ''skyrocket'' and the majority of these respondents would appeal to the BIA. Commenters noted the BIA's current backlog and the increased delay in issuing briefing schedules and decisions.

Response: Allowing immigration judges to pretermit and deny asylum applications that do not demonstrate a prima facie claim for relief or protection will increase, not decrease, efficiencies for DOJ. Commenters' predictions of how many cases will be pretermitted under these changes are speculation, as the Departments do not have data on the underlying bases for denials currently, which would be required to accurately predict how many might be pretermitted in the future. Moreover, as fewer than 20 percent of asylum applications are granted even with a full hearing, *see* EOIR, *Asylum Decision Rates, https://www.justice.gov/eoir/page/file/1248491/download,* and many of the ones not granted are appealed already, there is likely to be little operational impact on the BIA.[39] In contrast, pretermitting legally deficient claims will improve efficiency for immigration courts by allowing immigration judges to screen out cases that do not demonstrate prima facie eligibility and, thus, allowing potentially meritorious applications to progress more expeditiously to individual hearings.

Comment: One commenter noted that there are particular signatures on the asylum application which can only be signed by the applicant at the final hearing and claimed that pretermission is ''non-sensical'' because the application will not yet be complete.

Response: The Departments disagree with commenters' concerns that asylum applications may not be pretermitted because a signature is required by the applicant at the final hearing. The Departments believe that the commenters are referring to the signature in Part G of the Form I–589, which is most often signed by the alien at the beginning of the merits hearing on the alien's asylum application and in which the alien swears that the application's contents are true and acknowledges the consequences of submitting a frivolous application. Accordingly, the signature in Part G of the Form I–589 is related to a possible frivolousness finding and the attendant consequences.

Moreover, for the purposes of determining whether to pretermit an application, whether or not the immigration judge has had the applicant sign in Part G, the applicant signs in Part D at the time the application is completed. The signature in Part D is the alien's certification under penalty of perjury that the application and any evidence submitted with it are ''true and correct,'' in addition to another notice of the consequences of filing a frivolous application and other activities. Given the alien's signature in Part D that the application is ''true and correct,'' the Departments believe that the application is sufficient for the purposes of possible pretermission even without a signature in Part G.

Comment: Commenters stated that allowing pretermission will inevitably violate the confidentiality obligations for asylum applicants, speculating that the immigration judge, alien, and DHS counsel will engage in inappropriate conversations regarding the specifics of an asylum application in front of other people during master calendar hearings.

Response: With few exceptions, most immigration hearings are open to the public. 8 CFR 1003.27. Regulations further note that ''[e]videntiary hearings on applications for asylum or withholding of removal will be open to the public unless the alien expressly requests that the hearing be closed.'' 8 CFR 1240.11(c)(3)(i). A master calendar hearing is not an evidentiary hearing. *See Immigration Court Practice Manual,* ch. 4.15(a), *https://www.justice.gov/eoir/page/file/1258536/download* (''Master calendar hearings are held for pleadings, scheduling, and other similar matters.''). Further, an evidentiary hearing is designed to ''resolve factual matters in dispute,'' 8 CFR 1204.11(c)(3), which would necessarily exclude such a hearing from the ambit of pretermission. Accordingly, there is no reason that the specifics of an asylum application would be discussed at a master calendar hearing, and even if they were, an immigration judge may close the courtroom as appropriate to protect the parties. 8 CFR 1003.27(b).

Comment: Commenters noted that the Departments are required to comply with Executive Orders 12866 and 13653, which together direct agencies to evaluate the costs and benefits of alternative methods and to select the approach that maximizes net benefits. Commenters contended that the rule is ''wholly unconcerned'' with calculating the costs and benefits of the pretermission of asylum applications or reducing costs to Federal government agencies.

In particular, commenters expressed concern about costs of the rule possibly eliminating what the commenters referred to as the current, more flexible ''redlining'' procedure in favor of pretermission. The commenters explained that ''redlining'' allows the alien to update and edit the asylum application after it is filed ''up until the point of decision.''

Commenters disagreed that the rule will create efficiencies, arguing instead that the rule will ''increase administrative burden, expense, and processing time by effectively creating two distinct opportunities for appeals to the BIA, including: (1) Appeal from the IJ's decision to pretermit; and (2) appeal on the merits after the IJ's decision to pretermit is overturned.''

Response: The Office of Information and Regulatory Affairs, in conducting its review of the proposed rule, concluded that the Departments complied with Executive Orders 12866 and 13653, as set out in section V.D of the proposed rule. 85 FR at 36289–90. The Departments' consideration included all provisions of the proposed rule, including the changes to 8 CFR 1208.13 regarding pretermission of applications.

Further, as stated above, the Departments emphasize that allowing pretermission of applications will increase efficiencies by allowing immigration judges to complete the adjudication of certain legally insufficient asylum applications earlier in the process, which in turn leaves additional in-court adjudication time available for those applications that may be meritorious. This change would not prevent aliens from amending or updating applications that are pending a decision by the immigration judge, including a decision on pretermission. In addition, the Departments dispute the commenters' assumption that immigration judge decisions to pretermit an application will be overturned. Immigration judges apply the immigration laws and would only pretermit applications that fail to demonstrate a prima facie case for eligibility for relief—in other words, that the application could be sufficient to establish eligibility for relief. Applications that are facially deficient

[39] The Departments note that DOJ has also recently taken steps to improve adjudicatory efficiency at the BIA. *See* EOIR, *Case Processing at the Board of Immigration Appeals* (Oct. 1, 2019), *https://www.justice.gov/eoir/page/file/1206316/download.*

in this manner would not comply with the applicable law and regulations, and, as such, the Departments would not expect such decisions to be overturned on appeal.

4. Standards for Consideration During Review of an Application for Asylum or for Statutory Withholding of Removal [40]

4.1. Membership in a Particular Social Group

Comment: One organization noted generally that the rule denies asylum to individuals fleeing violence and persecution. Commenters noted that the inclusion of ''particular social group'' in the statute was designed to create flexibility in the refugee definition so as to capture individuals who do not fall within the other characteristics enumerated in section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), and to ensure that the United States provides protection in accordance with its treaty obligations. Commenters argued that the rule's narrowing of particular social group has been rejected by the Federal courts as contrary to congressional intent to align U.S. refugee law with the Convention relating to the Status of Refugees and its 1967 Protocol. *See Flynn* v. *Sec'y of Health, Ed. & Welfare,* 344 F. Supp. 94, 96 (E.D. Wis. 1972). Another organization stated that, by denying the most common grounds of particular social group membership, the rule ''abridges U.S. obligations under the Refugee Convention . . . which affords asylum seekers the opportunity to explain why they fit into a protected group.'' The organization also claimed that the rule breaches the United States' commitment to nonrefoulement, noting that the United States has committed itself to this principle as a party to the Refugee Protocol, the CAT, and customary international law. Commenters emphasized a quote from the UNHCR stating that ''[t]he term membership of a particular social group should be read in an evolutionary manner.''

Another organization noted that while the phrase ''particular social group'' in the Refugee Convention does not apply to every person facing persecution, the Convention requires only that a social group not be ''defined exclusively by the fact that it is targeted for persecution.'' According to the Convention, ''the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.'' As a result, the organization contended that the Convention allows particular social groups that do not exist independently of the persecution.

The organization claimed the NPRM takes the opposite approach, defining ''circular'' not only as particular social groups exclusively defined by persecution but also as those that do not exist independently of the persecution claim. The organization noted that, in doing so, the NPRM seeks to adopt the circularity analysis in *Matter of A–B–,* 27 I&N Dec. 316, which treats any group partially defined by the persecution of its members as circular. The organization alleged that this interpretation of circularity is a ''dramatic departure'' from longstanding precedent, noting that the courts of appeals have held that a particular social group is not circular unless it is defined ''entirely'' by persecution. The organization claimed that the Departments do not acknowledge or justify this ''departure,'' which makes the rule arbitrary. The organization also claimed that the Federal appellate cases cited in the rule have the same effect. In addition, the organization emphasized that the BIA has long accepted particular social groups with references to the persecution bringing asylum seekers to the United States.

One organization claimed the rule's requirement that the cognizable group must exist independently from the persecution abrogates the following specific particular social groups already recognized by circuit courts: Former gang members, *Arrazabal* v. *Lynch,* 822 F.3d 961 (7th Cir. 2016); former members of the Kenyan Mungiki, *Gatimi* v. *Holder,* 578 F.3d 611 (7th Cir. 2009); defected KGB agents, *Koudriachova* v. *Gonzales,* 490 F.3d 255 (2d Cir. 2007); young Albanian women targeted for prostitution, *Cece* v. *Holder,* 733 F.3d 662 (7th Cir. 2013) (en banc); former child guerilla soldiers in Uganda, *Lukwago* v. *Ashcroft,* 329 F.3d 157 (3d Cir. 2003); individuals targeted by Pakistani terrorist groups, *Rehman* v. *Att'y Gen. of U.S.,* 178 F. App'x 126 (3d Cir. 2006), and the Taliban, *Khattak* v. *Holder,* 704 F.3d 197 (1st Cir. 2013); and Ghanaians returning from the United States, *Turkson* v. *Holder,* 667 F.3d 523 (4th Cir. 2012).

Another organization claimed that, under international guidelines, the ''common characteristic'' and ''socially visible'' elements of a particular social group are meant to be ''disjunctive,'' requiring proof of either one or the other. The organization also alleged that the ''particularity'' requirement is unfounded, noting that, according to UNHCR, the size of the group is irrelevant in determining whether a particular social group exists.

Similarly, one organization noted that the rule would require a particular social group to be ''defined with particularity'' and ''recognized as socially distinct in the society at question,'' claiming that the NPRM fails to provide any reason for codifying these standards. The organization alleged that the particularity and social distinction requirements ''cut across'' each other, noting the BIA's interpretation that an asylum seeker ''identify a group that is broad enough that the society as a whole recognizes it, but not so broad that it fails particularity'' and claiming that this has caused the BIA to essentially end asylum grants based on particular social groups that have not been previously approved.

Multiple commenters called the rule ''unwise and discriminatory.'' Commenters alleged that the rule is designed to prevent individuals from Central America from receiving asylum and claimed that the rule evidences the Departments' intent to prevent ''whole classes of persons'' from claiming asylum based simply on ''the macro-level characteristics of their country of origin.'' One organization representing DHS employees criticized the Departments for creating a rule based on the belief that asylum seekers are engaging in ''gamesmanship'' within the United States legal system, a premise, the organization claimed, that is ''contrary to our experiences as adjudicators.'' The organization stated that several of the social groups ''slated for dismissal'' in the rule ''encompass a wide cross-section of potentially successful asylum claims.'' The organization also alleged that the rule creates a ''rebuttable presumption'' that asylum claims based on any of the ''broadly enumerated particular social groups'' are insufficient unless ''more'' is provided, but claimed the rule fails to define what is actually needed for a successful claim.

Another organization alleged that the NPRM's proposal would violate due process, claiming that the private interest at stake—preventing the violence or torture that would occur due to refoulement—is ''the most weighty interest conceivable.'' The organization contended that the government's countervailing interest is ''nonexistent'' due to the NPRM's silence, also alleging that ''working with pro se asylum seekers'' imposes a minimal burden on the government.

[40] As an initial matter, the Departments note that commenters' discussion on these points often referred solely to asylum claims. Where relevant, however, the Departments have also considered the comments in regards to statutory withholding of removal.

One organization claimed that the adjudication of asylum applications has become ''increasingly politicized'' over the past three years through the Attorney General's self-certification of cases. The commenter noted that the Attorney General has issued nine decisions in the past three years that restrict eligibility of relief for noncitizens (with four additional self-certified decisions pending), while only four precedential decisions were issued during the eight years of the previous administration. The organization stated that, rather than clarifying existing definitions, the rule ''virtually eliminates particular social group as a basis for asylum.''

One organization emphasized that if the Departments choose to codify the prerequisites to particular social groups as stated in the rule, they must ''consider all reasonable alternatives presented to'' them. Multiple organizations suggested the Departments adopt the *Matter of Acosta* standard for the analysis of particular social group claims, meaning that ''particular social group'' should be interpreted consistently with the other four protected characteristics laid out in the INA. 19 I&N Dec. 211, 233 (BIA 1985), *abrogated in part on other grounds by Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987). One organization emphasized that this definition is simple, straightforward, and could be understood by pro se asylum seekers.

Another organization alleged that the Departments failed to consider adopting the UNHCR definition of particular social group, which includes both immutability and the basic requirement that the group ''be perceived as a group by society.'' The organization contended that this standard, like the *Matter of Acosta* definition, is reasonable, emphasizing that it remains ''significantly closer to the other grounds for asylum in the INA'' than the Departments' proposal.

One organization expressed concern that the rule would codify the ''restrictive definition'' of particular social group announced in *Matter of M–E–V–G–,* 26 I&N Dec. 227, 237 (BIA 2014), noting that the rule shortens the definition set forth in *Matter of Acosta.* The organization also contended that the rule misconstrues the concept of particular social group by inserting unrelated legal issues into the definition, which the organization believes would lead to greater confusion for all parties involved. The organization emphasized that each particular social group claim should be evaluated on a ''case-by-case basis'' instead of being subjected to general rules that would result in ''blanket denials.'' Another organization stated that the Attorney General's own decision in *Matter of A–B–,* 27 I&N Dec. 316, is based on the necessity of a ''detailed, case-specific analysis of asylum claims'' and highlights the BIA's previous errors in ''assessing the cognizability of a social group without proper legal analysis.'' One organization asserted that the rule appears to codify the wrongly-decided *Matter of W–Y–C– & H–O–B–,* 27 I&N Dec. 189 (BIA 2018), and ''takes those restrictions even further.''

Another organization emphasized that the circuit courts have disagreed on ''at least a portion'' of the definition of particular social group. One organization noted that elements of the rule's proposed definition have met an ''uneven fate'' in the courts of appeals, with many courts finding at least one of the provisions inconsistent with the statutory text. Another organization contended that the circuit courts cannot be ''overruled'' by either this rule or ''the Attorney General's attempt to devise a new definition of 'particular social group' that intends to cut off certain claims'' that have been previously recognized by the circuit courts and the BIA. One organization noted that, while the NPRM states in its first footnote that agencies have the authority to re-interpret ambiguous statutory phrases, it fails to explain how the definitions at issue arise from an ambiguous term. Another organization claimed that until the Supreme Court resolves the disagreements surrounding the particular social group definition, the Departments have no authority to ''overrule'' the circuit courts' interpretation of this term.

Another organization alleged that the rule would ''carve out'' a laundry list of particular social groups toward which the administration has shown ''pervasive, unlawful hostility'' without any effort to ground these exceptions in the Departments' statutory authority, claiming this is a violation of the Administrative Procedure Act (''APA''). One organization contended that ''[t]he use of such brazen ipse dixit without more renders each entry on the list arbitrary,'' also claiming that this impedes the Departments' goal of consistency. The organization claimed the Departments failed to consider whether their ''laundry list'' of generally-barred particular social groups would result in the erroneous denial of meritorious claims.

Commenters claimed that one of the ''most unfair'' aspects of the rule is that it would require asylum seekers to state every element of a particular social group with exactness before the immigration judge. Commenters expressed particular concern with the portion of the rule stating that a failure to define a formulation of a particular social group before a judge constitutes a waiver of any such claim under the Act, including on appeal. One organization noted that this portion of the rule would disproportionately impact unrepresented asylum seekers, particularly those subjected to MPP, and would ''forever punish asylum seekers who were the victims of ineffective assistance of counsel.''

Another organization alleged that the combination of performance goals and interminable dockets will result in ''the demise of due process in Immigration Court for pro se litigants.'' The organization noted the importance of the ''motions practice'' in a legal system that is committed to due process, emphasizing the long-standing practice of allowing motions to reopen in the context of ineffective assistance of counsel. Another organization stated that, over the past five years, between 15 percent and 24 percent of all asylum seekers have been unrepresented by counsel, emphasizing that these individuals do not have training in United States asylum law, often speak little to no English, and are unfamiliar with the intricate rules surrounding particular social groups. One organization expressed specific concern for refugees. Another organization claimed that the rule provides no reasoning for its ''expansion of the punitive effect of waiver to encompass ineffective assistance claims,'' claiming this is against public policy and is also arbitrary and capricious; at least one other organization emphasized this point as well.

One organization expressed particular concern for members of the LGBTQ community, emphasizing that, due to the nature of the ''coming out and transitioning process,'' the formulation of a particular social group may change over time, also noting that a refugee may not know right away that he or she is HIV positive. The organization claimed that the rule, ''disregards the reality of LGBTQ lives'' and will cause LGBTQ asylum seekers to be sent back to danger merely because they were unable to ''come up with the right verbiage to describe the complicated process of coming out and transitioning.'' The organization claimed this issue is exacerbated by the fact that many of these individuals are unrepresented and do not speak English. Another organization noted that the INA requires exceptions to the one-year filing

deadline for ''changed and extraordinary circumstances,'' INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), emphasizing that this is particularly important for this category of asylum seekers.

One organization claimed the rule would make it especially difficult for African asylum seekers to qualify for asylum based on particular social group membership. The organization also expressed concern for women survivors of female genital cutting (''FGC''), alleging that these individuals would not know to include this fact as part of a gender-based particular social group claim. The organization claimed it would be ''a miscarriage of justice'' to preclude these women from presenting claims.

One organization alleged that the rule would make it ''almost impossible'' for children, particularly those from Central America or Mexico, to obtain asylum protection based on membership in a particular social group. The organization alleged that the rule's barring of a particular social group claim that was not initially raised in the asylum application (or in the ''record'' before an immigration judge) raises ''serious due process concerns'' for children, as many of the children arriving in the United States have suffered immense trauma and may not be able to discuss their experiences for quite some time. The organization expressed particular concern for unaccompanied children, noting they are often unable to discuss the harm they experienced in their home country until they have spent time with a trusted adult. The organization noted that, for many children, the asylum process is the first time they ever discuss their experiences, claiming the rule ''is unrealistic and an untenable burden for most children.''

Commenters also stated that an asylum seeker's life should not depend on his or her ''ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements.'' One organization stated that ''[a]pplying for asylum is not a word game; asylum seekers' lives are on the line with every application that an adjudicator decides.'' Multiple commenters claimed that asylum officers and immigration judges have a duty to help develop the record. One organization stated that the Departments should rely on the decisions of EOIR and Article III courts rather than on the expertise of asylum seekers. Finally, one organization expressed concern that this portion of the rule contains no exceptions for minors or individuals who are mentally ill or otherwise incompetent, stating that holding these respondents to this kind of legal standard violates their rights under the Rehabilitation Act. *See* 29 U.S.C. 794; *see also Franco-Gonzales* v. *Holder,* 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

Response: The Departments disagree with general comments that the rule would deny asylum to all individuals fleeing violence and persecution. The Departments note that asylum protection is not available to every applicant who is fleeing difficult or dangerous conditions in his or her home country. To qualify for asylum, an applicant must demonstrate, among other things, that the feared persecution would be inflicted ''on account of'' a protected ground, such as membership in a particular social group. *See* INA 101(a)(42), 8 U.S.C. 1101(a)(42) (defining ''refugee'' as a person who, inter alia, has suffered ''persecution or a well-founded fear of persecution on account of . . . membership in a particular social group''). Even accepting that the term ''particular social group'' was intended to create flexibility in the refugee definition, the contours of that flexible term are clearly ambiguous and within the purview of the Departments to decide. *See, e.g., Matter of A–B–,* 27 I&N Dec. at 326 (''As the Board and the Federal courts have repeatedly recognized, the phrase 'membership in a particular social group' is ambiguous.'' (collecting cases)). Accordingly, the Departments are establishing clear guidelines for adjudicators and parties regarding the parameters of particular-social-group claims. The Departments believe that such guidelines will promote a more uniform approach towards adjudicating such claims. This will not only aid adjudicators in applying a more uniform standard, but will also aid parties such that they may have a clearer understanding of how they may prevail on a particular social group claim as they develop their applications.

The Departments disagree that the proposed changes to particular-social-group claims violate the Act, case law, or the due process rights of immigrants. As noted in the NPRM, Congress has not defined the term ''membership in a particular social group.'' *See* 85 FR at 36278; *see also Grace II,* 965 F.3d at 888 (''The INA nowhere defines 'particular social group.' '').[41] Additionally, despite commenters' contentions that the Convention Relating to the Status of Refugees (''Refugee Convention''), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, or the related Refugee Protocol offers guidance on the matter, the term is not defined in either of those instruments. 85 FR at 36278; *see also Matter of A–B–,* 27 I&N Dec. at 326, n.5 (''The Protocol offers little insight into the definition of 'particular social group,' which was added to the Protocol 'as an afterthought.' '') (quoting *Matter of Acosta,* 19 I&N Dec. at 232)).

The Board has noted that the term ''particular social group'' is both ambiguous and difficult to define. *Matter of M–E–V–G–,* 26 I&N Dec. at 230 (''The phrase 'membership in a particular social group,' which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define.''). Moreover, the Board has also recognized that prior approaches to defining the term have led to confusion and inconsistency, warranting further evaluation. As the Board stated in *M–E–V–G–:*

> Now, close to three decades after *Acosta,* claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. . . . In *Matter of R–A–,* 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that ''the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.''

Id. at 231 (footnote omitted). Consequently, the inherently case-by-case nature of assessing the cognizability of a particular social group, the lack of a clear definition of the term and its consideration through an open-ended and largely subjective

[41] One commenter questioned the accuracy of the Departments' citation to and characterization of *Grace II's* underlying case, *Grace I,* 344 F. Supp. 3d at 146, because, according to the commenter, the case stated that the Attorney General could ''not propose a general rule that a particular social group will not qualify for asylum'' and did ''not reach the question of whether the Attorney General could propose a general rule that a particular group does qualify for asylum.'' Irrespective of the commenter's characterization of the Departments' citation, the D.C. Circuit recently reversed the district court regarding its statements that the agency action contested in that litigation improperly established a categorical bar against recognizing a specified particular social group. *Grace II,* 965 F.3d at 906. Specifically, the court determined that the Departments' use of the term ''generally'' demonstrated that the Departments had not imposed a categorical rule against finding the particular social group at issue in that litigation. *Id.* Similarly, the Departments here have set forth a list of particular social groups that ''generally, without more'' will not be cognizable, but have specifically recognized that the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279.

lens by adjudicators, and the potential for confusion and inconsistent application—particularly with conflicting circuit court interpretations of similar groups—all make the definition of a particular social group ripe for rulemaking. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)).

Furthermore, courts have also expressly held that the term is ambiguous. *See, e.g., Cordoba* v. *Holder,* 726 F.3d 1106, 1114 (9th Cir. 2013) (''We have recognized that the phrase 'particular social group' is ambiguous.''); *Fatin,* 12 F.3d at 1238 (''Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.' Thus, the statutory language standing alone is not very instructive.'').[42]

As noted in the NPRM, ambiguities in the Act should ''be resolved, first and foremost, by the agency.'' 85 FR at 36265 (quoting *Matter of R–A–,* 24 I&N Dec. at 631 (quoting *Brand X,* 545 U.S. at 982 (internal quotation and citations omitted)). Further, the Supreme Court has clearly indicated that administrative agencies, rather than circuit courts, are the most appropriate entities to make determinations about asylum eligibility in the first instance. The Supreme Court, in *INS* v. *Ventura,* 537 U.S. 12 (2002), noted:

> Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. . . . In such circumstances a judicial judgment cannot be made to do service for an administrative judgment. . . . Nor can an appellate court . . . intrude upon the domain which Congress has exclusively entrusted to an administrative agency. . . . A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Id. at 16 (cleaned up)); *cf. Gonzales* v. *Thomas,* 547 U.S. 183, 185–87 (2006) (applying *Ventura* to require a remand from the circuit court to the agency to determine a question of the meaning of ''particular social group). ''Indeed, 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations.'' *Scialabba* v. *Cuellar de Osorio,* 573 U.S. 41, 56–57 (2014) (plurality op.) (quoting *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999)). Accordingly, the Departments are acting within their well-established authority to define the term ''particular social group.''

Furthermore, the Departments' regulations regarding the adjudication of claims pertaining to ''membership in a particular social group'' are reasonable interpretations of the term, as evidenced by a long history of agency and circuit court decisions to have interpreted the terms consistently with the Departments' guidelines. *See Matter of W–G–R–,* 26 I&N Dec. 208, 222–23 (BIA 2014) (pertaining to past or present criminal activity or associations)*; Cantarero* v. *Holder,* 734 F.3d 82, 86 (1st Cir. 2013) (same); *Gonzalez* v. *U.S. Att'y Gen.,* 820 F.3d 399, 405 (11th Cir. 2016) (same); *Matter of A–B–,* 27 I&N Dec. at 320 (pertaining to presence in a country with generalized violence or a high crime rate and private criminal acts of which governmental authorities were unaware or uninvolved)*; Matter of S–E–G–,* 24 I&N Dec. 579, 585–86 (BIA 2008) (pertaining to attempted recruitment of the applicant by criminal, terrorist, or persecutory groups); *Matter of E–A–G–,* 24 I&N Dec. 591, 594–95 (BIA 2008) (same); *Matter of A–M–E– & J–G–U–,* 24 I&N, Dec. 69, 75 (BIA 2007) (same); *Matter of Pierre,* 15 I&N Dec. 461, 462–63 (BIA 1975) (pertaining to interpersonal disputes of which governmental authorities were unaware or uninvolved); *Gonzalez-Posadas* v. *Att'y Gen. of U.S.,* 781 F.3d 677, 685 (3d Cir. 2015) (same); *Gonzales-Veliz* v. *Barr,* 938 F.3d 219, 230–31 (5th Cir. 2019) (pertaining to private criminal acts of which governmental authorities were unaware or uninvolved); *Delgado-Ortiz* v. *Holder,* 600 F.3d 1148, 1151–52 (9th Cir. 2010) (''We conclude that Petitioners' proposed social group, 'returning Mexicans from the United States,' . . . is too broad to qualify as a cognizable social group.''); *Sam* v. *Holder,* 752 F.3d 97, 100 (1st Cir. 2014) (Guatemalans returning after a lengthy residence in the United States is not a cognizable particular social group).

The Departments agree with commenters that circuit court interpretations of the phrase ''particular social group'' have been uneven, and the inconsistency with which that phrase has been evaluated strongly militates in favor of the agencies adopting a clearer, more uniform definition. Further, the Departments have considered all relevant circuit court law on the issue and note that significant conflicts exist among the various interpretations. *See, e.g., Paloka* v. *Holder,* 762 F.3d 191, 197 (2d Cir. 2014) (highlighting conflicting circuit court decisions regarding whether young Albanian women are a particular social group and collecting cases showing differing circuit court decisions regarding cognizability of other particular social groups). Nevertheless, the Departments believe that the rule reflects an appropriate and reasonable synthesis of legal principles consistent with the Departments' respective policy positions. Additionally, as noted in the NPRM, 85 FR at 36265 n.1, to the extent that some circuits have disagreed with the Departments' reasonable interpretation, the Departments' proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X,* 545 U.S. at 982; *cf. Ventura,* 537 U.S. at 16–17 (within broad limits, the INA entrusts agencies, not circuit courts, to make basic asylum eligibility determinations).

The Departments disagree with commenters' assertions that the rule would render it ''virtually impossible'' to prevail on asylums claim involving membership in a particular social group or undermine the concept of ''case-by-case'' adjudication of particular-social-group claims, as described in *Matter of A–B–,* 27 I&N Dec. 316. Assuming the formulation of the proposed particular social group would, if supported, meet the definition of such a group in the first instance—*i.e.,* assuming the proposed particular social group sets forth a prima facie case that the group is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct—the rule does not alter an adjudicator's responsibility to determine whether the facts and evidence of each individual case ultimately establish that the proposed particular social group is cognizable. Thus, whether a proposed group has—*see, e.g., Matter of Toboso-Alfonso,* 20

[42] One commenter also suggests that the Departments cited *Cordoba,* 726 F.3d 1106, with a ''glaring omission.'' The commenter suggests that *Cordoba* acknowledges that the term ''particular social group'' is ambiguous, but asserts that the Departments fail to recognize that the case goes on to ''clear up that ambiguity.'' The Departments need not delve further into this analysis, which is refutable for various reasons, other than to state that the case plainly supports the proposition that the term ''particular social group'' is ambiguous and that such ambiguities are left to the Departments to clarify pursuant to agency authority. *Chevron,* 467 U.S. at 845 (''Once [the court] determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the [agency's] view that it is appropriate in the context of this particular program is a reasonable one.'').

I&N Dec. 819, 822 (BIA 1990) (designated as precedent by Attorney General Order No. 1895–94 (June 12, 1994)) (homosexuals in Cuba may be a particular social group)—or has not—*see, e.g., Matter of Vigil,* 19 I&N Dec. 572, 575 (BIA 1988) (young, male, urban, unenlisted Salvadorans do not constitute a particular social group)—been recognized in other cases is not dispositive of whether the proposed particular social group in an individual case is cognizable. *See S.E.R.L.* v. *Att'y Gen.,* 894 F.3d 535, 556 (3d Cir. 2018) (''Consequently, it does not follow that because the BIA has accepted that one society recognizes a particular group as distinct that all societies must be seen as recognizing such a group.''). Adjudicators should not assume that a particular social group that has been found cognizable in one case is cognizable in every other case in which it is asserted or is cognizable in perpetuity, nor should they assume the opposite. *Id.* Rather, if the proposed particular social group would be legally cognizable if sufficiently supported by evidence, adjudicators should continue to adjudicate particular social group claims on a case-by-case basis.

Further, as the Departments have specified, while the listed groups would be ''generally insufficient to establish a particular social group'' because they do not meet the definition of such a group, the Departments do not entirely foreclose the possibility of establishing an asylum claim on those bases. Rather, the rule simply lists social groups that, ''without more,'' generally will not meet the particularity and social distinction requirements for particular social group. 85 FR at 36279.

Such general guidelines are an appropriate use of agency authority that comports with the Attorney General's decision in *Matter of A–B–. Cf.* 8 CFR 208.4(a)(4),(5), 1208.4(a)(4), (5) (providing general categories of circumstances that may qualify as changed circumstances or extraordinary circumstances for purposes of INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D)); 8 CFR 212.7(d), 1212.7(d) (''The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act . . . with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances[.]''); *Matter of Y–L–,* 23 I&N Dec. at 274–76 (establishing a general presumption that aggravated felony drug trafficking crimes are ''particularly serious crimes'' for purposes of INA 241(b)(3)(B), 8 U.S.C. 1231(b)(3)(B)). The Departments are providing clarity on this issue through rulemaking, rather than through other forms of sub-regulatory guidance or through the development of case law in individual adjudications, in order to promote much needed uniformity and clarity on the particular-social-group issue. *See also* Memorandum from Jefferson B. Sessions, III, Attorney General, re: *Prohibition on Improper Guidance Documents* 1 (Nov. 16, 2017), *https://www.justice.gov/opa/press-release/file/1012271/download* (in contrast with issuing informal ''guidance documents,'' ''notice-and-comment rulemaking . . . has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decision making''). The Department applies the same response to address commenters' concerns with respect to the ''broad wording'' of the groups that the rule describes as generally not cognizable for asylum claims.

The Departments also disagree with commenters that the rule is unwise or discriminatory, or that the purpose of this rule is to exclude certain groups of applicants or target individuals from Central America and Mexico. As stated above, the rule is not ''immoral,'' motivated by racial animus or promulgated with discriminatory intent. Rather, it is rooted in case law from the BIA, multiple circuits, and the Supreme Court, none of which have evinced a racial or discriminatory animus. Further, the rule is intended to help the Departments better allocate limited resources in order to more expeditiously adjudicate meritorious asylum, statutory withholding of removal, and CAT protection claims. Relatedly, with respect to commenters' concerns about this rule's potential effect on certain, discrete groups—*e.g.,* LGBTQ individuals, minors, and other specific nationalities—the Departments note that they have codified a long-standing test for determining cognizability of particular social groups and have set forth a list of common fact patterns involving particular-social-group claims that generally will not meet those well-established requirements. The Departments did not first determine which groups should or should not be cognizable and craft a rule around that determination, and the rule does not single out any discretely-labeled groups in the manner suggested by commenters. Moreover, as the rule makes clear, it applies ''in general'' and does not categorically rule out specific claims depending on the claim's evidentiary support. Further, because each asylum application is adjudicated based on its own facts and evidentiary support and because the rule does not categorically rule out specific claims, commenters' concerns about the effects of the rule on broad, undifferentiated categories without reference to specific claims are conclusory, conjectural, unfounded, and wholly and inherently speculative.

With respect to commenters' claims that the social groups that would be dismissed under the rule would historically encompass a large number of potentially successful asylum claims, the Departments reiterate that they are setting forth, by regulation, a reasonable interpretation of the statutory term ''particular social group'' that will ameliorate stressors upon the healthy functioning of our immigration system and encourage uniformity of adjudications. Even assuming, without deciding, that there are other, broader interpretations of the term ''particular social group'' that might encompass a larger number of asylum applicants, the relevant inquiry is not whether the Departments' interpretation is the preferred interpretation or even the best interpretation. Rather the relevant inquiry is whether the Departments' interpretation is reasonable. *See Chevron,* 467 U.S. at 845; *see also Holder* v. *Martinez Gutierrez,* 566 U.S. 583, 591 (2012) (observing that the agency's ''position prevails if it is a reasonable construction of the [INA], whether or not it is the only possible interpretation or even the one a court might think best''). The regulations indeed set forth a reasonable interpretation of the term ''particular social group,'' for the reasons described above. The Departments also note again that the rule will not categorically exclude the listed groups, rather it issues guidance that such groups will ''generally'' not meet the requirements of a cognizable particular social group ''without more.''

Relatedly, commenters' statements that the rule would result in denial of meritorious claims are circular. A claim is meritorious if it meets all of the statutory requirements for asylum, including, where appropriate, the ambiguous statutory requirement of demonstrating ''membership in a particular social group.'' The Departments note the commenters' position that the term should be defined more broadly than what the Departments proposed, and, to be sure, a broader definition would result in more groups being recognized as cognizable. However, for the reasons explained in the NPRM, 85 FR at

36277–79, and throughout this rulemaking, the Departments have set forth a reasonable definition of the term as part of their well-established authority to do so. To the extent that applicants are unable to meet the statutory requirements, including ''membership in a particular social group'' as that term is reasonably defined by the Departments, their claims are not meritorious.

The Departments believe that commenter assertions that parties will need to prove that they do not belong in or are distinct from a listed particular social group misconstrue the particular social group analysis. People may, and are likely to, belong to multiple groups, which might or might not include cognizable particular social groups. An applicant need not prove that he or she does not belong to a non-cognizable group, only that he or she belongs to a cognizable group and was persecuted on account of that membership. Membership in a non-cognizable group does not negate one's membership in a cognizable group. Thus, an asylum applicant who has membership in one of the listed groups, which will generally not be cognizable without more, does not preclude an applicant from prevailing on a separate cognizable claim.

The Departments disagree with commenter assertions that the rule impermissibly creates a negative presumption against cognizability of the listed groups. As an initial point, the listed groups, as discussed in the NPRM, 85 FR at 36279, are generally rooted in case law, and commenters neither allege that the circuit court case law underlying the listing of these groups establishes a ''negative presumption'' against groups that have not been recognized in that case law, nor urge the Departments to abandon their longstanding policy to treat circuit court case law as binding—including decisions regarding the cognizability of alleged particular social groups—in the circuit in which it arises. Thus, to the extent that commenters disagree with the Departments' codification of existing case law, that disagreement lies with the case law itself. Additionally, in the Departments' experience, many advocates treat the recognition of a particular social group—either by the Board or a circuit court—as establishing a positive presumption, if not a categorical rule, that the group is cognizable in every case, yet commenters expressed no concern with that type of presumption. *Cf. S.E.R.L.,* 894 F.3d at 556 (''S.E.R.L. relies heavily on [*Matter of A–R–C–G–*], in which the Board considered a group consisting of married female victims of domestic violence.''); *Amezcua-Preciado* v. *U.S. Att'y Gen.,* 943 F.3d 1337, 1344 (11th Cir. 2019) (discussing similar proposed particular social groups across multiple circuits that closely tracked the group recognized by the BIA in *Matter of A–R–C–G–*); *Del Carmen Amaya-De Sicaran* v. *Barr,*—F.3d—, 2020 WL 6373124 (4th Cir. 2020) (noting decisions from other circuits addressing similar proposed particular social groups that closely tracked the group recognized by the BIA in *Matter of A–R–C–G–*). As the Departments discussed, *supra,* the rule does not depart from longstanding principles regarding the case-by-case nature of asylum adjudications. Thus, adjudicators do not apply a positive presumption that a particular social group that has been found cognizable in one case is cognizable in every other case in which it is asserted or is cognizable in perpetuity, nor do they apply a categorical negative presumption that a group listed in the rule is always and in every case not cognizable. Nothing in the rule creates categorical presumptions, either positive or negative.

It is always the applicant's burden to demonstrate that he or she belongs to a cognizable particular social group and must set forth the facts and evidence to establish that claim, regardless of whether or not the proposed group is described in this rule. INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B). This rulemaking highlights common proposed groups that generally, without more, will not meet an applicant's burden to demonstrate membership in a ''particular social group,'' and the burden remains on the applicant, as it always has, to demonstrate that he or she is a member of a cognizable particular social group. *Id.* This rulemaking puts applicants on notice that such groups, generally, without more, will not be cognizable. To the extent that an applicant believes that his or her membership in one of the listed groups should nevertheless be recognized, he or she may present his or her claim stating why the proposed group is cognizable and, as appropriate, appeal it to the BIA and a Federal circuit court.

The commenters' statements about the Attorney General's authority to certify cases and issue precedential decisions relate to powers delegated to the Attorney General by Congress that have existed for decades and are far outside of the scope of this rulemaking. INA 103(a)(1), (g), 8 U.S.C. 1103(a)(1), (g); 8 CFR 1003.1(h). All decisions in the immigration system are made in accordance with the evidence and applicable law and policy. In particular, EOIR's mission remains the same—to adjudicate cases in a fair, expeditious, and uniform manner. *See* EOIR, About the Office, *https://www.justice.gov/eoir/about-office* (last updated Aug. 14, 2018); *see also* 8 CFR 1003.1(d)(1)(ii) (''Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board[.]''); 8 CFR 1003.1(e)(8)(ii) (''[T]he Director shall exercise delegated authority from the Attorney General identical to that of the Board[.]''); 8 CFR 1003.10(b) (''immigration judges shall exercise their independent judgment and discretion'').

The Departments decline to incorporate the commenter recommendation to codify either the *Matter of Acosta* standard for particular social group, which required only that a group be immutable, or the alleged UNHCR standard, which commenters stated requires immutability and that the group ''be perceived as a group by society'' in lieu of the *Matter of M–E–V–G–* standard, which requires immutability, particularity, and social distinction. To do so would be to shirk decades of development in particular social group claims in favor of a standard set forth shortly after enactment of the Refugee Act of 1980, when ''relatively few particular social group claims had been presented'' to immigration adjudicators, and which ''led to confusion and a lack of consistency'' in subsequent years as adjudicators struggled with ''numerous and varied'' proposed groups. *See Matter of M–E–V–G–,* 26 I&N Dec. at 231. Moreover, ''immutability, while important, has never been the last or only word on the definition of a social group,'' because ''[m]any social groups are labile in nature.'' *Ahmed* v. *Ashcroft,* 348 F.3d 611, 617 (7th Cir. 2003). Further, notwithstanding the commenter's statement that the *M–E–V–G–* standard is confusing, the Departments note that the nearly all of the circuits have applied the *M–E–V–G–* test and the Third and Ninth Circuits have expressly accorded *Chevron* deference to that framework. *See, e.g., S.E.R.L.,* 894 F.3d at 554 n.20 (collecting cases). As the commenter notes, the Seventh Circuit has neither rejected nor endorsed the framework.

Relatedly, the Departments will not incorporate commenter suggestions to expand the regulatory language with respect to the requirement of

immutability to include characteristics that are ''so fundamental to individual identity or conscience that it ought not be required to be changed[,]'' as stated in *Matter of Acosta.* 19 I&N Dec. at 233. Contrary to the commenter's assertion, the Departments clearly noted in the NPRM that this rulemaking codifies the ''longstanding requirements'' of immutability, particularity, and social distinction, recognizing that ''[i]mmutability entails a common characteristic: A trait that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'' 85 FR at 36278 (internal quotations omitted) (citing *Matter of Acosta,* 19 I&N Dec. at 233). Accordingly, the Departments believe that this language adequately addresses the commenter concerns without further expanding the definition in the regulatory language.

The Departments disagree with commenters' concerns that the rule's requirement that the particular social group must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm is arbitrary. 85 FR at 36278. This codifies the Attorney General's analysis for determining whether a social group has been defined ''circularly,'' as laid out in *Matter of A–B–,* 27 I&N Dec. at 334 (''To be cognizable, a particular social group must 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal.''); *see generally Matter of M–E–V–G–,* 26 I&N Dec. at 243 (''The act of persecution by the government may be the catalyst that causes the society to distinguish [a collection of individuals] in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.''). In response to commenters' assertions that the Convention allows for particular social groups that do not exist independently of the persecution, and that this rule reflects a ''departure'' from the current particular-social-group adjudication, the Departments reiterate that ''[t]he 'independent existence' formulation'' has existed for some time and ''has been accepted by many courts.'' 85 FR at 36278; *see, e.g., Perez-Rabanales* v. *Sessions,* 881 F.3d 61, 67 (1st Cir. 2018) (''A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began.''); *Lukwago,* 329 F.3d at 172 (''We agree that under the statute a 'particular social group' must exist *COM007*independently of the persecution suffered by the applicant for asylum.''); *accord Amaya-De Sicaran,* 2020 WL 6373124 at *5 (''The proposition that a cognizable particular social group cannot be defined by the underlying persecution is hardly controversial. The anti-circularity principle—and the *Chevron* deference to which it is entitled—has won wide acceptance among the circuit courts . . . . Even prior to the Attorney General's decision, we have applied the anti-circularity principle . . . . And a broader examination of caselaw pre-*Matter of A–B–* confirms that this is no new proposition.'').

In recent litigation, asylum seekers did ''not challenge *A–B–*'s description of the circularity rule'' and, the court determined, *A–B–*'s test sets forth ''exactly the analysis required to determine whether a particular claim is or is not circular.'' *Grace II,* 965 F.3d at 905. For courts that have rejected this ''independent existence'' requirement, *see, e.g., Cece,* 733 F.3d at 671–72, both subsequent decisions recognizing the requirement, *see, e.g., Matter of A–B–,* 27 I&N Dec. 316, and *Matter of M–E–V–G–,* 26 I&N Dec. 227, and the Departments' proposed rule codifying it would warrant re-evaluation under well-established principles, *see Brand X,* 545 U.S. at 982; *see also Amaya-De Sicaran,* 2020 WL 6373124 at *5 (''The Attorney General's [anti-circularity formulation] in *Matter of A–B–* is not arbitrary and capricious.'').

The Departments disagree with commenters' concerns about due process violations with respect to the rule's requirement that, while in proceedings before an immigration judge, an applicant must ''first define the proposed particular social group as part of the asylum application or otherwise in the record'' or ''waive any claim based on a particular social group formulation that was not advanced.'' To the extent that this requirement allegedly ''goes further than'' *Matter of W–Y–C–& H–O–B–,* 27 I&N Dec. 189, as the commenter alleges, this requirement is merely a codification of the longstanding principle that arguments not made in front of an immigration judge are deemed waived for purposes of further review. *See, e.g., In re J–Y–C–,* 24 I&N Dec. 260, 261 n.1 (BIA 2007) (claim not raised below is not appropriate to consider on appeal).

Contrary to commenters' concerns, the rule does not violate notions of fairness or due process.[43] Nothing in the rule eliminates an alien's right to notice and an opportunity to be heard, which are the foundational principles of due process. *See Matthews* v. *Eldridge,* 424 U.S. 319, 348–49 (1976) (''The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'' (cleaned up)). Aliens remains subject to specified procedures regarding claims of a fear of return to an alien's country of nationality, including the ability to have a claim reviewed or heard by an immigration judge. Moreover, the fact that applicable law may limit the types of claims an alien may bring—*e.g.,* an asylum claim based on a fear of persecution unrelated to one of the five statutory grounds in INA 101(a)(42), 8 U.S.C. 1101(a)(42)—or the ability of an alien to bring an asylum or statutory withholding claim at all—*e.g.,* an alien convicted of an aggravated felony for which the alien was sentenced to an aggregate term of imprisonment of at least five years, INA 208(b)(2)(A)(ii), (B)(i) and 241(b)(3)(B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(i) and 1231(b)(3)(B)(ii)—does not mean that an alien has been deprived of due process. As explained in the NPRM and reiterated herein, this rule is rooted in well-established law and does not violate an alien's due process right regarding an application for relief or protection from removal.

Some commenters objected to the procedural requirement that an alien must initially define the proposed particular social group as either part of the record or with the application. The INA directs the Attorney General to establish procedures for the consideration of asylum applications, INA 208(d)(1), 8 U.S.C. 1158(d)(1), and regulations already require both an

[43] Asylum is a discretionary benefit demonstrated by the text of the statute that states the Departments ''*may* grant asylum,'' INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (emphasis added); *Dep't of Homeland Sec.* v. *Thuraissigiam,* 140 S. Ct. 1959, 1965 n.4 (2020) (''A grant of asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.''), and provides authority to the Attorney General and Secretary of Homeland Security to limit and condition, by regulation, asylum eligibility under INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). Courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 49–50). In other words, ''there is no constitutional right to asylum per se.'' *Mudric* v. *Att'y Gen. of U.S.,* 469 F.3d 94, 98 (3d Cir. 2006). Thus, how the Departments choose to exercise their authority to limit or condition asylum eligibility and an adjudicator's consideration of an applicant's conduct in relation to asylum eligibility do not implicate due process claims.

application for an alien to seek asylum, 8 CFR 208.3(a) and 1208.3(a), and that the application be completed in full to be filed, *id.* 208.3(c)(3) and 1208.3(c)(3). To the extent that some commenters' concerns regarded the exactness with which an alien must define the particular social group, the Departments note that most asylum applicants, 87 percent, have representation, EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download,* and that aliens, if of limited English proficiency, are able to avail themselves of the resources provided to them by the government that detail pro bono or low cost alternatives.

One commenter worried that an alien would have to ''expertly craft arguments in the English language in a way that satisfies highly technical legal requirements.'' The Department disagrees that this is what the regulations require. As an initial point, nothing in the rule requires an alien to craft arguments when applying for asylum. Aliens, with or without representation, have filled out asylum applications for decades, including by stating particular social groups as a basis for the asylum claim. Commenters have not submitted any evidence or alleged any change in an alien's ability to complete the application over the preceding 40 years, and the Departments are unaware of any reasons or allegations that aliens are now less capable of filling out an application—including stating a particular social group, if appropriate—that has been used for years. An alien simply has to state in the application why the alien is afraid. As noted in the NPRM, the specific form of the delineation will not be considered over and above the substance of the alleged particular social group. Further, if there are deficiencies, the alien will be provided an opportunity to correct them. Nothing in the rule requires aliens to ''craft arguments'' meeting ''highly technical legal requirements,'' and commenters' suggestions to the contrary are simply not consistent with either the rule and the longstanding practice.

One commenter indicated that it was the asylum officer's or immigration judge's duty to assist in developing the record, citing section 240(b)(1) of the Act, 8 U.S.C. 1229a(b)(1); *Jacinto,* 208 F.3d at 734 (an immigration judge has the duty to fully develop the record where a respondent appears pro se); and *Agyeman* v. *INS,* 296 F.3d 871, 877 (9th Cir. 2002) (an immigration judge must adequately explain the procedures to the respondent, including what he must prove to prevail at the hearing). Even accepting the immigration judge's duty as described by the cited case law, this is not in conflict with the rule, as the rule clearly explains by regulation what an applicant must do to demonstrate a cognizable particular social group, a concept which was previously articulated in disparate BIA decisions that have been interpreted differently by the various circuits. Additionally, even if, as stated in *Jacinto,* an immigration judge has a duty to fully develop the record, this does not obviate the applicant's burden of demonstrating at least prima facie eligibility for the relief which he or she is seeking prior to proceeding to a more intensive hearing.

Regarding commenters' concerns focused on the ability for aliens to seek redress after an improper particular social group was presented based on ineffective assistance of counsel, the Departments note that the rule is consistent with both practice and applicable law. If a particular social group is not presented because the alien did not tell his or her counsel about it, then there has been no ineffective assistance on the part of counsel. If the alien did provide his or her counsel with a particular social group and counsel elected not to present it as a strategic choice, then there is no basis to reopen the proceedings. *See In re B–B–,* 22 I&N Dec. 309, 310 (BIA 1998) (''subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen''); *cf. Matter of Velasquez,* 19 I&N Dec. 377, 382 (BIA 1986) (concession of attorney is binding on an alien absent egregious circumstances). Nevertheless, the Departments recognize there may be unique ''egregious circumstances'' in which reopening based on ineffective assistance of counsel may be warranted, provided that the appropriate procedural requirements for such a claim are observed. *See Matter of Lozada,* 19 I&N Dec. 637, 639 (BIA 1988). Thus, the Departments are revising the final rule to account for such a scenario, though they expect such claims to be rare.

The Departments disagree with the commenters' fairness concerns with respect to the rule's requirement that applicants define the proposed particular social group as part of the asylum claim. As an initial point, asylum applicants have provided definitions of alleged particular social groups in asylum applications for many years, and there is no evidence of any recent change that would preclude them from doing so. The commenters' concerns may be based on an inaccurate belief that the rule requires legal precision of a particular social group, but as discussed above, that is simply not the case. Adjudicators are experienced with addressing the substance rather than the form of a claim, and articulation deficiencies will have an opportunity for correction before an immigration judge renders a decision.

The Departments also acknowledge commenters' concerns about the ''ever changing landscape'' of particular-social-group law and the due process concerns associated with that. The ''ever-changing landscape'' is, in fact, a principal animating factor behind this rulemaking, as the Departments believe the rule will function as a ''hard reset'' on the divergent—and sometimes contradictory—case law regarding particular social groups over the past several years in lieu of clearer guidelines that are both reasonable and easier for adjudicators and applicants alike to follow. In particular, the current state of case law may make it confusing for applicants to appreciate what is or is not a cognizable group, and the rule directly addresses that concern by providing clear definitions that should allow for more effective consideration of meritorious claims. In short, providing clearer guidance should reduce due process concerns, rather than increase them.

Similarly, the Departments disagree that this rulemaking will be harmful to pro se respondents. Although there are comparatively few pro se asylum applicants as an initial matter, EOIR, *Current Representation Rates* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1062991/download,* the Departments believe that this regulation will provide clarity to all respondents, including those who are pro se. That clarity will also allow immigration judges to better consider pro se claims and ensure that the record is developed appropriately consistent with the law.

The Departments believe that this clarity will also assist immigration judges in their adjudications, contrary to commenters' assertions. The Departments also disagree with commenters' statements that reducing the amount of time that adjudicators must spend evaluating claims is an improper purpose for the rule. The Departments contest allegations that they may not take regulatory action to help improve efficiencies with immigration adjudications. Regardless, as noted in the NPRM, reducing the amount of time that adjudicators must spend evaluating claims and more uniform application of the law are two additional benefits to ''providing clarity to [the particular social group] issue.'' 85 FR at 36279.

The Departments note commenter concerns that the rule does not create a regulatory requirement for immigration judges to clarify the particular social group for the record and instead allows for immigration judges to pretermit without holding an evidentiary hearing. The Departments note that the asylum application itself, which the applicant must sign attesting to the application's accuracy, and in which the applicant has had the opportunity to list his or her particular social group, is already part of the record without any further need for the immigration judge to clarify. Because the burden is always on the asylum applicant to establish eligibility, INA 208(b)(1)(B), 8 U.S.C. 1158(b)(1)(B), and because the immigration judge must remain a neutral arbiter of the claim, EOIR, *Ethics and Professionalism Guide for Immigration Judges* 2 (Jan. 26, 2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf* (''An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.''), it would not be appropriate for the immigration judge to assist the alien in crafting his or her claim. Nevertheless, immigration judges are experienced and well-trained adjudicators who are adept at understanding the substance of a claim even if it is not perfectly articulated. Moreover, an alien will have 10 days to respond to any attempt to pretermit an application as legally insufficient, and there is no expectation that immigration judges will fail to follow the rule's requirements on that issue. In short, the Departments do not expect immigration judges to abdicate their duties to the law in considering an applicant's asylum claim.

The Departments disagree with commenters' concerns that the rule, in their estimation, violates the Rehabilitation Act of 1973, 29 U.S.C. 794, because it does not provide exceptions for minors, mentally ill persons, or individuals otherwise lacking competency.[44] The Departments note that no alien is excluded from applying for asylum—nor excluded from participating in processes to adjudicate such an application—on account of a disability. Further, all applicants for asylum are adjudicated under the same body of law, regardless of any particular individual characteristics, and nothing in the rule changes that. The Departments are unaware of any law requiring all asylum claims from minors, mentally ill persons, or incompetent aliens to be granted or establishing a categorical rule that each of those groups, regardless of any other characteristics, necessarily states a cognizable particular social group. The Departments are also unaware of any blanket exceptions to statutory eligibility for asylum for these identified groups. The rule does not change any established law regarding minors, *e.g.,* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), or those who lack mental competency, *e.g., Matter of M–A–M–,* 25 I&N Dec. at 480, 481–83 (holding that immigration judges should ''consider indicia of incompetency throughout the course of proceedings'' and implement appropriate safeguards, where necessary). In short, the rule provides clarity for asylum claims relevant to all aliens and does not alter any existing accommodations generally made for the identified groups. Further, because each asylum application is adjudicated based on its own facts and evidentiary support and because the rule does not categorically rule out specific claims, commenters' concerns about the effects of the rule on broad, undifferentiated categories without reference to specific claims are conclusory, conjectural, unfounded, and wholly and inherently speculative.

4.1.1. Past or Present Criminal Activity or Association (Including Gang Membership)

Comment: One organization noted that at least one court has recognized asylum claims from former child soldiers forced to commit bad acts, citing *Lukwago,* 329 F.3d at 178–180. The organization also stated that the United States has enacted the Child Soldiers Accountability Act, Public Law 110–340, imposing criminal and immigration penalties for those who use child soldiers. *See* 18 U.S.C. 2442. The organization emphasized that children recruited into other types of criminal acts, like gang activity, ''are not materially different from the children who fight on the front lines of conflicts in other parts of the world.'' The organization concluded by encouraging the government to extend its opposition to the use of child soldiers to ''a willingness to protect children fleeing from all types of forced criminal activity.''

Another organization emphasized that past activity is an immutable characteristic that ''cannot be undone,'' noting that an individual's personal biographical history cannot be changed. The organization noted that if a gang maintains that a child forcibly recruited is a member for life, the child would be regarded as a traitor for trying to leave the gang at a later time and would have a reasonable basis to fear for his or her life.

One organization alleged that the rule would change the law ''without explanation or justification'' by overturning the decisions of multiple Federal courts of appeals. The organization specifically referenced *Urbina-Mejia* v. *Holder,* 597 F.3d 360 (6th Cir. 2010) and *Benitez Ramos* v. *Holder,* 589 F.3d 426 (7th Cir. 2009). The organization claimed this would be contrary to the stated goal of the ''laundry list,'' which is legal consistency. *See* 85 FR at 36278. The organization also contended that the rule would be contrary to the intent behind the asylum bars, which preclude asylum based on a range of criminal conduct but ''pointedly'' do not preclude relief on account of previous gang membership. INA 208(b)(2)(A)–(B), 8 U.S.C. 1158(b)(2)(A)–(B). The organization also claimed the rule is contrary to congressional intent, claiming it makes no attempt to explain ''why the statutory bars'' on particular former persecutors ''should be extended by administrative interpretation to former members of gangs.'' *Benitez Ramos,* 589 F.3d at 430.

Response: The Departments note that the case cited by the commenter, *Lukwago,* 329 F.3d 157, which the commenter alleges recognized the likelihood of a cognizable particular social group involving former child soldiers, was published in 2003, well before the now-codified test for cognizability had been developed in *Matter of S–E–G–,* 24 I&N Dec. at 585–86 and *Matter of E–A–G–,* 24 I&N Dec. at 594–95. *See Matter of M–E–V–G–,* 26 I&N Dec. at 236–37 & n.11. Accordingly, this decision does not lend support to the commenter's claim. The Departments further note, however, that the court in *Lukwago* acknowledged that ''given the ambiguity of the [term ''particular social group''], [the court's] role is limited to reviewing the BIA's interpretation, using *Chevron* deference to determine if it is a ''permissible construction of the statute.'' *Lukwago,* 329 F.3d at 171. Additionally, the Child Soldiers Accountability Act is unrelated to this rulemaking.

Although past activity is an immutable characteristic, immutability alone is not sufficient to establish a cognizable particular social group; particularity and social distinction are also required. *See Matter of S–E–G–,* 24 I&N Dec. at 585–86; *Matter of E–A–G–,*

[44] The Departments note that the Rehabilitation Act applies to individuals with disabilities, and the status of being a minor does not automatically qualify someone as an ''individual with a disability'' under the statutory definition of that term. 29 U.S.C. 705(2).

24 I&N Dec. at 594–95; *Matter of M–E–V–G–,* 26 I&N Dec. at 237.

The Departments disagree with commenters that the rule would undermine establishing legal consistency and uniformity in the immigration laws, as it should encourage such consistency across all circuits by providing much-needed guidance on an ambiguous term in the Act. In fact, the circuits are themselves split on the issue of whether former gang membership is cognizable as a particular social group. *Compare Martinez* v. *Holder,* 740 F.3d 902, 910–12 (4th Cir. 2014) (former member of a criminal street gang may be a particular social group) *and, Benitez-Ramos* v. *Holder,* 589 F.3d 426, 430–31 (7th Cir. 2009) (same), *with Gonzalez* v. *U.S. Att'y Gen.,* 820 F.3d 399, 405 (11th Cir. 2016) (agreeing with First Circuit that former gang members do not constitute a cognizable ''particular social group''); *Cantarero* v. *Holder,* 734 F.3d 82, 85–86 (1st Cir. 2013) (''The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger. . . . Such recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status.''); *and Arteaga* v. *Mukasey,* 511 F.3d 940, 945–46 (9th Cir. 2007) (''We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft.''). *See also* Cong. Research Serv., *Asylum and Gang Violence: Legal Overview* 20 (Sept. 5, 2014) (''Granting asylum to aliens based on their membership in groups made up of former gang members is more complicated in that several Federal courts of appeals have evidenced at least some willingness to view former gang members as a particular social group, while others have suggested that granting asylum to those who belong to organizations that have perpetrated acts of violence or other crimes in their home countries is contrary to the humanitarian purposes of asylum.''). To the extent that commenters assert that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X,* 545 U.S. at 982.

4.1.2. Presence in a Country With Generalized Violence or a High Crime Rate

Comment: One commenter objected generally to the fact that the rule excludes asylum seekers coming from ''a country with generalized violence or a high crime rate,'' as the commenter believes this to be irrelevant. The commenter stated that the restriction appears designed to target individuals from specific countries and runs contrary to the purpose of asylum. The commenter stated that ''[i]t is natural'' for people to flee countries with violence that the governments are unable to control. One organization claimed the restriction will have a prejudicial impact on asylum seekers from Central America. Another organization specifically referenced the high crime rate in many African countries, claiming that violence is ''rampant'' due to ''national security forces'' and ''copycat violators.'' Another commenter stated generally that ''[t]he choice for them was to be killed and/or raped or to risk the hardships of seeking asylum in the U.S.,'' alleging that the frequency of these types of abuses does not make it reasonable to exclude them from eligibility for asylum claims. One organization claimed the restriction would unfairly impact LBGTQ+ individuals who are ''disproportionately victimized'' by violent crime and gender-based violence.

One organization noted that it would be ''difficult if not impossible'' to meet the three-prong test found in *Matter of M–E–V–G–,* 26 I&N Dec. at 237, using a claim in which the particular social group is based on ''presence in a county with generalized violence or a high crime rate.'' However, the organization expressed concern that this restrictive language (which it claims is not directly related to the particular social group definition at issue) would likely cause adjudicators to deny asylum applications solely because the applicant came from a country with a high crime rate, even if the applicant were to articulate a particular social group unrelated to the crime rate.

One organization claimed the rule is contrary to established case law recognizing that presence in a country with generalized violence or a high crime rate is ''irrelevant'' to evaluating an asylum seeker's claim. The organization noted that the Fourth Circuit has explained in at least three published opinions that criminal activities of a gang affecting the population as a whole are ''beside the point'' in evaluating an asylum seeker's particular claim. *See Alvarez-Lagos* v. *Barr,* 927 F.3d 236, 251 (4th Cir. 2019); *Zavaleta-Policiano* v. *Sessions,* 873 F.3d 241, 248 (4th Cir. 2017); *Crespin-Valladares* v. *Holder,* 632 F.3d 117, 127 (4th Cir. 2011).

Another organization alleged that the ''social distinction'' requirement makes it nearly impossible to develop a cognizable particular social group that does not reference the asylum seeker's country of origin. As a result, the organization claimed the rule would ''upend'' section 208 of the Act, 8 U.S.C. 1158, by preventing individuals fleeing ''the most violent countries in the world'' from receiving asylum or withholding of removal. The organization also contended that the ''generalized violence'' category is arbitrary to the extent it attempts to codify the statement in *Matter of A–B–* that particular claims are unlikely to satisfy the statutory grounds for demonstrating government inability or unwillingness to control the persecutors. *Matter of A–B–,* 27 I&N Dec. at 320. The organization claimed that attempting to codify that statement conflates two distinct elements of the asylum test, as the question of whether the government can control persecutors is distinct from whether a particular social group is cognizable. The organization also alleged that the Departments do not acknowledge or justify this conflation.

Response: The Departments acknowledge commenters' points that generalized violence may be a driving force behind many people fleeing their home countries. Although the suffering caused by such conditions is regrettable, the Departments note that asylum was never intended to protect individuals from generalized violence; instead, it was designed to protect those from violence perpetrated upon them on the basis of a protected ground, as well as other qualifying requirements. *See Harmon* v. *Holder,* 758 F.3d 728, 735 (6th Cir. 2014) (''General conditions of rampant violence alone are insufficient to establish eligibility.'').

Although circuit courts may not have been clear whether asylum claims based on fear of generalized violence or high crime rates are not cognizable on particular social group grounds or on nexus grounds (or on both grounds),[45] *see, e.g., Melgar de Torres* v. *Reno,* 191 F.3d 307, 314 (2d Cir. 1999) (''The increase in general crime that has been documented in the record does not

[45] Although the Departments have placed this category under the definition of ''particular social group,'' it may also be appropriately considered under the definition of ''nexus'' as well, as the lists under both definitions are nonexhaustive.

lend support to an asylum claim since a well-founded fear of persecution must be on account of an enumerated ground set forth in the Act, and general crime conditions are not a stated ground.''); *Umana-Ramos* v. *Holder,* 724 F3d 667, 670 (6th Cir. 2013) (''General conditions of rampant gang violence alone are insufficient to support a claim for asylum.''), they have been consistent that such fears are not a cognizable basis for asylum, even, contrary to one commenter, in the Fourth Circuit. *See, e.g., D.M.* v. *Holder,* 396 F. App'x 12, 14 (4th Cir. 2010) (''As found by the Board, the Petitioners have failed to show that they are at a greater risk of being victims of violent acts at the hands of criminal gangs than any other member of the general population in El Salvador. We have clearly held that a fear of general violence and unrest is inadequate to establish persecution on a protected ground.'').

The Departments believe that this rule—which establishes that particular-social-group claims grounded in an applicant's presence in a country with general violence or high crime rates, without more, will generally not be cognizable—is consistent with the Act, international law, and case law, particularly in connection to the definition of particular social group discussed, *supra,* which requires that the group exist independently of the alleged harm. Relatedly, commenters' allegations that the rule was crafted in response to the frequency of types of harm suffered are misguided. With respect to establishing a nexus to a protected ground, such as particular social group, it is not the frequency or severity of abuses that would render such claims insufficient, but rather the reasons for the abuse. Asylum is intended to protect individuals who have suffered abuses for a specific reason, on account of a protected ground. *Cf. Delgado-Ortiz,* 600 F.3d at 1151 (''Asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground.'').

The Departments further note that an alien coming from a country with generalized violence or high crime rates is not precluded from asylum on that basis alone; the rule merely establishes that a particular-social-group claim premised upon general violence or high crime rates will not, without more, prevail. To succeed on a particular-social-group claim, an applicant must demonstrate that he or she has been or will be targeted on the basis of immutable, particular, and socially distinct characteristics, and the Departments believe that groups defined by general violence or high crime rates generally do not meet this threshold.

The Departments do not disagree with commenters who suggested that it would be natural for individuals to flee countries where their governments could not control violence. Indeed there are myriad reasons that would encourage or compel an individual to leave his or her home country. However, a government's inability or unwillingness to control violence is but one factor for asylum eligibility with respect to claims of persecution by non-state actors. Applicants must meet all eligibility factors and merit a positive exercise of discretion to warrant relief.

The Departments agree with commenters who stated that it would be difficult for applicants whose particular social group is predicated upon general violence or high crime rates in the country of origin to demonstrate that their proposed group meets all three requirements of immutability, particularity, and social distinction. However, the Departments do not believe that a regulatory standard stating so would lead adjudicators to deny applications where the applicant has articulated a particular social group unrelated to the crime rate. Rather, the Departments believe that this rulemaking offers clear guidance to adjudicators and parties that such proposed groups, without more, will not be cognizable. *See* 85 FR at 36278 (''The proposed rule would further build on the BIA's standards and provide clearer guidance to adjudicators regarding whether an alleged group exists and, if so, whether it is cognizable as a particular social group in order to ensure the consistent consideration of asylum and statutory withholding claims.''). Furthermore, immigration judges and asylum officers undergo training in which they learn to adjudicate asylum claims, including the cognizability of particular social groups. The Departments are confident that adjudicators are aptly prepared, through training and experience, to adjudicate asylum claims without confusing the particular-social-group analysis with other facets of asylum eligibility requiring a separate analysis.

With respect to commenter statements that this rule is contrary to established case law which, the commenter stated, established that a country's generalized violence and high crime rates were ''irrelevant'' to the applicant's claim, the commenter appears to have conflated relevance for sufficiency. The Fourth Circuit, in the cited cases, determined that generalized violence or high crime rate did not undermine claims where the court determined there was sufficient evidence to establish a nexus to a protected ground. However, these cases do not endorse a position that claims rooted in generally violent conditions or high crime rates, without more, would be sufficient to warrant a grant of asylum. *See Alvarez-Lagos,* 927 F.3d at 251; *Zavaleta-Policiano,* 873 F.3d at 248; *Crespin-Valladares,* 632 F.3d at 127.

4.1.3. Being the Subject of a Recruitment Effort by Criminal, Terrorist, or Persecutory Groups

Comment: One organization noted that the rule narrows the definition of credible fear by ''eliminating claims to protection from fear of gangs or terrorists.'' Another organization claimed there is no support in the cases cited by the NPRM for making gang recruitment-related particular social groups generally non-cognizable, emphasizing that the NPRM does not provide any evidence as to why the courts should not continue to consider recruitment-based particular social groups on a case-by-case basis.

One organization noted that the U.S. government recognizes that children are often targets for gang recruitment and gang violence in their home countries. The organization expressed concern regarding the rule's presumption that ''attempted recruitment'' or ''private criminal acts'' are not sufficient for asylum, contending this ignores the reality that many child asylum seekers flee their home countries ''precisely because the government is unable or unwilling to control non-state actors like terrorist or gang organizations who would recruit or harm children and families.''

One organization noted that UNHCR has emphasized the importance of recognizing claims based on resistance to and desertion from non-state armed groups, explaining that gangs may try to harm individuals who have resisted gang activity, are opposed to gang practices, or attempt to desert a gang.

Response: The Departments disagree with the commenter's assertion that the rule eliminates any claims to protection. As stated above, the rule will not eliminate any particular-social-group claims. Rather, it sets forth a list of social group claims that will generally not be, without more, cognizable. This does not foreclose the possibility that an applicant could pursue or prevail on a claim in which they were the subject of a recruitment effort by a criminal, terrorist, or persecutory group. As noted by the NPRM, ''such facts could be the basis for finding a particular social group, given the fact- and society-specific nature of this determination.''

85 FR at 36279; *see also Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.''). However, as a general rule, such groups will not be cognizable, consistent with existing Attorney General and BIA precedent. *Matter of A–B–,* 27 I&N Dec. at 335 (''Victims of gang violence often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group''); *Matter of S–E–G–,* 24 I&N Dec. at 584 (''[Y]outh who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed. However, this does not necessarily mean that the shared past experience suffices to define a particular social group for asylum purposes.''); *Matter of E–A–G–,* 24 I&N Dec. at 594–95 (determining that ''persons resistant to gang membership'' is not cognizable); *see also Constanza* v. *Holder,* 647 F.3d 749, 754 (8th Cir. 2011); *see also Lizama* v. *Holder,* 629 F.3d 440, 447 (4th Cir. 2011); *Larios* v. *Holder,* 608 F.3d 105, 109 (1st Cir. 2010); *Lushaj* v. *Holder,* 380 F. App'x 41, 43 (2d Cir. 2010); *Barrios* v. *Holder,* 581 F.3d 849, 855 (9th Cir. 2009). The Departments do not dispute that children may be targets for gangs, gang recruitment, and gang violence in their countries of origin. However, whether such applicants for asylum have been harmed or fear harm from the gangs is only one part of the overall asylum inquiry. Even a further showing that the government is unwilling or unable to protect the applicant would not be enough to merit a grant of asylum without meeting the other eligibility requirements. As discussed above, an applicant must also demonstrate that the harm he or she suffered or fears is on account of protected ground, such as membership in a particular social group.

4.1.4. The Targeting of the Applicant for Criminal Activity for Financial Gain Based on Perceptions of Wealth or Affluence

Comment: Another organization claimed that history is full of examples of persecution of classes of people on the basis of perceived wealth or influence. The organization stated that, under the proposed rule, the members of the kulak class who were killed after the Russian Revolution or the many wealthy and middle class Cubans who fled the Cuban Revolution would not have been recognized as persecuted social groups.

Another organization contended that there is no legal basis or support in the NPRM for precluding courts from analyzing particular social groups involving wealth on a case-by-case basis. The organization referenced the BIA's decision in *Matter of A–M–E– & J–G–U–,* 24 I&N Dec. 69 (BIA 2007), *aff'd Ucelo-Gomez* v. *Mukasey,* 509 F.3d 70 (2d Cir. 2007) (cited at 85 FR at 36279), stating the fact that the BIA held thirteen years ago that ''affluent Guatemalans'' is not a cognizable particular social group ''does not even begin to support the NPRM's sweeping proposal to bar all PSGs that mention wealth.''

Response: As noted in the NPRM, a social group which is founded upon being targeted for criminal activity for financial gain or for perceptions of wealth or affluence are generally, without more, unable to meet the well-established requirements for cognizability. 85 FR at 36279; *see Matter of A–M–E– & J–G–U–,* 24 I&N Dec. at 75.

With respect to commenters who presented specific examples that they alleged illustrated persecution of classes of people on the basis of perceived wealth or influence, as well as comments suggesting that the Departments are doing away with individualized analysis, the Departments note again that there may exist examples of social groups based on wealth that are cognizable, and that the listed social groups have been identified as generally not cognizable, without more. However, ''the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.'').

4.1.5. Interpersonal Disputes of Which Governmental Authorities Were Unaware or Uninvolved

Comment: One organization noted that the rule would limit particular social groups based on both ''interpersonal disputes of which governmental authorities were unaware or uninvolved'' and ''private criminal acts of which governmental authorities were unaware or uninvolved.'' The organization emphasized that it is unlikely that a particular social group framed in this way would be cognizable; however, because the fact pattern is included in the rule as a ''limiting concept,'' the organization expressed concern that adjudicators would likely deny asylum based on this language, even though the rule specifies that it applies ''in the context of analyzing a particular social group.''

Another organization expressed concern that governments could attempt to remove U.S. or international sanctions by demonstrating that ''private actors'' were carrying out persecution against political dissidents and religious minorities. The organization noted that these governments could use propaganda to ''inflame local residents against a particular group,'' using the decimation of the Tutsis population in Rwanda as an example. According to the organization, governments could claim this was not a human rights violation because ''government soldiers themselves took no part in the attack.'' Another organization emphasized that violence is sometimes outside the state's reach, noting that violent activity can occur where weak governments use allied armed groups to provide security.

Response: As discussed above with respect to particular social groups defined by general violence or high crime rates, the Departments agree with commenters that it would be difficult to demonstrate that particular social groups defined by interpersonal disputes of which governmental authorities were unaware or uninvolved, without more, are cognizable. However, immigration judges and asylum officers undergo rigorous training on how to adjudicate asylum claims, including the cognizability of particular social groups. The Departments are confident that adjudicators are aptly prepared to adjudicate asylum claims without confusing the particular social group analysis with other facets of asylum eligibility requiring a separate analysis. The Departments fail to see how setting forth a social group that the commenter believes is unlikely to be presented is grounds for the commenter's objection to the rule.

The Departments do not address comments raising concerns about international sanctions or holding international governments accountable for alleged human rights violations, as the Departments' implementing statutes and regulations are unrelated to such matters, which are more properly handled by the Department of State.

Comments raising concerns about non-governmental violence that occurs ''outside the state's reach'' or in cases where ''weak governments use allied armed groups to provide security'' do not alter the Departments' determination that particular social

groups predicated upon interpersonal disputes of which governmental authorities were unaware or uninvolved, without more, are generally not cognizable. The commenter's statement about non-governmental violence that occurs ''outside the state's reach'' is not sufficiently specific for the Departments to draw any conclusion about its relevancy to such social groups. Although the Departments must be explicit that they are not endorsing the cognizability of such groups, the commenter's proposed scenario regarding weak governments using allied armed groups clearly would not involve governmental unawareness and is unlikely to involve personal disputes.[46]

4.1.6. Private Criminal Acts of Which Governmental Authorities Were Unaware or Uninvolved

Comment: One organization noted generally that the rule would remove protections for individuals fleeing violence from non-state actors. Another organization claimed that the rule's exclusion of acts ''of which governmental authorities are unaware or uninvolved'' disproportionately affects the ability of children to seek asylum. The organization noted that the ability of many children to access state protection in their home country is dependent upon the adults in their lives, emphasizing that not all children have an adult to help them obtain protection. The organization also noted that some children who go directly to government officials for protection may be dismissed. One organization noted generally that it has ''long been determined'' that the government does not actually need to be aware of the threats and that there is no requirement to report the persecution to the government if doing so ''would be futile or place the applicant at greater risk of harm,'' citing *Bringas-Rodriguez* v. *Sessions,* 850 F.3d 1051, 1062–72 (9th Cir. 2017) (en banc) and *Lopez* v. *U.S. Att'y Gen.,* 504 F.3d 1341, 1345 (11th Cir. 2007). Another organization claimed that the rule disregards the ''well-documented fact'' that oppressive governments utilize irregular forces for the purpose of denying their actions. The organization emphasized that chronic violence arises when a government is unwilling or unable to protect the life and liberty of its citizens, claiming that this government inaction puts people at risk of death. The organization concluded by alleging that the rule would send these individuals back ''into mortal danger.''

Another organization claimed this portion of the rule would violate the APA in at least six different ways. First, the organization alleged that the rule is contrary to law, as the INA does not state or imply that interpersonal or ''private'' acts cannot give rise to asylum. Instead, the statute makes clear that such acts can do so if they ''rise to the level of persecution, are taken on account of a protected ground, and are inflicted by actors the government is unable or unwilling to control.'' Second, the organization claimed that it is ''manifestly unreasonable'' to use the particular social group analysis to ''place entire groups of persecutors outside the asylum laws,'' noting that the particular social group analysis is dependent on the nature of the group to which the survivor belongs rather than the identity of the persecutor. Third, the organization alleged that a general prohibition of asylum in all situations where the government is ''uninvolved'' in the persecution is ''arbitrary and contrary to law,'' claiming that the substitution of ''uninvolved'' for ''unable or unwilling'' would render large categories of previously meritorious claims ineligible. The organization also emphasized that the rule would require survivors of persecution by non-state actors to report persecution to authorities ''even where laws against gender-based violence are limited or non-existent.'' The organization noted that current asylum law allows applicants to submit evidence as to why reporting this type of violence was impossible or dangerous, claiming there is no legitimate justification for the prohibition of such evidence.

Fourth, the organization claimed that the NPRM's use of the word ''private'' implicitly raises the ''unable or unwilling'' standard on some claims. Fifth, the organization contended that the ''interpersonal'' category is ''even more sweeping'' and therefore contrary to the INA, claiming that the plain meaning of the ''interpersonal'' violence category would bar *all* asylum claims. Sixth, the organization claimed the ''interpersonal'' and ''private'' categories violate the INA to the extent that, in the Departments' view, they apply to domestic or other gender-based violence. The organization claimed this is ''at odds'' with the evidence, which clearly shows that this type of violence is ''not simply a private matter based on personal animosity.'' The organization also claimed that the application of the ''interpersonal'' and ''private'' categories to domestic and other gender-based violence would violate constitutional equal protection principles because the presumption created by these categories would have a disproportionate effect on women (as women are much more likely to experience violence by an intimate partner).

Similarly, another organization noted that this portion of the rule is especially damaging to gender and LGBTQ+ related claims because ''many are rooted in intimate partner or family violence that government actors choose to ignore as private or family matters.'' The organization emphasized the BIA's decision in *Matter of A–R–C–G–,* 26 I&N Dec. 338 (BIA 2014), holding that a Guatemalan woman should be granted asylum on the basis of abuse by her former spouse, noting that this precedent has allowed many female asylum seekers from Central America to win cases. One organization stated that ''the very indifference'' of governmental authorities to the plight of survivors of gender-based violence proves that persecution exists, emphasizing there is ''no good reason'' for denying the claims of survivors who can show their government's failure to protect them.

Another organization claimed the rule ''condemns women to endure various forms of domestic- and gender-based violence, stripping them of the humanitarian protection of the United States.'' The organization contended that this ''upends'' the longstanding recognition and protection of particular social groups, across circuits, on the following grounds: Femicide, *Perdomo* v. *Holder,* 611 F.3d 662, 662 (9th Cir. 2010); honor killings, *Sarhan* v. *Holder,* 658 F.3d 649, 649 (7th Cir. 2011); female genital mutilation, *Mohammed* v. *Gonzales,* 400 F.3d 785, 785 (9th Cir. 2005); arranged or inescapable marriages, *Acosta Cervantes* v. *Barr,* 795 F. App'x 995, 995 (9th Cir. 2020); and ''other forms of domestic violence,'' *Muñoz-Ventura* v. *Barr,* 799 F. App'x 977, 977 (9th Cir. 2020). One organization contended that, by dismissing violence against women or LGBTQ+ individuals as an ''interpersonal dispute,'' the rule fails to recognize that gender-based violence is a ''social means to subordinate rather than an individual problem'' and requires comprehensive responses.

Response: The Departments disagree that the rule is contrary to law. At the outset, the Departments acknowledge that the INA does not specify whether interpersonal or ''private'' acts can give rise to an asylum claim. While the actions of private actors are also discussed elsewhere in this

[46] Regarding the commenters' specific example, the Departments note that claims from Tutsis in Rwanda may also be framed in terms of race or nationality which are not defined in the rule and are separate from claims based on a particular social group.

rulemaking,[47] the Departments will now address concerns as they were raised specifically in the context of establishing a particular social group. As the commenters contend, acts can give rise to asylum claims only if they are taken on account of a protected ground, such as ''particular social group.'' And, as discussed above, the term ''particular social group'' is ambiguous. As the Departments have set forth a reasonable determination that the term would generally not include, without more, social groups predicated upon private criminal acts of which governmental authorities were unaware or uninvolved, such private acts would generally not be sufficient grounds for asylum. *See Matter of A–B–,* 27 I&N Dec. at 335 (''groups defined by their vulnerability to private criminal activity likely lack the particularity'' required for cognizability).

The commenter's allegations that the rule violates the APA are predicated on presumptions that the rule categorically excludes certain types of social group claims. As stated above, ''the regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.''). The Departments believe that the listed social groups generally fail to meet the requirements for cognizability, not because, as the commenter alleged, of the identity of the persecutor, but rather because such groups are generally defined by the group members' vulnerability to private criminal activity. *See Matter of A–B–,* 27 I&N Dec. at 335.

The Departments note that social groups predicated on domestic or other gender-based violence, insofar as the group is defined by private criminal acts of which governmental authorities were unaware or uninvolved, will generally not be cognizable, as they, like all social groups defined by such acts, likely lack the requisite particularity due to the ''broad swaths of society [that] may be susceptible to victimization'' or social distinction to be cognizable. *Matter of A–B–,* 27 I&N Dec. at 335–36. Similarly, the Departments disagree with commenter's assertions that the rule would implicitly raise the ''unwilling or unable'' standard, as the Departments believe that social groups defined by private criminal acts of which governmental authorities were unaware or uninvolved are not cognizable under the particular social group analysis of immutability, particularity, and social distinction, irrespective of the government's inability or unwillingness to help, which is an independent factor in considering asylum eligibility.

With respect to commenters' concerns about this rule's potential effect on LGBTQ and gender-based-violence related claims, the Departments note again that they have codified a long-standing test for determining cognizability of particular social groups and have set forth a list of common fact patterns involving particular-social-group claims that generally will not meet those well-established requirements. The Departments did not first determine a set of groups that should or should not be cognizable and craft a rule around that determination.

To the extent that commenters assert that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X,* 545 U.S. at 982.

4.1.7. Past or Present Terrorist Activity or Association

Comment: At least one commenter raised concerns with the ''past or present terrorist activity or association'' base for not favorably adjudicating a particular social group. The commenter asserted that the terms ''terrorist activity'' and ''terrorist association'' were overbroad and, as a result, would result in unnecessary denials of asylum claims. Moreover, the commenter stated that the Departments did not provide ''empirical research'' to support the provision's inclusion, but rather relied on the ''unproven'' statement that allowing particular social groups defined by terrorist activity or association would reward membership in organizations that cause harm to society and create a perverse incentive to engage in reprehensible or illicit behavior as a means of avoiding removal.

Response: The Departments disagree that the terms ''terrorist activity'' or ''terrorist association'' are overbroad. The Departments are using the ''terrorist activity'' language that Congress clearly defined in the INA. *See* INA 212(a)(3)(B)(iii), 8 U.S.C. 1182(a)(3)(B)(iii). To the extent the commenter alleges that the statutory definition itself is overbroad, such arguments are outside the scope of this rule. Moreover, the Departments do not believe the phrase ''terrorist association'' is overly broad. The Departments intend for this provision to apply to those who voluntarily associate, or have previously voluntarily associated, with a terrorist organization. The Departments believe the ordinary meaning of the term provides sufficient definition for adjudicators to apply. *See, e.g.,* ''Associate'' Definition, Merriam-Webster, *https://www.merriam-webster.com/dictionary/associate* (defined as ''join[ing] as a partner, friend, or companion'' with an example of ''They were closely associated with each other during the war'').

Although the Departments do not maintain data on the number of prior asylum grants based on a terrorism-related particular social group, the Departments believe it is reasonable that, as a general matter, persons applying for asylum in the United States cannot claim asylum based on their participation in, or association with, terrorism. For example, Congress included certain terrorism-related activities as a categorical bar from asylum eligibility. *See* INA 208(b)(2)(A)(v), 8 U.S.C. 1158(b)(2)(A)(v).[48] Similarly, although this is not a categorical bar to terrorism-based particular social groups, generally disfavoring such groups is consistent with this Congressional intent.

Finally, the Departments note that association with past or current terrorist activity is at least as ''anti-social'' as association with criminal gang activity, if not more so, and the latter has been rejected as a basis for a particular social group by multiple courts. *Cf. Arteaga,* 511 F.3d at 945–46 (''We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit

[47] The Departments note that longstanding law has precluded private acts of violence as a basis for asylum or similar protection for many years. *See, e.g., Matter of Pierre,* 15 I&N Dec. 461, 462–63 (BIA 1975) (strictly personal dispute between a husband and wife does not state a claim on account of race, religion, political opinion or membership in a particular social group). Further, circuit courts have also held that private acts of violence are not a cognizable basis for asylum, though their decisions are sometimes rooted in other bases. *See, e.g., Prado* v. *U.S. Att'y Gen.,* 315 F. App'x 184, 188 (11th Cir. 2008) (''Ordinary criminal activity and acts of private violence are generally not 'persecution' within the meaning of 8 U.S.C. 1101(a)(42)(A).''). The Departments' consideration of private violence under the definition of particular social group in no way precludes its consideration in connection with the other requirements necessary for asylum, including nexus and persecution.

[48] The Departments note that certain activities or associations that trigger terrorism-related inadmissibility grounds may potentially be the subject of discretionary group-based, situational, or individual exemptions. In such cases, they would not constitute bars to asylum eligibility.

theft.''); *Cantarero,* 734 F.3d at 85–86 (''The BIA reasonably concluded that, in light of the manifest humanitarian purpose of the INA, Congress did not mean to grant asylum to those whose association with a criminal syndicate has caused them to run into danger. . . . Such recognition would reward membership in an organization that undoubtedly wreaks social harm in the streets of our country. It would, moreover, offer an incentive for aliens to join gangs here as a path to legal status. . . . Accordingly, the BIA's interpretation merits our deference under *Chevron.*''); *Elien,* 364 F.3d at 397 (''Such recognition unquestionably would create a perverse incentive for [aliens] coming to or residing in the United States to commit crimes, thereby immunizing themselves from deportation. . . . Moreover, the BIA has never extended the term 'social group' to encompass persons who voluntarily engaged in illicit activities.''). Consequently, the Departments decline to follow a suggestion that terrorist association should generally be considered a cognizable particular social group.

4.1.8. Past or Present Persecutory Activity or Association

Comment: One organization claimed that the NPRM's proposed bar on ''past persecutory activity,'' 85 FR at 36279, is contrary to the APA in the same manner as the proposed bar on past criminal conduct. The organization alleged that listing a scenario involving past persecutory activity as generally non-cognizable would create even greater uncertainty, however, because ''past persecutory activity'' is not defined in the NPRM.

Response: Although the commenter's broad and unspecified allegations make a response difficult, the Departments do not believe this rulemaking is in violation of the APA for reasons given in both the NPRM and this final rule, and they reiterate that this rulemaking does not impose any categorical bar as suggested by the commenter. The Departments have provided descriptions and reasons for all the provisions and have established a reasonable basis for the rule. With respect to the commenter's concerns about what conduct falls under the term ''past persecutory activity,'' the Departments note that this rulemaking, including the NPRM, sets forth clear guidelines about what conduct constitutes persecutory activity, 85 FR at 36280–81, and thus, that this should serve as a guide for conduct involving past persecutory activity.

4.1.9. Status as an Alien Returning From the United States

Comment: One organization noted that the rule would generally not find a particular social group to be cognizable if based on ''status as an alien returning from the United States.'' The organization expressed concern about this, noting that there have been circumstances where ''Westernized Iraqi citizens have faced persecution and potential torture based on their perceived ties to the United States.'' The organization emphasized that each proposed particular social group should be evaluated on a case-by-case basis instead of being subjected to general rules that would result in ''blanket denials.''

Another organization claimed that ''status as an alien returning from the United States'' is on its face an ''immutable, socially distinct, and particular'' characteristic. The organization emphasized that past association as a former resident of the United States is similar to one's membership in a family or one's specific history because it is a particular characteristic that cannot be changed. The organization alleged that this portion of the rule could result in the denial of asylum to individuals persecuted due to their real or imputed association with the United States by ''a regime that is hostile to this country, or its culture and values.''

One organization disagreed with the claim that any group based on individuals returning from the United States will be ''too broad'' to qualify as a particular social group, 85 FR at 36279, claiming this is ''factually and legally erroneous.'' The organization alleged that, as a factual matter, the number of individuals returning to some countries from the United States is small. As a legal matter, the organization claimed that whether a group is potentially large would not, by itself, mandate the conclusion that the group is not particular.

Response: The Departments reiterate once again that this rule does not foreclose the possibility of pursuing and prevailing upon a particular social group claim defined by the applicant's status as an alien returning from the United States. ''[T]he regulation does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 906 (''[T]he record in this case does not support the asylum seekers' argument that [the Departments] have erected a rule against asylum claims involving allegations of domestic and/or gang violence.''). If applicants believe that their proposed group as an alien returning from the United States meets one of the exceptions to the general rule based on, as commenter's proposed, the group meeting the particularity requirement, the applicants may propose such a group.

The Department disagrees with comments that individuals returning from the United States can, generally, demonstrate that their group is sufficiently particular or socially distinct. *See, e.g., Reyes* v. *Lynch,* 842 F.3d 1125, 1139 (9th Cir. 2016) (upholding BIA's determination that a proposed social group of deportees ''was too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal''); *Lizama,* 629 F.3d at 446 (rejecting proposed group of ''young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs'' as ''clearly fail[ing] to meet the required criteria'' (internal quotations omitted)). However, to the extent that commenters believe there may be exceptions to this general rule, ''the rule does not foreclose that, in rare circumstances, such facts could be the basis for finding a particular social group, given the fact- and society specific nature of this determination.'' 85 FR at 36279; *see Grace II,* 965 F.3d at 905.

4.2. Political Opinion

Comment: Commenters argued that the proposed definition of political opinion is inconsistent with legislative intent and international law, which, commenters asserted, require the term to be construed broadly. Specifically, commenters asserted that Congress, in passing the Refugee Act of 1980, aimed to align the United States definition of ''refugee'' with the United States' obligations under the 1967 Protocol relating to the Status of Refugees. Commenters provided excerpts from the House Report for the Refugee Act of 1980 and UNHCR guidance stating the term should be construed broadly. Commenters also argued that Congress is the branch that holds the plenary power and that the proposed edits to 8 CFR 208.1(d) are an attempt ''to do an end run around the legislative intent'' of section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42).

Commenters expressed concern that the proposed definition of political opinion is inconsistent with Federal court and BIA precedent. Commenters

cited *Cardoza-Fonseca,* 480 U.S. 421, to argue that the proposed definition of ''political opinion'' is too narrow. One commenter also cited cases from the United States Courts of Appeals for the Second, Third, and Ninth Circuits, which the commenter argued evidence that the term political opinion should be construed broadly. Another commenter noted that Federal courts have recognized political opinions based on feminist beliefs, labor organizing, environmental beliefs, support of student organizations, and gangs. With respect to BIA precedent, one commenter asserted that the NPRM incorrectly interpreted *Matter of S–P–,* 21 I&N Dec. 486 (BIA 1996), and that the case actually instructs that the term political opinion should be construed broadly. The commenter similarly asserted that the BIA decisions in *Matter of D–V–,* 21 I&N Dec. 77 (BIA 1993), and *Matter of N–M–,* 21 I&N Dec. 526 (BIA 2011), support a broad reading of political opinion. One commenter cited the third edition of the Webster's New World College Dictionary (1997) to argue that the definition of the word ''political'' is unambiguously understood to include more than just opposition to a particular regime. Accordingly, the commenter argued, the proposed definition of political opinion contradicts the plain meaning of the INA.

Commenters expressed concern that political opinions not directly related to regime change would be considered invalid under the proposed definition. As an example, one commenter asserted that Wang Quanzhang (who the commenter stated is a human rights defender in China) and Ivan Safronov (a Russian journalist who, the commenter stated, was charged with treason for contributing to a prominent business newspaper) would not have valid political opinions under the proposed definition. Commenters asserted that individuals could hold valid political opinions unrelated to regime change such as LGBTQ rights advocacy, voter registration advocacy, and opinions on the publication of data about COVID–19 in countries that seek to hide the pandemic's impact. One commenter noted that in some nations the geopolitical landscape renders a distinction between opposition to a specific regime indistinguishable from political opinions about cultural issues.

Commenters similarly expressed concern that gang-based claims would be rejected under the proposed definition. Commenters asserted that gangs can have substantial political power and that some nations are unable to control gang violence and influence. One commenter stated that the United States Department of State recognized this reality in its 2019 Country Reports on Human Rights Practices. Other commenters cited provisions of the UNHCR Guidelines on International Protection noting that gang-based and gender-based claims can be valid.

Commenters also expressed concern with the ''absent expressive behavior'' language in proposed 8 CFR 208.1(d) and 8 CFR 1208.1(d), asserting that section 208(b) of the Act, 8 U.S.C. 1158(b), does not require protected grounds to be expressed in a particular way and that ''political opinion,'' not ''political activity'' is the protected ground. Commenters asserted that the proposed definition contradicts UNHCR Guidance on expressing opinions. Commenters argued that ''absent expressive behavior'' is ''antithetical to the concept of an imputed political opinion against a non-state organization'' and that it is inconsistent with Federal case law that has recognized imputed political opinions against gangs that fall outside of the proposed definition of expressive behavior.

One commenter expressed concern that the proposed definition of political opinion ''frustrates the reliance interests'' of ''thousands'' of individuals whose asylum claims are based on political opinions under the current understanding of the concept. The commenter expressed concern that individuals with pending applications would ''have a much lower likelihood of obtaining relief under the proposed rule.''

Response: In regards to commenters' concerns that the final rule contravenes various Federal circuit court decisions, the Departments note that the disparity in interpretations of the term political opinion is a partial motive for the amendment. As discussed in the NPRM, this rule will provide clarity in an area of conflicting case law that has made uniform application challenging for adjudicators.

One commenter suggested that the Departments were ''seek[ing] to erase all precedent that is favorable to asylum seekers.'' The Departments deny this purported motive. As mentioned in the NPRM, the purpose behind the amendments surrounding political opinion is to provide clarity to adjudicators, avoid further strain on the INA's definition of ''refugee,'' and to acknowledge that the statutory requirements and general understanding of political opinion is intended to advance or further a discrete cause related to political control of a state.

A commenter expressed concern that the Departments failed to recognize that many asylum seekers flee their homelands because their governments are unable or unwilling to control non-state actors, including international criminal organizations. The Departments do not disagree that this may be the motivation for some aliens to flee their homelands. However, that fact alone does not create a basis for protection under the immigration laws. Asylum and statutory withholding of removal are narrowly tailored—allowing for the discretionary grant of protection from removal in the case of asylum and granting protection from removal in the case of withholding—to aliens who demonstrate that they meet specific eligibility criteria. The asylum laws were not created to address any misfortune that may befall an alien. Rather, asylum generally is available to individuals who are able to establish, among other things, that the harm they experienced or fear was (or there is a well-founded basis to believe would be) inflicted on account of a protected ground. The rule will improve the system by creating a clearer definition of political opinion, which, in turn, will assist in the expeditious processing of meritorious claims.

Several commenters listed various opinions which, commenters' opined, would no longer fit within the political opinion category. The Departments acknowledge that the rule codifies a specific definition for articulating political opinion claims, though it also incorporates existing case law principles.[49] As explained in the NPRM, the Departments seek to provide clear standards for adjudicators to determine political opinion claims. For example, if political opinion were expanded to include opposition to international criminal organizations, it would ''interfere with the other branches' primacy in foreign relations,'' and ''strain the language of'' INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). *See Saladarriaga* v. *Gonzales,* 402 F.3d 461, 467 (4th Cir. 2005) (holding that an individual's cooperation with the DEA, even if it stemmed from disapproval of a drug cartel, did not constitute a political opinion). Although the Departments agree that international

[49] As discussed herein, the rule itself applies prospectively to applications filed on or after its effective date; accordingly, it will have no effect on pending applications, contrary to commenters' concerns. However, the rule also codifies many principles that are already applicable through binding case law. Thus, although the rule itself may not apply to pending applications, applicable case law that is reflected in the rule may nevertheless still apply to pending applications.

criminal organizations threaten both their fellow countrymen and the international community, the appropriate redress for such concerns is not to broadly grant asylum on the basis of political opinion.

A commenter stated, without more, that the rule does not meet the materiality standard as outlined in the UNHCR guidance. The Departments decline to respond to commenters' general assertions that the rule violates U.S. international treaty obligations.

The Departments do not share a commenter's concern that the NPRM defines ''political opinion'' narrowly to the extent that it runs afoul of congressional intent to define ''refugee'' broadly. The NPRM notes that since the enactment of the statute, the definition of ''refugee'' has been strained in various contexts. *See Saladarriaga,* 402 F.3d at 467. Thus, one aspect of the motive behind the NPRM is to reduce the strain on the statute and return the statute to its original meaning.

Additionally, the commenter claimed that the expansive definition was meant to mirror the 1967 Protocol relating to the Status of Refugees, the 1951 Convention relating to the Status of Refugees, and UNHCR guidelines, which the commenter claims are now violated by the new definition. The Departments reject this conclusion. While UNHCR guidelines are informative, they are not prescriptive and thus not binding. *See Aguirre-Aguirre,* 526 U.S. at 427 (''The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.''); *Cardoza-Fonseca,* 480 U.S. at 439, n.22 (''Indeed, the Handbook itself disclaims such force[.]'').

In regards to the meaning of ''political,'' the Departments note that, according to the Merriam-Webster Dictionary, ''political'' does have numerous definitions. *See* ''Political'' Definition, Merriam-Webster, *https://www.merriam-webster.com/dictionary/political.* However, all but one of those definitions relates specifically, and often solely, to governments. Moreover, the first definition refers only to the government. Similarly, the Departments reject commenters' assertions that ''expressive behavior'' is solely ''political action'' and therefore distinct from political opinion. First, the Departments note that the definition of political opinion has been highly debated. *See, e.g.,* Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion,* 37 Mich. J. Int'l L. 243, 246–47 (2016) (''The tension between [differing interpretations of political opinion] raises the overarching question of whether political opinion should be defined at all. It is evident that existing definitions have not provided sufficient guidance, and that there is no definition in the adjacent area of human rights law that can be logically imported . . . . [A] broadly agreed-upon definition of political opinion would advance the jurisprudence by providing a consistent standard.''). The NPRM aims to clarify this definition for adjudicators. The Departments' use of ''expressive behavior'' is directly related to the NPRM's definition of political opinion as ''intended to advance or further a discrete cause related to political control of a state.'' 85 FR at 36280. Moreover, the Departments are unaware of any claim rooted in political opinion that did not contain some type of expressive behavior, and it is not clear how an opinion never uttered or conveyed could be recognized as a political opinion.

Another commenter expressed concern that a particular state's geopolitical landscape that would leave political opinions indistinguishable from cultural issues. First, BIA case law clearly holds that political opinion involves a cause against a state or political entity rather than against a culture. *Matter of S–P–,* 21 I&N Dec. at 494. However, the Departments also acknowledge that there may be rare circumstances that will amount to exceptions to the general guiding principles laid out in the NPRM. For this reason, the rule uses ''in general'' to guide adjudicators in their determinations.

4.3. Persecution

Comment: Commenters expressed a wide range of concerns with the rule's definitional standard for ''persecution.'' *See* 85 FR at 36280–81; 8 CFR 208.1(e), 1208.1(e). Overall, commenters asserted that the Departments' justification was generally flawed and inappropriately relied on case law to support its position.

Commenters asserted that the proposed definition of persecution is inconsistent with the statutory meaning of the word. For example, commenters argued that the new definition impermissibly alters the definition of refugee so that it does not conform with the United Nations Convention and Protocol Relating to the Status of Refugees. Commenters said this violates the ''fixed-meaning canon'' of construction, which ''holds that words must be given the meaning they had when the text was adopted.'' Commenters considered the meaning of ''refugee,'' which incorporates persecution, in the Refugee Act and argued that legislators intended for persecution to have a broad meaning in order to align the INA with U.S. international obligations.

Commenters expressed concern that the proposed definition of persecution would exclude claims based on threats with no accompanying effort to carry out the threat or non-exigent threats. Commenters cited and discussed numerous Federal cases, including, *Cardoza-Fonseca,* 480 U.S. 421, and argued that Federal case precedent suggests that threats alone can be the basis of asylum claims. One commenter provided the example of death threats and noted that the United States Court of Appeals for the Sixth Circuit reasoned that an applicant need not wait for an actual attempt on his or her life before having a valid claim for asylum. *Juan Antonio,* 959 F.3d at 794. Another commenter similarly argued that a teenage girl who rebuffed inappropriate advances from a corrupt official would not be able to prevail on a persecution claim unless the official assaulted her. Commenters asserted that through the focus on severe and exigent threats, the proposed definition and the accompanying non-exhaustive list of factors would unlawfully lead to denials of asylum claims where applicants suffer significant harms that fall short of an immediate threat to life or property. At least one commenter asserted that this requirement of action would inappropriately eliminate claims based on a well-founded fear of future persecution.

Commenters expressed concern that the proposed definition of persecution wrongfully fails to account for the possibility of cumulative harms rising to the level of persecution and argued that Federal case law instructs that adjudicators must consider cumulative harm. *See, e.g., Herrera-Reyes* v. *Att'y Gen. of U.S.,* 952 F.3d 101, 109 (3d Cir. 2020); *Tairou* v. *Whitaker,* 909 F.3d 702, 707 (4th Cir. 2018); *Matter of O–Z– & I–Z–,* 22 I&N Dec. 23 (BIA 1998). Commenters expressed concern that the rule would prevent applicants who have suffered multiple distinct harms from prevailing on an asylum claim if each instance is deemed to be not severe or to be minor. To illustrate these concerns, one commenter discussed persecution suffered by the Rohingya and another detailed the case of one of his clients whose application, the commenter argued, would be granted under the current regulations and case law but denied under the persecution definition established by the rule.

One commenter argued that because factors suggesting a lack of persecution

are overrepresented, adjudicators would not be engaging in case-by-case analysis and that the scales are inappropriately tipped towards finding a lack of persecution.

Commenters expressed concern that the proposed definition inappropriately fails to consider how children and adults experience harm differently. Specifically, commenters argued that children may experience harm because of affiliation with family members and caregivers and that harm suffered by children may rise to the level of persecution even though the same harm would not rise to such a level for adults. Other commenters noted that it is not reasonable to expect children to seek protection from official sources.

Commenters expressed concern that the proposed rule would require asylum seekers to demonstrate that persecutory laws would likely be enforced against them. As an example, commenters noted that asylum seekers coming from countries where same sex relationships carry the death penalty would not be able to secure asylum unless they could also establish that the law would likely be applied to them. In many cases, one commenter argued, such a penalty is not enforced frequently because sexual minorities are not likely to break the law given the risk of death. The commenter noted that the United States Court of Appeals for the Ninth Circuit has suggested that applicants with these types of claims should prevail. *See Karouni* v. *Gonzales,* 399 F.3d 1163, 1173 (9th Cir. 2005). Commenters also noted that even if laws such as the above are not enforced, they are still persecutory in nature because of the fear and vulnerability that they create in those that could be subjected to the laws.

Response: As stated in the proposed rule, the Departments added new paragraphs in 8 CFR 208.1 and 1208.1 ''to define persecution and better clarify what does and does not constitute persecution.'' 85 FR at 36280. These changes clarify that persecution is an extreme concept that requires severe harm and specify different examples of conduct that, consistent with case law, do not rise to the level of persecution. *See* 85 FR at 36280–81. They are not unduly restrictive, and it is well-established that not every harm that befalls an alien, even if it is unfair, offensive, unjust, or even unlawful, constitutes persecution. *See Gjetani* v. *Barr,* 968 F.3d 393, 397 (5th Cir. 2020) (''Persecution is often described in the negative: It is *not* harassment, intimidation, threats, or even assault. Persecution is a specific term that does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.'' (quotation omitted)); *see also Ahmed* v. *Ashcroft,* 341 F.3d 214, 217 (3d Cir. 2003) (discrimination against stateless Palestinians in Saudi Arabia did not amount to persecution).

Commenters are correct that the definition of ''refugee'' in the Act, first codified by the Refugee Act, incorporates ''persecution'' and that Congress enacted the Refugee Act in order to conform the Act with the United States' obligations under the 1967 Protocol relating to the Status of Refugees. *See Matter of Acosta,* 19 I&N Dec. at 219. However, commenters are incorrect that Congress intended for the Refugee Act to import any specific international or extrinsic definition of ''persecution.'' Instead, as explained by the BIA, Congress used the term persecution prior to the Refugee Act, and, accordingly, it is presumed that Congress intended for that pre-Refugee Act construction to continue to apply. *Id.* at 222.[50] That prior construction of the term included the notions that ''harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome . . . and either by the government of a country or by persons or an organization that the government was unable or unwilling to control.'' *Id.* The standards for persecution contained in the proposed rule and this final rule align with this understanding of ''persecution,'' and the rule is not incompatible with the Act or the United States' international treaty obligations.

Some of the standards implemented by this rule involve matters that the Federal courts have adjudicated inconsistently. For example, the rule establishes that repeated threats would not constitute persecution absent ''actual effort to carry out the threats.'' 8 CFR 208.1(e), 1208.1(e). Courts have held that threats, even with accompanying action, do not necessarily rise to the level of persecution. *See, e.g., Gjetani,* 968 F.3d at 398 (collecting cases and explaining that ''[E]ven those subject to brutal physical attack are not necessarily victims of 'persecution.' Courts have condemned all manner of egregious and even violent behavior while concluding they do not amount to persecution.''); *see also Quijano-Rodriguez* v. *Gonzales,* 139 F. App'x 910, 910–11 (9th Cir. 2005) (collecting cases).

The Departments note that Federal courts have also held that threats without attempts to carry out the threat may at times constitute persecution. *See, e.g., Duran-Rodriguez* v. *Barr,* 918 F.3d 1025, 1028 (9th Cir. 2019) (explaining that ''death threats alone can constitute persecution'' but ''they constitute 'persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm' '' (citation omitted)). Threats ''combined with confrontation or other mistreatment'' are likely to be persecution; however, ''cases with threats *alone,* particularly anonymous or vague ones, rarely constitute persecution.'' *Id.* (internal citation omitted) (emphasis added); *see also Lim* v. *INS,* 224 F.3d 929, 936 (9th Cir. 2000) (''In certain extreme cases, we have held that repeated and especially menacing death threats can constitute a primary part of a past persecution claim, particularly where those threats are combined with confrontation or other mistreatment. . . . Threats standing alone, however, constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.''). Even the case cited by commenters, *Juan Antonio,* 959 F.3d at 794, noted that threats alone amount to persecution only when they are ''of a most immediate and menacing nature''; moreover, the respondent in that case experienced beatings and rape in addition to threats, rendering that case inapposite to the rule, *id.* at 793.

The Departments believe that the rule reflects appropriate and reasonable lines drawn from the relevant case law regarding persecution, particularly due to the difficulty associated with assessing the credibility of an alleged threat, especially in situations in which the threat was made anonymously and without witnesses or the existence of other corroborating evidence. *See Lim,* 224 F.3d at 936 (''Furthermore, claims of threats are hard to disprove. A finding of past persecution raises a regulatory presumption of future persecution and flips the burden of proof . . . to show that conditions have changed to such a degree that the inference is invalid . . . . Flipping the burden of proof every time an asylum applicant claimed that he had been threatened would unduly handcuff the [government].''). To the extent that the standards implemented by this rule conflict with case law interpreting what sorts of conduct rise to the level of persecution, the Departments invoke

[50] Moreover, as also noted by the BIA, the Protocol itself leaves the determination of who should be considered a refugee, which inherently includes a determination of who is at risk of persecution, to each state party itself. *Matter of Acosta,* 19 I&N Dec. at 220.

their authority to interpret the ambiguities of what constitutes persecution—an undefined term in the Act—outside the bounds of such prior judicial constructions. *See Brand X,* 545 U.S. at 982; *see also Grace II,* 965 F.3d at 889 (noting that the term ''persecution'' is ''undefined in the INA''); *cf. Fernandez* v. *Keisler,* 502 F.3d 337, 347–48 (4th Cir. 2007) (applying *Brand X* to affirm the BIA's rejection of the Fourth Circuit's prior interpretation of section 101(a)(22) of the Act, 8 U.S.C. 1101(a)(22), where the court's prior interpretation did not rest on a determination that the statute was ''unambiguous''). Moreover, in response to the commenters' concerns, the final rule more clearly specifies the types of threats included within the definition such that menacing and immediate ones may still come within the definition consistent with the case law noted above.

To the extent that aspects of persecution adjudications are not covered by the rule, the Departments expect adjudicators to conduct all determinations consistent with the law, regulations, and precedent. Accordingly, the rule does not conflict with case law explaining that harms must be considered cumulatively and in the aggregate, *see, e.g., Matter of Z–Z–O–,* 26 I&N Dec. 586, 589 (BIA 2015) (holding that applicant's experiences did not amount to persecution ''when considered either individually or cumulatively''); *Matter of O–Z– & I–Z–,* 22 I&N Dec. at 25–26 (considering incidents of harm ''[i]n the aggregate''), because it does not in any way direct adjudicators to blindly only consider harm suffered individually. In other words, adjudicators will still consider harms suffered by applicants in the aggregate.

Similarly, the rule does not end case-by-case adjudications of whether conduct constitutes persecution. The Departments disagree with commenters that the Departments' choice to frame persecution in the context of conduct that does not rise to the level of persecution while leaving open further adjudication of what conduct constitutes persecution in any way ''tips the scales.'' ''Persecution is often described in the negative . . . .'' *Gjetani,* 968 F.3d at 397.

As noted by commenters, Federal courts have held that an applicant's age is relevant for determining whether the applicant suffered persecution. *See, e.g., Liu* v. *Ashcroft,* 380 F.3d 307, 314 (7th Cir. 2004) (''[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution.''). Commenters are incorrect, however, that the rule's persecution standard conflicts with this instruction. Instead, the rule provides a general standard for persecution that is built around the severity of the harm. 8 CFR 208.1(e), 1208.1(e). This focus on severity does not foreclose arguments or an adjudicator's finding that harms suffered by an applicant are severe in their particular context given the applicant's age or particular circumstances, even if such harms may not generally be considered severe for the average applicant.

Regarding commenters' concerns with the rule's instruction that ''[t]he existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally,'' the Departments note this standard is consistent with well-established law that ''an asylum applicant can establish a well-founded fear of persecution by proving either a pattern or practice of persecution of a social group, of which the applicant has proven she is a member, or by proving the applicant will be singled out personally.'' *Ayele* v. *Holder,* 564 F.3d 862, 870 (7th Cir. 2009). Laws that are unenforced or enforced infrequently cannot demonstrate a pattern or practice of persecution, 8 CFR 208.13(b)(2)(iii), 1208.13(b)(2)(iii), and without credible evidence that such laws would be applied to the applicant, the alien cannot demonstrate that he or she would be singled out individually for persecution, *id.* The rule does not alter these well-established precepts. Further, this requirement that the mere existence of a law, without more, is insufficient to rise to the level of persecution is in keeping with prior interpretations of persecution. For example, the BIA has explained that evidence of the enactment of a new law is not evidence of changed country conditions for the purposes of a motion to reopen ''without convincing evidence that the prior version of the law was different, or was differently enforced, in some relevant and material way.'' *Matter of S–Y–G–,* 24 I&N Dec. 247, 257 (BIA 2007).

This definition does not foreclose an applicant from citing to the existence of such laws as a part of his or her evidence to demonstrate past persecution or risk of future persecution. Nor does this requirement require an applicant to live in secret in order to avoid future harm. Further, the Departments expect that in many cases there may be credible evidence of the enforcement of such laws. For example, in the Ninth Circuit case cited by commenters, the government conceded at oral argument that the Lebanese government arrested individuals for homosexual acts and enforced the law at issue. *Karouni,* 399 F.3d at 1172.

Finally, the rule's persecution standard does not in any way foreclose claims based solely on a well-founded fear of future persecution. Instead, the adjudicator will consider whether the future harm feared by the applicant would constitute persecution under the rule's standards. In other words, the adjudicator would consider whether the feared harm would be carried out by an individual with the intent to target the applicant's belief or characteristic, would be severe, and would be inflicted by the government or by persons or organizations that the government is unable or unwilling to control.[51]

4.4. Nexus

Comment: Numerous commenters expressed general disagreement regarding the rule's nexus provisions, including referring to the list as an ''anti-asylum wish list.'' Commenters claimed that it directed adjudicators to deny most claims.

Some commenters alleged that the Departments were attempting to accelerate asylum hearings at the expense of due process; the commenters construed the rule as creating a checklist that bypasses careful consideration that due process requires. Others opined that the rule prioritized efficiency and expediency over fairness, due process, and ''basic humanity.'' Commenters stated the rule allowed ''blanket denials.''

Another commenter opined that the rule was arbitrary because the Departments failed to consider the real-world implications of the proposal. Commenters expressed concern that, after the enactment of the rule, many asylum seekers would not have favorable adjudication of their claims,

[51] Specifically regarding commenters' concerns that the rule's standard that threats without accompanying action do not constitute persecution would undermine claims based on fear of future persecution, the Departments believe that the commenters are conflating past harms and determinations of past persecution with fear of future harm and determinations of a well-founded fear of future persecution. Indeed, it is difficult to understand how anyone could predict whether future threats will occur and difficult to conceive of a claim in which an alien alleges a fear of future threats but not a fear of future physical, mental, or economic harm. The real issue is the likelihood of future harm based on past threats, and the rule does not alter an alien's ability to argue that past threats are evidence of either past persecution or a likelihood of future persecution.

including those based on violence from non-state actors. Others claimed the rule's nexus components were ''completely incapable of supporting a meritorious asylum claim.''

Commenters expressed concern that the rule precludes a mixed-motive analysis, reasoning that if an actor had any one, potential motive listed in the rule, it would be fatal to the claim, and that it violates the ''one central reason'' standard. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i).

Some of the commenters' disagreement surrounded *Matter of A–B–,* 27 I&N Dec. 316. One commenter opined that the rule is contrary to *Matter of A–B–*'s requirement of case-by-case rigorous analysis, and another commenter worried that the NPRM codified *Matter of A–B–,* despite, as the commenter characterized, its unfavorable treatment in various Federal courts.

Other commenters argued that the nexus provisions conflated ''categories of people'' with requirements of the perpetrator's mental state.

Another commenter expressed concern that the rule included ''substantive changes to the law disguised in procedural attire.''

Response: As an initial point, to the extent commenters' points misstate the rule, address issues not raised by the rule, are rooted in erroneous reasoning, are contrary to facts or law, or reflect unsubstantiated and exaggerated melodramatic views of the rule, the Departments decline to adopt those points. The Departments do not wish to enact some ''anti-asylum wish list'' in this rule. In codifying the circumstances that are generally insufficient to support a nexus finding, the Departments are simply specifying common circumstances, consistent with case law, in order to provide clarity and efficiency for adjudicators. The Departments proposed these amendments in order to assist aliens with meritorious claims, as well as the entire immigration system. As with all regulations or policy changes, the Departments considered the effect this rule will have; accordingly, the Departments reject commenters' allegations that such implications were not considered.

The rule's inclusion of these general guidelines for nexus determinations will not result in due process violations from adjudicators failing to engage in an individualized analysis. The rule provides a nonexhaustive list of eight circumstances that generally will not warrant favorable adjudication, but the rule does not prohibit a favorable adjudication depending on the specific facts and circumstances of the applicant's particular claim. *See* 8 CFR 208.1(f), 1208.1(f) (''For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances''); *see also Grace II,* 965 F.3d at 906 (holding that the inclusion of qualifying terms like ''in general'' and ''generally'' demonstrated that the government had not enacted a rule that all gang-based asylum claims would fail to demonstrate eligibility for asylum). In other words, the rule implicitly allows for those rare circumstances in which the specified circumstances could in fact be the basis for finding nexus given the fact-intensive nature of nexus determinations. *See* 85 FR at 36279. The amended regulations do not remove that fact-intensive nature from the nexus inquiry; rather, the amended regulations provide clarity in order to reduce the amount of time that adjudicators must spend evaluating claims. While the Departments did consider expediency and fairness, the Departments disagree that expediency is prioritized over and above due process.

The Departments disagree with commenters' concerns that the nexus provisions eliminate the mixed motive analysis or violate the ''one central reason'' standard. As discussed above in Section II.C.4.3 of this preamble, to the extent that aspects of persecution adjudications are not covered by the rule, the Departments expect adjudicators to conduct all determinations consistent with the law, regulations, and precedent. Here, the rule provides guidance on harms that would not be considered on account of one of the five protected grounds; the rule did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to one of the listed circumstances that would generally not be harm on account of a protected ground. Further, the preamble to the NPRM acknowledges mixed motive claims by quoting the REAL ID Act of 2005, which defined the nexus element as requiring that one of the five protected grounds to be ''at least one central reason for persecuting the applicant.'' 85 FR at 36281.

As to the concerns surrounding *Matter of A–B–,* the Departments reiterate the above discussion that adjudicators should continue to engage in individualized, fact-based adjudications as the rule provides only a list of circumstances that do not constitute harm on account of a protected ground in most, but not all, cases. Accordingly, the rule is consistent with the Attorney General's admonishment, in *Matter of A–B–,* of the BIA for failing to engage in an individualized analysis and instead accepting the Government's concessions as true. 27 I&N Dec. at 339. Regarding commenters' further concerns that the rule should not codify *Matter of A–B–* given its varied treatment by the Federal courts, the Departments note that the United States Court of Appeals for the District of Columbia Circuit recently affirmed that *Matter of A–B–* holds that decision makers must make individual determinations on a case-by-case basis. *Grace II,* 965 F.3d at 905. The Departments also note that every circuit court addressing *Matter of A–B–* on its merits so far, as opposed to the unusual procedural challenge at issue in *Grace II,* has found it to be a valid exercise of the Attorney General's authority. *See, e.g., Gonzales-Veliz* v. *Barr,* 938 F.3d at 234 (''In sum, because *A–B–* did not change any policy relating to asylum and withholding of removal claims, we reject Gonzales-Veliz argument that *A–B–* constituted an arbitrary and capricious change in policy.''); *Diaz-Reynoso* v. *Barr,* 968 F.3d 1070, 1080 (9th Cir. 2020) (''Accordingly, we decline to hold that the Attorney General's decision in *Matter of A–B–* was arbitrary or capricious.'').

The Departments disagree with the commenters' allegation that the Departments conflated nexus with other asylum requirements by not solely focusing on the perpetrator's state of mind. The NPRM provides a list of situations that would not ordinarily be on account of a protected ground. 85 FR at 36281. The listed situations are attenuated from protected grounds to the extent that they do not meet the necessary nexus requirement. While some of the listed situations, particularly those related to the rationale for the harm, are closely related to other elements of asylum, including particular social group, a nexus analysis has often required an examination of the persecutor's views. *See Sharma* v. *Holder,* 729 F.3d 407, 412–13 (5th Cir. 2013); *Caal-Tiul* v. *Holder,* 582 F.3d 92, 95 (1st Cir. 2009). Thus, the inclusion of the situations related to rationale for the harm are consistent with case law.

Finally, the Departments reiterate that the NPRM does not re-write asylum law as some commenters suggested. As noted in the NPRM and herein, the provisions of the rule related to the substance of asylum claims flows from

well-established statutory authority and relevant case law; thus, it does not ''re-write'' substantive asylum law. The NPRM falls squarely within the Departments' authority, which is discussed more fully in Section 6.5 of this preamble.

4.4.1. Interpersonal Animus or Retribution

Comment: Commenters expressed particular concerns regarding the specification that claims based on ''interpersonal animus or retribution'' generally will not be favorably adjudicated. 8 CFR 208.1(f)(1), 1208.1(f)(1). One commenter opined that it was arbitrary and irrational for the Departments to rely on *Zoarab* v. *Mukasey,* 524 F.3d 777, 781 (6th Cir. 2008), in support of this change because that case's facts were ''unusual.''

Commenters expressed confusion as to whether interpersonal modified both animus and retribution. If it did not modify retribution, commenters expressed concern that retribution, which they defined as punishment, encompasses all asylum claims.

Other commenters remarked that all harm between people is interpersonal.

Commenters also expressed concern that the inclusion of this situation would result in the erasure of mixed motive analysis as some ''may engage in persecution for pretextual reasons to hide their bias.''

Response: The inclusion of claims based on ''interpersonal animus and retribution'' as examples of claims that will generally not result in a favorable adjudication because the harm is not on account of a protected ground is consistent with longstanding precedent. The Departments cited to just one case, *Zoarab,* 524 F.3d at 781, to illustrate this point in the NPRM, but there are numerous other examples. *See, e.g., Martinez-Galarza* v. *Holder,* 782 F.3d 990, 993 (8th Cir. 2015) (finding that harm ''motivated by purely personal retribution'' is not a valid basis for an asylum claim); *Madrigal* v. *Holder,* 716 F.3d 499, 506 (9th Cir. 2013) (explaining that ''mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim''); *Amilcar-Orellana* v. *Mukasey,* 551 F.3d 86, 91 (1st Cir. 2008) (holding that ''[f]ear of retribution over personal matters is not a basis for asylum under the Immigration and Nationality Act''); *Jun Ying Wang* v. *Gonzales,* 445 F.3d 993, 998 (7th Cir. 2006) (acknowledging that the Seventh Circuit has ''repeatedly held that a personal dispute cannot give rise to a claim for asylum''); *Molina-Morales* v. *INS,* 237 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Grava* v. *INS,* 205 F.3d 1177, 1181 n.3 (9th Cir. 2000), and reiterating that ''[p]urely personal retribution is, of course, not'' a protected ground, specifically, imputed political opinion); *Blanco de Belbruno* v. *Ashcroft,* 362 F.3d 272, 284 (4th Cir. 2004) (finding that ''[f]ears of 'retribution over purely personal matters . . .' do[es] not constitute [a] cognizable bas[is] for granting asylum'') (quoting *Huaman–Cornelio* v. *BIA,* 979 F.2d 995, 1000 (4th Cir. 1992)). The Departments disagree that *Zoarab* is not an accurate example of this basic proposition despite commenters' characterizations of the case's particular facts. Furthermore, after the NPRM was promulgated, the Attorney General made the point more explicitly that interpersonal animus or retribution will generally not support a nexus finding required under the INA. *See Matter of A–C–A–A–,* 28 I&N Dec. 84, 92 (A.G. 2020) (''An alien's membership in a particular social group cannot be incidental, tangential, or subordinate to the persecutor's motivation for why the persecutor sought to inflict harm. . . . Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus.'' (cleaned up)). ''The reasoning for this is straightforward: When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse.'' *Id.* (internal quotation marks omitted).

To the extent commenters argue that any harm between two people is ''interpersonal,'' commenters misinterpret both the cases supporting this provision and the rule itself. Instead, the point here is that a personal dispute between two people—for example a property dispute that causes some sort of altercation or a personal altercation because of one person's involvement with a criminal investigation and prosecution—is not generally a valid basis for an asylum claim because it is not harm on account of a protected ground. Further, as set out in the rule, the qualifier ''interpersonal'' applies to both animus and retribution. Accordingly, commenters are incorrect that this provision states that any claim based on ''retribution'' would generally be insufficient and that all or most claims would fail as a result.

Finally, the Departments reiterate the discussion above in Section II.C.4.4 of this preamble that the inclusion of these examples does not foreclose a mixed motive analysis. Accordingly, to the extent an applicant's fear is based on harm partially motivated by an interpersonal dispute and partially motivated by another potentially protected ground, the adjudicator will consider those particular facts and circumstances to determine the applicant's eligibility for asylum or statutory withholding of removal.

4.4.2. Interpersonal Animus in Which the Alleged Persecutor Has Not Targeted, or Manifested an Animus Against, Other Members of an Alleged Particular Social Group in Addition to the Member Who Has Raised the Claim at Issue

Comment: Commenters also raised concerns regarding this change in the NPRM described in this heading. One commenter argued that it was a ''clear attempt to bar women from obtaining asylum based on domestic violence,'' a claim that the commenter noted was an ''uncontroversial basis for asylum in many of our courtrooms until the Attorney General issued *Matter of A–B–.*'' One commenter asserted that this amendment gives the persecutor a ''free pass'' to persecute someone because that person will be unable to establish that another person suffered under this persecutor. Further, the commenter argued that asking an alien to investigate, while attempting to flee for safety, whether the persecutor had persecuted others was impossible, absurd, and arbitrary. Another commenter claimed that it violated the INA to require an alien to demonstrate that the persecutor ''manifested animus against others.'' One commenter claimed that the amendment was irrational because it held aliens seeking asylum through membership in a particular social group to a different and higher evidentiary standard than aliens seeking asylum through the other four protected grounds. The commenter asserted that this reading was supported by the BIA's use of ejusdem generis in *Matter of Acosta,* 19 I&N Dec. 211, and the Attorney General's favorable citation of the rule in *Matter of L–E–A–,* 27 I&N Dec. 581. Another commenter insisted that ''interpersonal'' was a meaningless modifier.

Response: The Departments, based on prior case law, decided that demonstration of animus against other members of the particular social group is generally necessary to establish nexus. 85 FR at 36281; *see also Matter of A–C–A–A–,* 28 I&N Dec. 84, 92 (A.G. 2020) (''Furthermore, if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, then the applicant may not satisfy the nexus requirement.''). The focus of the nexus requirement is membership in the group, INA

101(a)(42), 8 U.S.C. 1101(a)(42), and by definition, a ''group'' encompasses more than one individual. Thus, an alleged persecutor who has no interest in harming other individuals ostensibly in that group is generally not seeking to persecute one individual on account of his or her membership in that alleged particular social group. Without such animus against other group members, the motivation would appear to be personal, rather than on account of membership in the group, and a personal dispute, as discussed above, is generally insufficient on its own to qualify the applicant for the relief of asylum. *See Madrigal,* 716 F.3d at 506.

Asylum law is not meant to provide redress for every victim of crime no matter how sympathetic those victims may be. Accordingly, in order to demonstrate that an alien was persecuted ''on account of'' a particular social group based on interpersonal animus, the alien will ordinarily need to demonstrate that the persecutor has targeted or manifested an animus against someone else in that particular social group. Because an alien will necessarily articulate a particular social group that is socially distinct in order for the group to be cognizable in the first instance, it is reasonable to expect the alien to be able to articulate whether the alleged persecutor has sought to harm other members of that group. The rule does not require aliens to investigate or ask their alleged persecutors anything; rather, the aliens should already have evidence about the persecutor's motives in order to advance a valid asylum claim in the first instance, especially in cases where the alleged persecutor is the government.

Despite the inclusion of this ground as a statement of one type of claim that is generally incapable of supporting an application for relief, the Departments reject commenters' interpretation of this provision as a bar. Rather, as the Departments have detailed above, the rule itself allows for circumstances where a listed situation, based on the specific facts, will support a nexus finding. For example, as noted by commenters, an applicant who is a persecutor's initial victim may argue that despite the persecutor's lack of action against other group members, the applicant's dispute with the persecutor is in fact on account of the protected ground and not on account of a non-protected personal concern.[52] Accordingly, commenters' suggestion that each persecutor will have a ''free pass'' is also incorrect.[53]

Additionally, the Departments disagree that this provision evidences discriminatory intent against a particular class of asylum applicants. The rule is designed to provide expedited adjudication of meritorious claims as well as increased clarity and uniformity—a problem that commenters highlighted by noting that ''many,'' but not all, courts held a particular standard regarding applications premised on domestic violence.

The Departments do not believe that this requirement violates the INA, and without a more specific comment, they are unable to respond.

This provision is not irrational and does not hold aliens relying on membership in a particular social group to a higher evidentiary standard. Although particular social group is a more amorphous category than race, religion, nationality, or political opinion—and, thus, more in need of definitional clarity—each protected ground requires demonstration of the same base elements: Persecution or a well-founded fear of persecution on account of a protected ground.

Further, ''interpersonal'' is not a meaningless modifier. The Departments use the term ''interpersonal'' to differentiate instances of animus and dispute between two private parties from instances of animus and dispute between a private individual and a government official.

4.4.3. Generalized Disapproval of, Disagreement With, or Opposition to Criminal, Terrorist, Gang, Guerilla, or Other Non-State Organizations Absent Expressive Behavior in Furtherance of a Discrete Cause Against Such Organizations Related To Control of a State or Expressive Behavior That is Antithetical to the State or a Legal Unit of the State

Comment: Commenters expressed concerns regarding the required analysis, the underlying intent, and the necessary elements of the inclusion of ''generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state'' in the list of circumstances that will generally not support a nexus finding. Specifically, some commenters argued that this provision undermines a rigorous fact-based analysis as it ''categorically state[s] that certain opinions can never be political.'' The commenters urged that this type of labeling is incorrect and improper. Additionally, commenters asserted that the provision ''evidences a clear discriminatory intention to utterly annihilate the entire genres of asylum cases where opposition to gangs constitutes a political opinion.'' Another commenter claimed that the rule was ''clearly designed'' to eliminate asylum for those fleeing the ''Northern Triangle'' (El Salvador, Guatemala, and Honduras) of Central America. One commenter asserted that because the international criminal organizations function as quasi-governments, there is often no reason for an alien to engage in expressive behavior that is antithetical to the state because ''the state has no real authority.''

Response: First, commenters are incorrect that this provision prohibits certain opinions from being considered ''political.'' Instead, as discussed above, adjudicators should continue to engage in fact-based analysis of the particular facts and circumstances of an individual applicant's claim, and the rule expressly allows for rare circumstances in which the facts of a listed situation could be the basis for finding nexus. This provision does not remove that fact-intensive nature from the nexus inquiry.

Additionally, the Departments disagree that this provision evidences a discriminatory intent. Again, the rule is designed to allow a more expeditious adjudication of meritorious asylum claims so that applicants do not have to wait a lengthy amount of time before receiving relief. The Departments' inclusion in this section of the rule of a certain category of claims that is frequently raised but is generally insufficient to establish nexus is not the product of a desire to harm or inhibit a particular people, nationality, or group.

As to a commenter's suggestion that aliens may be unlikely to engage in expressive behavior that is antithetical to the state because the state has no real authority due to international criminal organizations functioning as quasi-governments, the Departments interpret this comment to refer to organizations such as drug cartels whom the commenter believes function as de facto governments in some countries. Although the Departments question the factual accuracy of the commenter's point and otherwise believe the comment is either hypothetical or

[52] The Departments also note that the commenters' example of an ''initial victim'' necessarily presumes both that there are other victims and that the alien knows or will know of them. Consequently, that example would fall outside of the rule's purview in any event.

[53] Further, persecutors are not brought to justice under U.S. asylum law nor should it be viewed that way. The Departments are not giving persecutors ''one free pass'' because they are often not dealing with the persecutors themselves.

speculative, especially due to the fact-intensive, case-by-case nature of asylum application adjudications, they nevertheless note that the rule does not preclude claims based on opposition to non-state organizations related to efforts by the state to control such organizations. 8 CFR 208.1(d), 1208.1(d). And if an applicant establishes that the organization is the de facto government or otherwise functions in concert with the government, then the rule does not preclude a claim based on the applicant's opposition to that organization or the government. In other words, whether the country has ''real authority'' or not, nothing in the rule precludes a claim based on opposition to non-state organizations in the circumstances outlined in the rule, though the Departments note that, in general, aliens who do not engage in expressive behavior regarding such organizations or the government are unlikely to establish a nexus based on political opinion for purposes of an asylum application.

4.4.4. Resistance to Recruitment or Coercion by Guerilla, Criminal, Gang, Terrorist, or Other Non-State Organizations

Comment: Commenters asserted that the inclusion of ''resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations'' as a particular circumstance that generally does not support a nexus finding does not take in to account the significant power yielded by transnational criminal organizations, which often function as de facto governments.

Response: The Departments appreciate commenters' concerns about the expansive power of transnational criminal organizations. The Departments agree with commenters that such organizations may pose significant dangers. If an alien asserts that the government is unable or unwilling to control the transnational criminal organization, the alien may present evidence to establish that. As the Departments have previously mentioned, the NPRM explicitly acknowledges the fact-intensive nature of the nexus inquiry and further acknowledges that rare circumstances defined by the listed situations may warrant a favorable nexus determination.

4.4.5. The Targeting of the Applicant for Criminal Activity for Financial Gain Based on Wealth or Affluence or Perceptions of Wealth or Affluence

Comment: Regarding ''the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence,'' one commenter expressed concern about the Departments' citation to *Aldana-Ramos* v. *Holder,* 757 F.3d 9, 18 (1st Cir. 2014), as support. The commenter stated that the case's primary holding was ''even if a persecutor seeks to harm an asylum seeker for financial gain, the BIA must engage in a mixed motive analysis to determine whether the protected characteristic was also a central reason for the persecution.'' The commenter alleged that the Departments were relying on *Aldana-Ramos* to ''implement a blanket rule against asylum seekers who may be targeted, in part, based on wealth or perceived wealth, with no regulatory requirement that adjudicators engage in mixed motive analysis, as is required under the Real ID Act as codified in the INA.''

Response: As discussed above, the nexus provisions do not eliminate the mixed-motive analysis. The NPRM explicitly detailed that it was providing guidance on what generally would not be considered one of the five protected grounds; the NPRM did not state, nor was it meant to be construed, that it precluded mixed-motive analysis if the situation involved one of the five protected grounds in addition to a situation on the list that was not adjudicated to be a protected ground. Thus, the NPRM is consistent with mixed-motive analysis precedent, and an applicant may provide argument, like the respondent in *Aldana-Ramos,* that his or her alleged persecutor is motivated by a protected ground in addition to the non-protected ground stated in the exception.

4.4.6. Criminal Activity

Comment: Commenters expressed concern about the rule's inclusion of ''criminal activity'' as the basis of claims that will generally not support a favorable adjudication due to the breadth of the provision and the underlying precedent. Numerous commenters opined that ''virtually all harm'' that satisfies the persecution requirement could be characterized as ''criminal activity'' because ''in virtually every country, beatings, rape, and threatened murder'' are criminalized. Another commenter realized that this broad definition may not be what the Departments intended, but without providing boundaries on the term, the Departments invited ''mass denials of claims by those who have bona fide asylum claims.'' A commenter expressed concern that the category would include aliens who were forced or coerced into committing crimes. Additionally, a commenter expressed reservations about the Departments' reliance on *Zetino* v. *Holder,* 622 F.3d 1007, 1016 (9th Cir. 2010), explaining that the ''alien was detained and unrepresented before the immigration court and the BIA'' and ''it was not until he had filed a pro se petition for review that he obtained counsel, and most of his appeal centered on procedural defects in the proceedings below.''

Response: The inclusion of ''criminal activity'' is not overly expansive. Rather, as demonstrated by the explanatory case citation provided by the Departments, this provision is meant to capture cases that are premised on generalized criminal activity. *See Zetino,* 622 F.3d at 1016 (discussing the ''desire to be free from harassment by criminals motivated by theft or random violence by gang members'').

The Departments find that these generalized claims are distinct from the commenters' concerns that persecutory acts in general may be ''criminal.'' To the extent commenters are nevertheless concerned that this provision would prohibit a broader swath of claims, the Departments again reiterate that these categories of cases are not categorical bans. Instead, the rule explicitly noted that there may be exceptions, and an applicant may present argument to the adjudicator as to why their individual case meets the nexus requirement. For example, aliens who were forced and coerced into crime may be an exception based upon the specific facts of the situation.

Further, the citation to *Zetino* remains an accurate example of the Departments' proposition despite commenters' concerns, which involved procedural issues unrelated to the relevant points in the case.

4.4.7. Perceived, Past or Present, Gang Affiliation

Comment: Regarding the inclusion of ''perceived, past or present, gang affiliation'' as the basis of claims that will generally not support a favorable adjudication, commenters objected to a perceived double standard and the implications for aliens, especially children. Several commenters argued that this provision was arbitrary and capricious because it would make individuals who were incorrectly imputed to be gang members ineligible for asylum while allowing incorrect

imputation of other characteristics, for example, homosexuality, to be grounds for asylum. Another commenter noted that this change would twice victimize aliens because imputed gang membership occurs at no fault of their own. One commenter also expressed concern that children who are forced into prostitution or drug smuggling would lose their right to asylum.

Response: The Departments acknowledge commenters' concerns and have sympathy for aliens who incorrectly have gang membership imputed onto them by no fault of their own. These concerns, however, do not result in a viable asylum claim. ''[T]he asylum statute does not provide redress for every misfortune.'' *Matter of A–B–,* 27 I&N Dec. at 318.

Regarding commenters' concerns that the rule provides an inconsistent approach to immutability, commenters compare dissimilar claims. While gang affiliation and homosexuality are traits that may both be imputed, accurately or not, to an applicant, the underlying ground of the latter may be a protected ground while the former is not. Thus, the Departments' approach toward immutability is consistently based on the protected nature of the underlying ground.

Commenters are incorrect that this provision would cause children, such as those forced into prostitution or drug smuggling by criminal gangs, to lose their eligibility for asylum.[54] Indeed, as noted in the preamble, claims premised on these sorts of gang affiliations had already been found in case law to not support a finding of asylum eligibility prior to the proposed rule's publication. *See, e.g., Reyes,* 842 F.3d at 1137–38 (holding that ''former members of the Mara 18 gang in El Salvador who have renounced their membership'' was not a cognizable particular social group); *Matter of A–B–,* 27 I&N Dec. at 320 (''Generally, claims by aliens pertaining to . . . gang violence perpetrated by non-governmental actors will not qualify for asylum.''). Because these gang-based claims are not related to a protected ground, it reasonably follows that they would further not succeed on nexus because the harms would not be on account of a protected ground. Nevertheless, the Departments again reiterate that, as discussed above, the rule explicitly provides for rare exceptions; children who were forced into prostitution or drug smuggling may present argument that their case sufficiently meets the nexus requirements based upon the specific facts in their application.

4.4.8. Gender

Comment: Some commenters expressed strong objections to the NPRM's inclusion of gender in the list of circumstances that would not ordinarily result in a favorable adjudication, including allegations that the provision is arbitrary and capricious as well as ''cruel and contrary to the purposes underlying Congress' desire to provide protection to refugees.'' Some commenters also argued that the amendments took a new and capricious position and would result in substantial and irreparable harm to aliens. One commenter opined that this provision was really about a desire to reduce the amount of aliens who could seek asylum.

Commenters asserted that gender has been one of the bedrock bases for asylum claims and that, as a result, the rule overturns decades of contrary legal precedent. In support, commenters cited to multiple cases ''in which immigration judges, the BIA, and the courts of appeals have held that gender-based persecution provides a valid ground for asylum.'' [55] One commenter claimed that the proposed rule ''runs counter to every case to have considered it.'' According to commenters, this includes the precedent cited in support of the rule, *Niang* v. *Gonzales,* 422 F.3d 1187 (10th Cir. 2005), which they assert in fact holds that gender can provide an adequate basis for establishing membership in a particular social group. *Id.* at 1199–1200. Some commenters asserted that the Departments should have included a larger quotation in the NPRM preamble, including:

> the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ''on account of'' their membership. 8 U.S.C. 1101(a)(42)(A). It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group.

Niang, 422 F.3d at 1199. One commenter expressed a belief that the Departments' choice of language to cite in *Niang* was designed to deceive the public and to reduce the notice and comment burden.

Commenters asserted that the inclusion of gender conflicts with the international obligations and international norms of the United States. For example, a commenter noted that the UNHCR, which oversees the Refugee Convention, has confirmed that people fleeing persecution based on gender, gender-identity, and sexual orientation do qualify for asylum under the Convention's definition of a refugee. In regards to numerosity, the commenter pointed to UNHCR guidance which explained, ''[t]he size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.'' Commenters stated that because the inclusion of gender would exclude meritorious claims for relief, the rule against gender-based asylum claims would violate the government's duty of non-refoulement as codified in statutory withholding of removal at section 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A). Commenters stated that the rule against gender-based asylum would aid and abet violations of the law of nations in contravention of the Alien Tort Claims Act (''ATCA'') because there is a specific and universal obligation to prevent domestic violence and other violence against women in international law.

One commenter argued that it is improper to disfavor gender-based claims in the nexus section. In support of that position, the commenter asserted that to support a general bar on gender-based claims within the nexus analysis, the agencies would need to show that gender is not generally a central reason for persecution throughout the world, and further, the proposed regulation changes do nothing to establish any empirical claims about causation.

Commenters also expressed concern that the amendment would prevent adjudicators from evaluating claims on a case-by-case basis.

[54] The Departments note that aliens who are victims of criminal activities, including human trafficking, may be eligible for other immigration benefits beyond asylum based on that victimization. INA 101(a)(15)(T),(U), 8 U.S.C. 1101(a)(15)(T),(U).

[55] For example, one commenter cited to the following cases: *De Pena-Paniagua* v. *Barr,* 957 F.3d 88, 93–94 (1st Cir. 2020); *Cece,* 733 F.3d 671–72; *Sarhan* v. *Holder,* 658 F.3d 649, 654–57 (7th Cir. 2011); *Perdomo,* 611 F.3d at 662; *Agbor* v. *Gonzales,* 487 F.3d 499, 503 (7th Cir. 2007); *Hassan* v. *Gonzales,* 484 F.3d 513, 517–18 (8th Cir. 2007); *Barry* v. *Gonzales,* 445 F.3d 741, 745 (4th Cir. 2006); *Gao* v. *Gonzales,* 440 F.3d 62, 70 (2d Cir. 2004), *vac'd on other grounds sub nom. Keisler* v. *Gao,* 552 U.S. 801 (2007); *Niang,* 422 F.3d at 1999–1200; *Mohammed* v. *Gonzales,* 400 F.3d 785, 795–98 (9th Cir. 2005); *Balogun* v. *Ashcroft,* 374 F.3d 492, 499 (7th Cir. 2004); *Abay* v. *Ashcroft,* 368 F.3d 634, 639–42 (6th Cir. 2004); *Yadegar-Sargis* v. *INS,* 297 F.3d 596, 603–04 (7th Cir. 2002); *Fatin,* 12 F.3d at 1241; *In re Kasinga,* 21 I&N Dec. 357, 375 (BIA 1996); *cf., e.g., Kadri* v. *Mukasey,* 543 F.3d 16, 21 (1st Cir. 2008) (''Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group.''); *Karouni* v. *Gonzales,* 399 F.3d at 1171–72 (reaching the same conclusion).

Another commenter noted that levels of gender-based violence have risen during the coronavirus pandemic and stated that, as a result, it is not appropriate for the Departments to take action to restrict asylum claims based on gender.

A commenter requested that the Departments not eliminate one of the few protections for gender-based violence.

Another commenter noted the Department of State's work to reduce and eliminate gender-based violence, including emphasizing in the refugee protection context that the ''empowerment and protection of women and girls has been a central part of U.S. foreign policy and national security'' and that ''gender-based violence[ ] is a critical issue'' that is ''intricately linked to'' the Department's strategic goals.

Finally, a commenter made numerous unsupported claims, including that the inclusion of gender violates the constitutional guarantee of equal protection; that the inclusion of gender in the laundry list is contrary to the evidence; and that the NPRM's failure to include a rationale for listing gender as failing the nexus requirement is, without more, sufficient to render that inclusion arbitrary.

Response: Regarding commenters' concerns that gender and ''private criminal acts'' would no longer be recognized as a viable claim, the Departments again note that the rule, after listing the eight situations that will generally not result in favorable adjudication, also notes that in rare circumstances, given the fact-specific nature of such determinations, such facts could be the basis for finding nexus. Although the nexus requirement for an asylum claim requires scrutiny when an asserted particular social group encompasses ''millions'' of individuals, *Matter of A–C–A–A–,* 28 I&N Dec. 92, the rule does not categorically bar all gender-based asylum claims contrary to the assertions of commenters. In other words, the rule does not completely prohibit applications with a nexus related to issues of gender from being granted, and the inclusion of gender in the list of circumstances that generally does not constitute harm on account of a protected ground does not conflict with the requirement that adjudicators consider each application on a case-by-case basis. Further, a purpose for the amendments was to allow for increased clarity and more uniform adjudication than the prior scheme which was shaped through case law. Thus, the Departments do not believe that the inclusion of gender in the listed situations generally resulting in unfavorable adjudication is cruel, novel, capricious, or contrary to congressional intent.

The Departments acknowledge commenters' discussion of a wide range of case law involving issues surrounding gender and applications for asylum or for statutory withholding of removal. To the extent that the Departments' inclusion of ''gender'' as an example of a nexus basis that generally will not support a favorable adjudication conflicts with the provided case law, the Departments reiterate the discussion in Section II.C.4.3 of this preamble regarding *Brand X.* The Departments invoke their authority to interpret the ambiguities in the Act, including what constitutes harm on account of a protected ground, outside the bounds of any prior judicial constructions. *See Brand X,* 545 U.S. at 982 (explaining that agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations because there is a presumption that Congress left statutory ambiguity for the agencies to resolve).

Regarding commenters' specific objections to the Departments' use of *Niang,* the Departments agree that the section following the quote in the NPRM stated that the issue surrounding gender is the nexus determination. This does not undermine, but enhances, the inclusion of gender in the listed circumstances that, without more, will not generally result in favorable adjudication based on nexus. *Niang* goes on to place more limits on a specific gender-based particular social group: ''It may well be that only certain women—say, those who protest inequities—suffer harm severe enough to be considered persecution. The issue then becomes whether the protesting women constitute a social group.'' *Niang,* 422 F.3d at 1200. This tracks with the rule: Harm on account of gender alone will generally result in unfavorable adjudication.

Another commenter pointed to the UNHCR's approach toward gender and numerosity. While the Departments appreciate the comment, they note that they are not bound by the UNHCR, and commenters' reliance on guidance from UNHCR is misplaced. UNHCR's interpretations of or recommendations regarding the Refugee Convention and Protocol, such as set forth in the UNHCR Handbook, are ''not binding on the Attorney General, the BIA, or United States courts.'' *INS* v. *Aguirre-Aguirre,* 526 U.S. at 427. ''Indeed, the Handbook itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.' '' *Id.* at 427–28. Further, to the extent such guidance ''may be a useful interpretative aid,'' *id.* at 427, it would apply only to statutory withholding of removal, which is the protection that implements Article 33 of the Convention, *cf. R–S–C–* v. *Sessions,* 869 F.3d 1176, 1188, n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''). In the withholding of removal context, the Departments disagree with commenters that the rule will violate the United States' non-refoulement obligations because such claims are not, without more, meritorious.

In addition, the Departments note that commenters asserted that violating a so-called ''specific and universal obligation to prevent domestic violence and other violence against women'' was a viable claim under the ATCA. The Departments further note, however, that the ''aiding and abetting'' violations of the law of nations is not currently recognized as within the scope of the ATCA. *Doe* v. *Nestle, S.A.,* 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom. Nestle USA, Inc.* v. *Doe I,* No. 19–416, 2020 WL 3578678 (July 2, 2020), and *cert. granted sub nom. Cargill, Inc.* v. *Doe I,* No. 19–453, 2020 WL 3578679 (July 2, 2020). Moreover, the commenters failed to demonstrate that such a claim would ''rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,'' such as violation of safe conducts, infringement of the rights of ambassadors, or piracy, that the Court has recognized. *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 724–25 (2004).

Much of the commenters' concern regarding the inclusion of gender arises from a misunderstanding of the complexity of particular social groups and the role of mixed-motive analysis. The Departments explain that the inclusion of gender indicates that, generally, a claim based on gender, without additional evidence, will not be favorably adjudicated in regards to the nexus claim. However, it does not read, nor should it be interpreted to mean, that the inclusion of gender in the claim is fatal. Rather, a claim based on gender alone will generally be insufficient. As to the role of mixed motive analysis, the text of the NPRM acknowledges mixed motive claims by quoting the REAL ID

Act of 2005 that defined the nexus element as requiring that one of the five protected grounds be ''at least one central reason for persecuting the applicant.'' 85 FR at 36281. Further, the NPRM explicitly detailed that it was providing guidance on what would not be considered one of the five protected grounds; the NPRM did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to a situation on the list that was not adjudicated to be a protected ground.[56]

The Departments disagree with commenters that the rule must show that gender is not the cause of harm around the world in order to include gender in the list of circumstances that generally does not constitute harm on account of a protected ground. Indeed, these comments miss the purpose of this discussion in the rule. The Departments do not make any statement about the question or prevalence of gender-based harm in other countries, but instead the point is that such harm is not on account of a protected ground and accordingly generally fails to support a valid claim to asylum or to statutory withholding of removal. As noted elsewhere, asylum is not designed to provide relief from all manners of harm that may befall a person. *See, e.g., Gjetani,* 968 F.3d at 397–98.

The Departments further disagree with commenters' statements that the inclusion of gender violates the constitutional guarantee of equal protection. The rule does not provide any benefits or discriminate on the basis of one gender over another.

Other commenters noted the severe problem of gender-based violence, especially in the global coronavirus pandemic, and the extensive work the Department of State is undertaking to reduce and eliminate gender-based violence. The Departments agree with commenters regarding the severity of the problem and the good work being done across the Federal government to address the problem. As previously mentioned, however, the narrow asylum statutes are not drafted to provide redress for every problem. The Departments must act within the legal framework set out by Congress.

4.5. Evidence Based on Stereotypes

Comment: Commenters expressed numerous reservations and disagreements with the Departments' regulation regarding the admissibility of evidence based on or promoting stereotypes to support the basis of an applicant's fear of harm. 8 CFR 208.1(g), 1208.1(g).

Some commenters alleged that the NPRM created a vague new evidentiary bar. Other commenters opined that the provision excludes necessary and critical evidence; some alleged that the NPRM was ''part of [the Departments'] efforts to make it harder for asylum seekers to present their cases,'' including claims based on particular social groups. Commenters also worried that the changes would unfairly advantage the government and violate due process. Other commenters expressed concern that the amendments would place a larger burden on adjudicators as they would be presented with difficult and time-consuming factual and legal issues. Regarding well-founded fear, a commenter alleged that the distinction between widespread, systemic laws or policies—evidence used to support a well-founded fear of persecution—and cultural stereotypes is so narrow that it will result in a ''quagmire of confusion'' and ''countless hours and resources of litigation.''

Other commenters claimed that cultural stereotypes were necessary for well-founded fear of persecution claims and were utilized in country condition reports. For example, a commenter argued that the Department of State's country reports contain cultural stereotypes. As evidence of this claim, the commenter included three quotes from the Human Rights Report for Guatemala: ''[a] culture of indifference to detainee rights put the welfare of detainees at risk''; ''[t]raditional and cultural practices, in addition to discrimination and institutional bias, however, limited the political participation of women and members of indigenous groups''; and ''[i]ndigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream.'' Further, the commenter asserted that this was evidence that ''it would be impossible to discuss conditions in any country without discussing its culture and without engaging in at least some stereotyping.'' The commenter extrapolated this onto several other elements of an asylum claim, including a subjectively genuine and objectively reasonable fear of harm and a socially distinct, particular social group.

A commenter opined that this provision was evidence that the Departments ''fail[ed] to engage in reasoned decision making''; the commenter continued by claiming that the NPRM ''raises doubts about whether the agency appreciates the scope of its discretion or exercised that discretion in

[56] The Departments note that gender was not included among other broad categories, such as race or nationality, as a basis for refugee status in either the 1951 Refugee Convention or the 1980 Refugee Act. Further, no precedential decision has unequivocally recognized gender, standing alone, as a basis for asylum. *See, e.g., Fisher* v. *INS,* 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (''Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act.''). The Departments further note that gender has frequently been analyzed by circuit courts in the context of the definition of a particular social group, rather than under the rubric of nexus, though the courts themselves are in disagreement over the issue. *See Matter of A–C–A–A–,* 28 I&N at 91 (''Although I do not decide the matter in this case, I note that there has been disagreement among the courts of appeals about whether gender-based groups may constitute a particular social group within the meaning of the INA.''). At least three circuits have concluded that gender is too broad or sweeping to constitute a particular social group itself. *See Gomez* v. *INS,* 947 F.2d 660, 664 (2d Cir. 1991) (''Like the traits which distinguish the other four enumerated categories-race, religion, nationality and political opinion-the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.''), *Safaie* v. *INS,* 25 F.3d 636, 640 (8th Cir. 1994) (''We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.''); *Da Silva* v. *U.S. Att'y Gen.,* 459 F. App'x 838, 841 (11th Cir. 2012) (''The BIA determined that 'women' was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a 'social group' under the INA.''). Another circuit has quoted the language in *Gomez* approvingly. *Lukwago* v. *Ashcroft,* 329 F.3d 157, 172 (3d Cir. 2003). Still another has rejected ''generalized sweeping classifications for asylum,'' while noting that the Board ''has never held that an entire gender can constitute a social group under the INA.'' *Rreshpja* v. *Gonzales,* 420 F.3d 551, 555 (6th Cir. 2005). One circuit has intimated that gender alone could suffice to constitute a particular social group, though it remanded the case to the Board to address that issue in the first instance. *Perdomo,* 611 F.3d at 667; *but see Rreshpja,* 420 F.3d at 555 (''We do not necessarily agree with the Ninth Circuit's determination that virtually all of the women in Somalia are entitled to asylum in the United States.''). Further, although gender is generally regarded as an immutable characteristic, *see e.g., Kauzonaite* v. *Holder,* 351 F. App'x 529, 531 (2d Cir. 2009) (''However, although gender is an immutable characteristic. . . gender alone is insufficient to identify a particular social group.''), modern notions of gender fluidity may raise questions about that assumption in individual cases. *Cf, e.g., Bostock* v. *Clayton,* 140 S.Ct. 1731, 1779 & n.45 (2020) (''while the Court does not define what it means by a transgender person, the term may apply to individuals who are 'gender fluid,' that is, individuals whose gender identity is mixed or changes over time.'' (Alito, J. dissenting)). Further, because every alien has a gender of some classification, gender may not carry sufficient particularity to warrant classification as a particular social group. *Cf. Matter of L–E–A-,* 27 I&N Dec. at 593 (''Further, as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group. There is no evidence that Congress intended the term 'particular social group' to cast so wide a net.''). In short, although the rule considers gender under the category of nexus, it may also be appropriately considered under the definition of ''particular social group'' as well, as the lists under both definitions are nonexhaustive.

a reasonable manner.'' *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1905 (2020) (quoting *Michigan* v. *EPA,* 576 U.S. 743, 750 (2015) (internal quotation marks omitted)).[57] Finally, commenters asserted that the provision's purported application only to aliens and not to DHS represented an unfair asymmetry because there was no prohibition of DHS filing evidence promoting stereotypes in opposition to asylum applications.

Response: The Departments reject the characterization of the rule regarding admissibility of evidence based on stereotypes as a new evidentiary bar. Numerous courts, and the BIA, have made clear that the Federal rules of evidence do not apply in immigration proceedings, but the evidence must be probative and its admission may not be fundamentally unfair. *See, e.g., Rosendo-Ramirez* v. *INS,* 32 F.3d 1085, 1088 (7th Cir. 1994); *Baliza* v. *INS,* 709 F.2d 1231, 1233 (9th Cir. 1983); *Tashnizi* v. *INS,* 585 F.2d 781, 782–83 (5th Cir. 1978); *Trias-Hernandez* v. *INS,* 528 F.2d 366, 369 (9th Cir. 1975); *Marlowe* v. *INS,* 457 F.2d 1314, 1315 (9th Cir. 1972); *Matter of Toro,* 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Lam,* 14 I&N Dec. 168, 170 (BIA 1972). As the rule makes clear, ''conclusory assertions of countrywide negative cultural stereotypes'' are not probative of any of the eligibility grounds for asylum. *Matter of A–B–,* 27 I&N Dec. at 336 n.9.

For example, in *Matter of A–B–,* the Attorney General determined that the evidence submitted in *Matter of A–R–C–G–,* 26 I&N Dec. 388 (BIA 2014), ''an unsourced partial quotation from a news article eight years earlier,'' was not appropriate evidence to support the ''broad charge'' that Guatemala had a '' 'culture of machismo and family violence.' '' *Matter of A–B–,* 27 I&N Dec. at 336 n.9 (quoting *Matter of A–R–C–G–,* 26 I&N Dec. at 394). Similarly, the rule establishes that such unsupported stereotypes are not admissible as probative evidence. 85 FR at 36282 (''pernicious cultural stereotypes have no place in the adjudication of applications for asylum and statutory withholding of removal, regardless of the basis of the claim''); *see also Matter of A–C–A–A–,* 28 I&N Dec. at 91 n.4 (''Furthermore, the Board should remember on remand that 'conclusory assertions of countrywide negative cultural stereotypes . . . neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations.' '' (quoting *Matter of A–B–,* 27 I&N Dec. at 336 n.9)).

Reliance on stereotypes about a country, race, religion, nationality, or gender is inconsistent with the individualized consideration asylum claims require. Further, by definition, stereotypes are not subject to verification and have little intrinsic probative value; to the contrary, they frequently undermine credibility considerations that are important to an asylum claim. *Cf. Thomas* v. *Eastman Kodak Co.,* 183 F.3d 38, 61 (1st Cir. 1999) (''The concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments.''). Instead, they reflect ''a frame of mind resulting from irrational or uncritical analysis.'' *Nguyen* v. *INS,* 533 U.S. 53, 68 (2001). Thus, even ''benevolent'' stereotypes are generally disfavored in law. *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Johnson Controls,* 499 U.S. 187, 199–200 (1991) (stating, in rejecting employer policy related to female fertility due to potential exposure to fetal hazards, that the ''beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination''). In short, stereotypes about another individual or country have little place in American law as evidence supporting any type of claim. *See United States* v. *Bahena-Cardenas,* 411 F.3d 1067, 1078 (9th Cir. 2005) (''Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion.'').

To be sure, asylum claims are generally rooted in hearsay, frequently cannot be confronted or rebutted, and are typically uncorroborated except by other hearsay evidence. *See, e.g., Angov,* 788 F.3d at 901 (' 'The specific facts supporting a petitioner's asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner's grasp. By definition, they will have happened at some time in the past—often many years ago—in a foreign country. In order for the [DHS] to present evidence ''refuting or in any way contradicting'' petitioner's testimony, it would have to conduct a costly and often fruitless investigation abroad, trying to prove a negative—that the incidents petitioner alleges did not happen.' '' (quoting *Abovian* v. *INS,* 257 F.3d 971, 976 (9th Cir. 2001) (Kozinski, J., dissenting from denial of pet'n for reh'g en banc))); *Mitondo* v. *Mukasey,* 523 F.3d 784, 788 (7th Cir. 2008) (''Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials.''). Thus, adjudicators are certainly seasoned in assessing evidence that is not subject to verification and has minimal probative value in the context of asylum claims.

Nevertheless, the Departments believe that the harms associated with the use of evidence rooted in stereotypes far outweigh what little, if any, probative value such evidence may have in an asylum claim. Accordingly, the rule does not represent a wholly new evidentiary bar per se, but rather a codification of the point that such stereotypes will not meet the existing admissibility standards because they are inherently not probative. Contrary to commenters' suggestions, such evidence should not be necessary to an asylum application. Even if such stereotypes were admitted into evidence, they would be given little to no weight for the reasons stated above. Further, to the extent that an applicant's claim is supported only by the applicant's personal stereotypes about a country or the alleged persecutor, that claim is likely unmeritorious in the first instance.

Further, the Departments disagree with commenter assertions that the term ''cultural stereotypes'' is vague. As alluded to above, the concept of stereotyping is well-established in American jurisprudence, and legal questions regarding stereotypes, especially stereotypes about foreign countries, arise in a variety of settings. *See, e.g., United States* v. *Ramirez,* 383 F.Supp.2d 1179, 1180 (D. Neb. 2005) (collecting cases excluding testimony based on cultural stereotypes of different foreign countries); *United States* v. *Velasquez,* No. CR 08–0730 WHA, 2011 WL 5573243, at *3 (N.D. Cal. 2011) (not permitting a ''cultural defense'' expert witness to testify ''as his opinions are based on cultural stereotypes and generalizations that have no probative value in this case'' and permitting a ''mental condition expert'' to testify on the condition that he ''refrain from offering testimony based on stereotypes and/or generalizations of Guatemalan, Mayan, Mam or any other culture''); *see also*

[57] The Departments respond to allegations of failure to engage in reasoned decision making below in section II.C.6.2.

Bahena-Cardenas, 411 F.3d at 1078 (''Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion.''). Moreover, existing Department policies forbid the use of generalized stereotypes in law enforcement activities. *See* U.S. Dep't of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity 4 (2014) (''Reliance upon generalized stereotypes involving the listed characteristics is absolutely forbidden.''), *https://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf.* Thus, the Departments do not believe that adjudicators will have difficulty understanding the rule's reference to ''cultural stereotypes.''

The Departments also disagree with commenter assertions that it will be difficult to distinguish between widespread, systemic laws or policies—a form of accepted evidence to establish a well-founded fear—and cultural stereotypes. The Departments are seeking to bar admissibility of non-probative evidence of the kind described in *Matter of A–B–,* broad cultural stereotypes that have no place in an impartial adjudication. Evidence of systemic laws or policies is more probative and concrete than unsupported assertions of reductive cultural stereotypes. For example, bald statements that a country, as a whole, has a particular cultural trait that causes certain members of that country to engage in persecution is evidence that has no place in an adjudication. In contrast, evidence that a country's leader has instituted a program to carry out systematic persecution against certain groups would be highly probative evidence. General assertions of cultural stereotypes are inherently conclusory, reductive, and unhelpful to the adjudicator or trier of fact—in addition to being harmful in and of themselves—and should not be admissible.

In support of the claim that cultural stereotypes are necessary for many asylum claims, one commenter presented three excerpts from a Department of State Human Rights Report on Guatemala. The Departments appreciate the commenter's examples, but they do not reflect assertions of pernicious cultural stereotypes described in this rulemaking.

The first alleged stereotype was that ''[a] culture of indifference to detainee rights put the welfare of detainees at risk.'' However, the report goes on to state: ''On August 22, Ronald Estuardo Fuentes Cabrera was held in confinement while awaiting trial for personal injury charges after a car accident. Fuentes died from internal thoracic injury hours before his scheduled trial and without having received a medical exam, while his wife and the passenger of the other vehicle were taken for medical care.'' U.S. Dep't of State, 2019 Country Reports on Human Rights Practices: Guatemala 6 (2019), *https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/*guatemala. Further, the report nowhere alleges that Guatemalans are indifferent to detainee rights because of some cultural trait peculiar to Guatemalans. Thus, not only do these statements not promote any particular cultural stereotype about Guatemalans based on race, religion, nationality, gender or similar characteristic, but they are supported by some facts. In short, this statement reflects verifiable facts, not a stereotype.

The second alleged stereotype was that ''[t]raditional and cultural practices, in addition to discrimination and institutional bias, . . . limited the political participation of women and members of indigenous groups.'' Once again, the report went on to detail the low numbers of women and indigenous people in the government to support its conclusion. *Id.* at 12–13. Elsewhere in the report, the State Department included specific information about sexual harassment: ''No single law, including laws against sexual violence, deals directly with sexual harassment, although several laws refer to it. Human rights organizations reported sexual harassment was widespread.'' *Id.* at 17. Similarly, the report contained specific information about discrimination: ''Although the law establishes the principle of gender equality and criminalizes discrimination, women, and particularly indigenous women, faced discrimination and were less likely to hold management positions.'' *Id.* The Departments do not see how this broad statement suggests a stereotype about an alleged persecutor for purposes of supporting an asylum claim such that it would fall within the ambit of the rule. Moreover, it is, again, based on evidence rather than a stereotype.

The final alleged stereotype contained in the report was that ''[i]ndigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream.'' This quote was also followed by supporting statements, including details regarding indigenous leaders who were killed. *Id.* at 20–21. Again, the Departments do not see how this broad statement suggests a stereotype such that it would fall under the rule. Further, it does not suggest that indigenous individuals possess some inherent trait—as opposed to larger structural factors in the country—that causes them to be underrepresented in national politics. Thus, it is also based on evidence rather than a stereotype.

Other commenters expressed concern that this portion of the rule would place a larger burden on adjudicators. The Departments appreciate both the comment and the underlying concern. But, as noted above, adjudicators at both Departments are experienced in assessing evidence of little-to-no probative value, and immigration judges at DOJ are already experienced at ruling on evidentiary objections as a matter of course in immigration proceedings. Thus, the Departments do not believe that this portion of the rule will increase any burden beyond what adjudicators already face. The definition of ''cultural stereotypes'' is straightforward; the Departments have confidence that adjudicators will be able to apply such a definition in a timely and fair manner. Nevertheless, in response to some of the apparent confusion by some commenters, the Departments have modified the language in the final rule to make it clearer. The change does not reflect a substantive modification from what was intended in the NPRM.

The Departments reject the commenters' assertions that this rule was passed with bad intent. One aim of this rule is to allow a more expeditious adjudication of meritorious asylum claims so that applicants do not have to wait a lengthy amount of time before receiving relief. The Departments agree with the commenter who stated that many asylum applications require at least some discussion of the culture of the country to which the applicant fears return. However, the Departments disagree with the commenter's assertions that some level of stereotyping would be helpful to the applicant's claim. Stereotypes are inherently unsupported generalizations. Such conclusory statements are not probative and can indeed be harmful, as discussed above.

Further, the Departments disagree with the commenter who asserted that the rule would disadvantage the applicant and violate due process. As discussed above, an applicant's inability to submit nonprobative evidence neither disadvantages the applicant nor violates due process.

Finally, in response to commenters' concerns about the perceived asymmetry of the rule, the Departments note that DHS is already bound by policy to treat stakeholders, including

aliens, in a non-discriminatory manner. DHS therefore may not rely on stereotype evidence to oppose an asylum application. *See* U.S. Immigration and Customs Enforcement, Office of Diversity and Civil Rights, *https://www.ice.gov/leadership/*dcr (''It is U.S. Immigration and Customs Enforcement's (ICE) policy to ensure that employees, applicants for employment and all stake holders are treated in a non-discriminatory manner in compliance with established laws, regulations and Executive Orders.''); *cf. Doe* v. *Att'y Gen.,* 956 F.3d 135, 155 n.10 (3d Cir. 2020) (''The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about 'what he or she does in bed' is never appropriate.'' (quoting USCIS, *RAIO Directorate—Officer Training: Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* 34 (Dec. 28, 2011))). Further, although Federal case law is clear that stereotypes have no place as a basis to deny asylum applications, *e.g., Doe,* 956 F.3d at 155 n.10 (collecting cases), there is no similar Federal case law regarding the use of stereotypes as a basis for granting asylum applications, and the issue of the reliance on stereotypes to support an asylum application has arisen only recently, *Matter of A–B–,* 27 I&N Dec. at 336 n. 9. Consequently, as both immigration judges and DHS are already bound by policy, if not also law, not to rely on stereotypes as a basis to oppose or deny an asylum application, the rule does not create any asymmetry regarding evidence of stereotypes. To the contrary, it corrects an existing asymmetry to ensure that asylum applications are not granted based on inappropriate evidence of stereotypes.

4.6. Internal Relocation

Comment: Commenters generally expressed concern that the NPRM would create a standard for the analyzing the reasonableness of internal relocation that almost no applicant for asylum, withholding of removal, or protection under the CAT regulations would be able to meet.[58]

Commenters expressed several concerns with the proposed list of factors pertaining to the internal relocation analysis in proposed 8 CFR 208.13(b)(3) and 1208.13(b)(3). First, commenters expressed concern that the list places too much weight on the identity and reach of the persecutor, and that it lacks factors pertaining to the asylum seeker and factors unrelated to the asylum application (such as country conditions).

Second, commenters asserted that the proposed list inappropriately implies that asylum seekers coming from large countries or who are subjected to persecution from a single source can reasonably relocate internally. Some commenters argued that persecution does not end at the limits of political jurisdictions and that persecutors could have contacts throughout a country or region. One commenter noted that UNHCR guidance does not require an asylum seeker to prove that his or her entire home country is unsafe before seeking asylum. Similarly, one commenter expressed concern with the proposed definition of the term ''safety,'' arguing that there has been no judicial disagreement or confusion pertaining to the current regulation and that the proposed definition would limit adjudicators' ability to perform case-by-case analyses.

Third, commenters argued that the proposed rule inappropriately focuses on an asylum seeker's ability to travel to the United States. Commenters noted a lack of jurisprudence discussing ability to travel and alleged that since asylum seekers had to first travel to the United States to make a claim, the factor would lead to the denial of most applications.

Fourth, commenters similarly expressed concern that the proposed rule would eliminate the reasonableness analysis, thus forcing adjudicators to ignore the overall context of an asylum applicant's plight. One commenter argued that many cases have been sent to the BIA from Federal courts so that adjudicators could apply the current reasonableness test to internal relocation determinations.

Finally, commenters took issue with the NPRM's assertion that 8 CFR 208.13(b) and 1208.13(b) include ''unhelpful'' language that undermines the need for the entire section. Commenters noted that Federal courts and the BIA have almost unanimously endorsed the current language and have not raised such concerns.

Commenters also expressed concern with the proposed regulation's change to the burden of proof for asylum seekers who establish they were subjected to past persecution by a non-governmental entity. Commenters argued that, contrary to the NPRM's assertion, the current regulations are preferable. Specifically, increasing the burden would be inappropriate, commenters argued, because asylum seekers would have already established past persecution and that the government is unable or unwilling to protect them.

One commenter noted that the proposed change to the burden of proof is unnecessary because DHS could offer information evidencing that internal relocation is reasonable, and then the applicant could respond to such information.

One commenter argued that the proposed change to the burden of proof in the case of non-state actors unfairly targets asylum seekers from Central American countries and Mexico because the types of individuals and groups that would be considered non-state actors under the proposed rule are commonly cited persecutors in asylum cases pertaining to these countries.

Response: To respond to commenters' concerns that ''almost no applicant . . . would be able to meet'' the revised standard for reasonableness of internal relocation, the Departments reject that concern as speculative. The Departments also reject a commenter's allegation that the factors in this section were ''justifications to deny applications of *bona fide* asylum seekers.'' These factors are relevant and material to an alien's asylum eligibility, as discussed in further detail below.

The Departments emphasize that the rule requires adjudicators to consider ''the totality of the relevant circumstances'' (as stated in 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal)) when determining the reasonableness of internal relocation. The Departments note that the proposed list identifies the ''most relevant'' circumstances for consideration and provides a streamlined presentation of those factors. *See* 85 FR at 36282. The list of factors in paragraph (b)(3) is not exhaustive, however, so the regulatory amendments do not foreclose consideration of factors mentioned by commenters, such as factors related to the particular asylum seeker or factors unrelated to the asylum application. This approach is not a one-size-fits-all analysis, as one commenter alleged. Rather, the totality of the relevant circumstances test allows adjudicators to consider each case individually.

Relatedly, the Departments disagree that the list of factors afford inordinate weight to the identity and reach of the persecutor or that adjudicators must make determinations in a vacuum. As a baseline matter, asylum is a form of

[58] The Departments note that consideration of internal relocation in the context of an application for withholding of removal under the CAT regulations is different than the consideration of internal relocation in the context of an application for asylum and statutory withholding of removal. *Compare, e.g.,* 8 CFR 1208.13(b)(3), 1208.16(b)(3) (assessing the reasonableness of internal relocation), *with* 1208.16(c)(3)(ii) (assessing internal relocation without reference to reasonableness).

discretionary relief for which an applicant must demonstrate to the Secretary or Attorney General that he or she, inter alia, is a refugee as defined in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), and warrants a favorable exercise of discretion. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *Cardoza-Fonseca,* 480 U.S. at 428 n.5; 8 CFR 208.14(a), (b), 1208.14(a), (b). To determine whether the applicant is a refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), the Departments assess the applicant's ''fear of persecution,'' which includes whether the applicant could relocate to avoid future persecution and whether it would be reasonable to do so. *See Melkonian* v. *Ashcroft,* 320 F.3d 1061, 1069 (9th Cir. 2003) (requiring a finding that an alien could relocate to avoid persecution and that it ''must be reasonable to expect them to do so'' (citing *Cardenas* v. *INS,* 294 F.3d 1062, 1066 (9th Cir. 2002)); *see also Singh* v. *Ilchert,* 63 F.3d 1501, 1511 (9th Cir. 1995) (permitting the Attorney General to assess an alien's ability to relocate to a safer part of the country). The Act does not require consideration of internal relocation. *See generally* INA 208, 8 U.S.C. 1158. Rather, this analysis was implemented by regulation to address whether ''an [asylum] applicant may be able to avoid persecution in a particular country by relocating to another area of that country.'' Asylum Procedures, 65 FR 76121 (Dec. 6, 2000). This rule would refine those regulations, which agencies may do so long as they give a reasoned explanation for the change. *See, e.g., Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' (citing *Brand X,* 545 U.S. at 981–82)).

As the Departments explained in the NPRM, the changes are necessary for numerous reasons. First, the Departments believe the ''current regulations regarding internal relocation inadequately assess the relevant considerations.'' 85 FR at 36282. Second, the Departments changed the regulatory burdens of proof because the Departments determined that the burdens should generally align with those ''baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions.'' *Id.* Third, the Departments made amendments to facilitate ''ease of administering these provisions.'' *Id.* The Departments believe that the rulemaking will better serve the needs of adjudicators who will benefit from the addition of factors that more adequately assess relevant considerations for internal relocation and the elimination of less relevant factors. Despite commenters' disagreements with the new list of factors, the Departments believe that the regulations must clearly and accurately guide adjudicators in assessing the reasonableness of internal relocation. The Departments anticipate that the new regulations will facilitate more accurate and timely determinations, given that adjudicators will spend most of their time considering the most relevant factors and less time considering less relevant factors or trying to determine whether certain factors are relevant. This is especially significant considering the unprecedented pending caseload and the need for efficient adjudication. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/*download. Given these revisions to the regulations, adjudicators are not left to make determinations ''in a vacuum,'' as commenters suggested.

Accordingly, the Departments determined that the following factors were most relevant to an adjudicator's analysis: ''the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.'' 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). The Departments do not imply that this list compels the conclusion that asylum seekers who come from large countries or who were subjected to persecution from a single source can reasonably relocate internally, as commenters alleged. Instead, the Departments find those factors ''most relevant'' for adjudicators to consider in determining whether internal relocation is reasonable—not that those factors absolutely indicate that internal relocation is reasonable. 85 FR at 36282. Furthermore, as noted above, the listed relevant factors are not exhaustive and adjudicators may consider other factors that may be relevant to a particular case.

As commenters pointed out, the Departments recognize that persecutors may not be confined to political jurisdictions, which is already reflected in the factor assessing the ''size, reach, or numerosity of the alleged persecutor.'' 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). Moreover, the Departments disagree with a commenter's allegation that the rule redefines safety—neither the proposed rule nor this final rule redefines ''safety.''

The Departments disagree that the factor assessing the alien's ability to travel to the United States is inappropriate. First, this factor is considered under the totality of the circumstances; thus, this factor's presence will not automatically result in one determination or another. The Departments added this factor so that adjudicators would fully consider whether an alien had already traveled a great distance to relocate to the United States, and whether the alien's ability to do so reflected a similar ability to relocate within the country from which the alien is seeking protection. Second, in contrast to commenters, the Departments believe that a lack of jurisprudence on this factor counsels in favor of including it in the regulation. Nor do the Departments find the lack of directly relevant jurisprudence surprising. Because the current regulations do not highlight an alien's ability to travel to the United States as one of the most relevant factors, courts would have had little reason to consider this factor unless a party raised it. *See, e.g., Garcia-Cruz* v. *Sessions,* 858 F.3d 1, 8–9 (1st Cir. 2017) (remanding the case to the BIA to consider the reasonableness factors specifically provided in the regulations); *Khattak,* 704 F.3d at 203–04 (same). Nevertheless, case law has considered travel-related factors such as an alien's return trips or previous relocations. *See, e.g., Ullah* v. *Barr,* No. 18–28912020 WL 6265858, at *1–2 (2d Cir. Oct. 26, 2020) (holding that country's lack of restriction on internal movement or relocation and alien's ability to work and move around the country without incident supported the BIA's finding that the alien could safely relocate to avoid future persecution); *Gambashidze* v. *Ashcroft,* 381 F.3d 187, 193 (3d Cir. 2004) (considering, in part, that the alien and his family relocated to a city that ''is not a great distance'' from the city where they faced persecution before the alien relocated again to the United States); *Belayneh* v. *I.N.S.,* 213 F.3d 488, 491 (9th Cir. 2000) (holding that the alien had not established a reasonable fear of future persecution in part because she had ''traveled to the United States and returned to Ethiopia three times without incident''). These cases provide examples in which courts

recognized that the ability and willingness to travel and the distance traveled are all relevant to the reasonableness inquiry because they may indicate the extent to which an alien is physically or financially able to travel. In that same vein, the Departments have determined that an alien's ability to travel to the United States is clearly relevant and appropriate to the reasonableness inquiry.

The rule does not eliminate the reasonableness analysis, as commenters alleged. First, the heading of each regulatory section is ''Reasonableness of internal relocation.'' 8 CFR 208.13(b)(3), 1208.13(b)(3) (asylum); 208.16(b)(3), 1208.16(b)(3) (statutory withholding of removal). The heading indicates the content of the section. What follows is a list of factors and the requisite burdens of proof to aid an adjudicator's assessment of the reasonableness of internal relocation. For example, the regulations state, in the case of a governmental persecutor, ''it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, *it would be reasonable for the applicant to relocate*'' and, in the case of a non-governmental persecutor, ''there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that *it would be unreasonable to relocate.*'' 8 CFR 208.13(b)(3)(ii), (b)(3)(iii), 1208.13(b)(3)(ii), (b)(3)(iii) (emphases added). The reasonableness inquiry continues to be an active prong of the internal relocation assessment. In addition, under the new regulations, adjudicators must not disregard other factors, as commenters alleged; rather, the regulations instruct adjudicators to consider ''the totality of the relevant circumstances.'' 8 CFR 208.13(b)(3), 1208.13(b)(3). Application of the previous regulations by courts and the BIA are irrelevant and unpersuasive as evidence that the rules cannot be changed. As previously explained, it is properly within the Departments' authority to revise their regulations. *See, e.g., Encino Motorcars, LCC,* 136 S. Ct. at 2125.

The Departments maintain that the language in the previous regulations was unhelpful. 85 FR at 36282. Equivocal phrases in the prior regulation—that factors ''may, or may not, be relevant''—are almost paradigmatically unhelpful. The Departments believe the revised regulations, including review under the totality of the circumstances and the nonexhaustive list of factors provided, will continue to allow adjudicators to assess internal relocation on a case-by-case basis.

Although commenters alleged that Federal courts and the BIA have ''nearly unanimously endorsed'' the previous regulations, the cases referenced in support of their allegations merely apply the previous regulations. Judicial application of regulations cannot be construed as ''endorsing'' the regulations except to the extent that a court finds the regulations to be a reasonable interpretation of the statute. *See Chevron,* 467 U.S. at 844 (''[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'').

Finally, the Departments disagree that changing the burden of proof is inappropriate. As explained in the NPRM, the Departments believe the realigned burden of proof follows the ''baseline assessments of whether types of persecution generally occur nationwide, while recognizing that exceptions, such as persecution by local governments or nationwide organizations, might overcome these presumptions.'' 85 FR at 36282. Contrary to the commenters' assertion, when an adjudicator is determining reasonableness of internal relocation, an applicant may not have already established past persecution or that the government was unable or unwilling to protect the alien. For example, an applicant may be claiming a fear of future persecution pursuant to 8 CFR 208.13(b)(2), 1208.13(b)(2). Although showing past persecution raised a rebuttable presumption that internal relocation would be unreasonable under the prior regulation, the Departments have concluded, upon fresh review, that applying a blanket presumption independent of the identity of the persecutor is inconsistent with assessments of how widespread persecution is likely to be based on the identity of the alleged persecutor. Whereas government or government-sponsored actors would generally be expected to have nationwide influence, a private individual or organization would not ordinarily have such reach. Placing the burden on the government to show that the alien's fear of future persecution is *not* well-founded where he was previously persecuted by a non-governmental actor therefore inverts the usual burden of proof—which lies with the applicant—without good reason. *See* 85 FR at 36282 (explaining this rationale).

In the final rule, DHS still bears the burden to demonstrate that the applicant could relocate to avoid future persecution and that it would be reasonable for the applicant to do so in the case of a governmental persecutor (8 CFR 208.13(b)(3)(ii), 1208.13(b)(3)(ii) (asylum); 208.16(b)(3)(ii), 1208.16(b)(3)(ii) (statutory withholding of removal)), and the alien bears the burden to demonstrate that it would be reasonable to relocate in the case of a non-governmental persecutor (8 CFR 208.13(b)(3)(iii), 1208.13(b)(3)(iii)). These burdens reflect the Departments' belief that aliens who claim past persecution by non-state actors should bear the burden to rebut the presumption that internal relocation is reasonable.

The different burdens of proof do not unfairly target or discriminate against asylum seekers from Central American countries and Mexico, as commenters alleged. The new burden of proof applies to all asylum seekers, regardless of the country of origin. The Departments note that, contrary to the commenters' allegations, the examples of private-actor persecutors provided by the regulations exist in many countries, not just Central American countries and Mexico. *See, e.g., Mashiri* v. *Ashcroft,* 383 F.3d 1112, 1115–16 (9th Cir. 2004) (detailing facts in which a German citizen of Afghan descent was persecuted by non-state actors in Germany, some of whom were part of a Neo-Nazi mob); *Doe* v. *Att'y Gen. of the U.S.,* 956 F.3d 135, 139–40 (3d Cir. 2020) (detailing facts in which a Ghanaian citizen was persecuted by family members and neighbors in Ghana).

4.7. Factors for Consideration in Discretionary Determinations

Comment: Commenters generally expressed concern that the Departments did not provide a sufficient justification for the proposed changes and did not consider the practical consequence of the proposed rule. Commenters similarly expressed general concerns that the proposed changes are in conflict with section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), are contrary to case precedent, are immoral, and would negatively impact children seeking asylum. The true purpose of the rule, some commenters asserted, is to lead to the denial of virtually all asylum applications.

Commenters expressed concern that the Departments seek to depart from the BIA's approach in *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987). One commenter stated that it was inappropriate to use language from the

case to justify the proposed new factors while also superseding the case's central holding. Commenters stated that *Matter of Pula* instructs that danger of persecution should outweigh all but the most egregious factors. Commenters similarly stated that *Matter of Pula* requires adjudicators to consider the totality of the circumstances and to not give any particular factor such significant weight that it would outweigh all the others.

Citing *East Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832 (9th Cir. 2020), one commenter expressed concern that the proposed rule conflicts with recent Federal court precedent that the creation of ''eligibility bars'' to asylum is constrained by statute. The commenter asserted that as some of the discretionary factors would require denial of applications as a matter of discretion, they are, in actuality, unlawful eligibility bars.

Commenters stated that the proposed negative factors that adjudicators would be required to consider are not related to the merits of an asylum claim and are unavoidable in many cases. As a result, commenters argued, adjudicators would be required to deny most asylum cases as a matter of discretion. One commenter asserted that the Departments did not consider alternative policy options, and one commenter stated that the rule should be amended to require adjudicators to consider positive factors in their discretionary determinations. Commenters argued that inappropriately cabining discretion in this way is in conflict with making asylum determinations on a case-by-case basis.

Commenters expressed concern that the only way for applicants to overcome the presence of nine of the proposed adverse factors would be to show ''extraordinary circumstances'' or ''exceptional and extremely unusual hardship.'' One commenter stated that a demonstration of past persecution or a well-founded fear of future persecution is ''per se'' exceptional and extremely unusual hardship. Therefore, the commenter argued that by meeting the legal standard for asylum, applicants necessarily would meet the proposed new standard of exceptional and extremely unusual hardship. The commenter similarly stated that past persecution is ''exceptional hardship.'' Another commenter stated that application of the ''exceptional and extremely unusual hardship'' standard in exercising discretion for asylum applications contravenes the INA because Congress did not expressly provide for that heightened standard. Instead, the commenter noted that in section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A), Congress stated that the Attorney General ''may'' grant asylum. The commenter asserted that if Congress intended the use of a heightened standard, it would have expressly done so, as it did in section 240A(b)(1)(D) of the Act, 8 U.S.C. 1229b(b)(1)(D), for non-LPR cancellation of removal. The commenter cited the Supreme Court's decision in *Cardoza-Fonseca* for support. *See* 480 U.S. at 432 (''[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.''). Accordingly, consistent with *Matter of Marin,* 16 I&N Dec. 581, 584–85 (BIA 1978), the commenter asserted that the totality of the circumstances approach should be applied in the exercise of discretion for asylum applications.

Commenters disagreed with the Departments' position that creating a list of proposed factors would save adjudicators time. Specifically, commenters noted that since a finding of ''extraordinary circumstances'' or an exceptional and extremely unusual hardship would require a separate hearing, the proposed factors would not save time.

Response: The Departments disagree that they failed to provide sufficient justification for this proposed change in the NPRM, evidenced by the three-page discussion of this section alone. *See* 85 FR at 36282–85. Nevertheless, the Departments provide further explanation in this final rule.

Asylum is a discretionary benefit. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (providing that the Departments ''*may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section'' (emphasis added)); *see also Cardoza-Fonseca,* 480 U.S. at 443 (''[A]n alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it.'' (emphases in original)). Accordingly, ''with respect to any form of relief that is granted in the exercise of discretion,'' an alien must satisfy the eligibility requirements for asylum and establish that the application ''merits a favorable exercise of discretion.'' INA 240(c)(4)(A),8 U.S.C. 1229a(c)(4)(A); *see also Matter of A–B–,* 27 I&N Dec. at 345 n.12 (explaining that the ''favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA'' and providing relevant discretionary factors to consider in the exercise of such discretion), *abrogated on other grounds, Grace II,* 965 F.3d at 897–900.

In its broadest sense, legal discretion is defined as the ''exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right.'' *Discretion,* Black's Law Dictionary (11th ed. 2019); *see also Discretion,* Merriam-Webster (last updated July 6, 2020), *https://www.merriam-webster.com/dictionary/discretion* (defining ''discretion'' as the ''power of free decision or latitude of choice within certain legal bounds''). While the statute and case law are clear that a grant of asylum is subject to discretion, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *INS* v. *Stevic,* 467 U.S. 407, 423 n.18 (1984), the statute and regulations are silent as to guidance that may direct such exercise of discretion.

The BIA has explained that the exercise of discretion requires consideration of the relevant factors in the totality of the circumstances, based on the facts offered by the alien to support the application in each case. *See Matter of Pula,* 19 I&N Dec. at 473 (noting that ''a number of factors . . . should be balanced in exercising discretion''). Further, the BIA has provided factors that may be relevant to the inquiry, including humanitarian considerations, such as the alien's age or health; any countries through which the alien passed en route to the United States and those countries' available refugee procedures; personal ties to the United States; and the alien's use of fraudulent documents. *See id.* at 473–74 (''Each of the factors . . . will not, of course, be found in every case. . . . In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion.'').

In building upon the BIA's guidance and evaluating all policy options, the Departments have determined that it is appropriate to codify discretionary factors for adjudicators to consider. 85 FR at 36283. The statute and regulations currently contain discretionary factors for consideration in regard to other forms of relief. *See, e.g.,* 8 CFR 212.7(d), 1212.7(d) (authorizing the Attorney General to consent to an application for visa, admission to the United States, or adjustment of status, for certain criminal

aliens when declining to favorably exercise discretion ''would result in exceptional and extremely unusual hardship''); *see also Matter of Y–L–,* 23 I&N Dec. 270, 276–77 (A.G. 2002) (providing various factors that may indicate extraordinary and compelling circumstances that the Attorney General may consider to determine whether certain aggravated felonies are ''particularly serious crimes'' under section 241(b)(3)(B) of the INA for purposes of withholding of removal); *Matter of Jean,* 23 I&N Dec. 373, 383–84 (A.G. 2002) (explaining that discretionary relief requires a balancing of the equities, including, if any, extraordinary circumstances, the gravity of an alien's underlying criminal offense, or unusual hardships). The Departments have similar authority to promulgate discretionary factors for asylum relief. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see* 85 FR at 36283.

Contrary to commenters' concerns that the proposed rule effectively creates bars (or ''eligibility bars'') to asylum and inappropriately cabins adjudicators' discretion, the Departments reiterate that this rulemaking identifies various factors for consideration in making a discretionary determination on an asylum application. These factors are not bars; accordingly, concerns that the rule would result in the denial of all asylum claims are misguided. Rather, in regard to the three significantly adverse factors, the proposed rule clearly stated that ''the adjudicator *should also consider any other relevant facts and circumstances* to determine whether the applicant merits asylum as a matter of discretion.'' *Id.* (emphasis added). And in regard to the nine adverse factors, the proposed rule stated that ''the *adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances* . . . or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in exceptional and extremely unusual hardship to the alien.'' *Id.* (emphasis added). Thus, a finding that any of the factors applies does not foreclose consideration of other relevant facts and circumstances, which a true asylum ''bar'' would require.

Commenters asserted that this rule is inconsistent with the BIA's approach in *Matter of Pula* and subsequent related case law in which past persecution or a strong likelihood of future persecution ''should generally outweigh all but the most egregious of adverse factors.'' 19 I&N Dec. at 474. The Departments clearly stated in the NPRM that the rule ''supersede[d]'' the BIA's approach in *Matter of Pula,* 85 FR at 36285, which is squarely within their authority. ''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' *Encino Motorcars, LLC,* 136 S. Ct. at 2125 (citing *Brand X,* 545 U.S. at 981–82). The Court has further explained what a ''reasoned explanation'' should entail: Awareness in its decision making process that it is changing positions; demonstration that the new policy is permissible under the implementing statute, and not just the APA; statement and belief that the new policy is better; and provision of ''good reasons'' for the new policy. *See Organized Village of Kake* v. *U.S. Dep't of Agric.,* 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (summarizing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009)). In the NPRM, the Departments provided such information: awareness of changed position, 85 FR at 36285; demonstration that the policy is permissible under the INA and APA, *see generally* 85 FR at 36282–85; statement that the new policy is better, 85 FR at 36283; and good reasons for the new policy, 85 FR at 36283, 36285. Accordingly, the Departments properly and permissibly changed their policy from *Matter of Pula.*

Significantly, the rule does not preclude consideration of positive factors. Further, the NPRM instructed adjudicators to ''consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.'' 85 FR at 36283. Accordingly, the rule allows for consideration of positive equities as part of an adjudicator's discretionary analysis. The Departments have determined that the factors provided in the NPRM are appropriate and relevant to such analysis.

Moreover, the rule does not ''categorically limit'' adjudicators' discretion or make certain outcomes ''practically mandatory''; rather, the rule guides the exercise of discretion by providing various factors for consideration. The NPRM clearly stated, and the Departments reiterate, that the proposed factors were ''nonexhaustive.'' 85 FR at 36283. Further, the NPRM stated that ''any other relevant facts and circumstances'' should be considered and provided exceptions to one of the significantly adverse factors. *See id.* Accordingly, although the Departments proposed significantly adverse and adverse factors, an adjudicator must continue to consider positive factors in the discretionary analysis.

The Departments disagree with commenters that past or future persecution should be considered ''per se'' exceptional and extremely unusual hardship. Rather, the Departments have determined that the approach described in the NPRM—providing criteria for an adjudicator's consideration in the exercise of discretion, in addition to consideration of whether extraordinary circumstances or exceptional and extremely unusual hardship exists—is appropriate. Moreover, the Departments disagree that consideration of extraordinary circumstances or exceptional and extremely unusual hardship conflicts with the Act. Congress authorized the Attorney General to make discretionary asylum determinations, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), and that authority permits him to deny asylum even if an applicant can establish past or future persecution.

The Departments ''believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.'' 85 FR at 36283, 36285. In this way, the list of factors to consider, including consideration of extraordinary circumstances or exceptional and extremely unusual hardship, would take place in one streamlined adjudication. Accordingly, the Departments disagree with commenters that the list of factors would not save time, is ''unworkable'' or ''cumbersome,'' or limits adjudicatory discretion.

The Departments also disagree that this section of the rule is immoral or would negatively impact children seeking asylum. Adjudicators consider these factors, as relevant, to all asylum cases. As it may relate specifically to children, if extraordinary circumstances exist or exceptional and extremely unusual hardships would arise if the application was denied, the adjudicator should consider such circumstances. *See* Section II.C.1.3 of this preamble for further discussion on this point.

4.7.1. Unlawful Entry or Unlawful Attempted Entry Into the United States

Comment: Commenters expressed general concern that the proposed regulation would improperly lead adjudicators to deny ''virtually all'' applications for asylum seekers who enter the United States between ports of entry. One commenter stated that the ''immediate flight'' exception is too narrow.

Commenters averred that the proposed regulation is contrary to section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1), which instructs that individuals are eligible to apply for

asylum regardless of where they enter the United States.

Commenters expressed concern that the proposed regulation is inconsistent with case law. Commenters argued that contrary to the NPRM's argument, *Matter of Pula,* 19 I&N Dec. Dec. 467 (BIA 1987), does not support the Departments' position that an unlawful entry should be a significant adverse factor. Instead, one commenter asserted that in *Matter of Pula* the BIA reversed *Matter of Salim,* 18 I&N Dec. 311 (BIA 1982), to the extent that *Matter of Salim* suggested that ''the most unusual showing of countervailing equities'' was needed to overcome a ''circumvention of orderly procedures.'' Citing, for example, *Zuh* v. *Mukasey,* 547 F.3d 504, 511 n.4 (4th Cir. 2008), commenters similarly argued that Federal courts of appeals have given the manner of an asylum seeker's entry into the United States very little weight (and sometimes no weight) in discretionary determinations and have noted that place of entry reveals little about the merits of the case. And, citing *Huang* v. *INS,* 436 F.3d 89, 100 (2d Cir. 2006), one commenter noted that the Second Circuit Court of Appeals reasoned that if an illegal manner of entry were afforded significant weight, then virtually no asylum applicant would prevail.

Commenters expressed concern that codification of unlawful entry as a significantly adverse factor in discretionary determinations contradicts recent Federal court decisions from the Ninth Circuit Court of Appeals and the District Court for the District of Columbia that struck down November 2018 regulations by the Departments. Commenters argued that the NPRM is similar to a 2018 Interim Final Rule (IFR) that, when coupled with a presidential proclamation issued the same day, made any individual who arrived between designated ports of entry ineligible for asylum. Commenters noted that the Ninth Circuit Court of Appeals found that the 2018 IFR was arbitrary and capricious and that it infringed upon treaty commitments (*E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242 (9th Cir. 2020)). Commenters noted that the District Court for the District of Columbia held that the bar was inconsistent with the INA and congressional intent (*O.A.* v. *Trump,* 404 F. Supp. 3d 109, 147 (D.D.C. 2019)). Commenters expressed concern that the present rulemaking is intended to circumvent the courts' decisions on the 2018 IFR.

Commenters disagreed with the NPRM's reasoning that the proposed rule is necessary to address the strained resources used to adjudicate the growing number of asylum cases. One commenter asserted that ''expediency'' is not an appropriate consideration in determining the relief available to asylum seekers. The commenter also noted that in *Gulla* v. *Gonzales,* 498 F.3d 911, 919 n.2 (9th Cir. 2007), the Ninth Circuit Court of Appeals held that ''hypothetical numbers'' of potential asylum seekers is not a basis to deny relief to an applicant who has demonstrated a valid claim. The commenter similarly argued that limiting asylum to those who traveled from contiguous countries and those who flew directly to the United States is in conflict with case precedent and obligations under the 1967 Refugee Protocol.

Commenters expressed concern with the impact of the proposed rule in light of the CBP's practice of ''metering.'' Commenters asserted that, under the practice, applicants are required to wait for months in ''dangerous conditions'' in Mexico before they are able to apply for asylum. Commenters stated that some applicants are motivated to enter the United States between ports of entry in order to avoid the dangerous conditions.

One commenter expressed concern that codifying unlawful entry as a significant adverse discretionary factor would particularly burden children. The commenter argued that children often arrive with adults (such as parents, smugglers, or traffickers) who choose the manner and place of entry. The commenter argued further that children who travel to the United States on their own may not comprehend the importance of arriving at a port of entry.

Response: The Departments disagree that this factor will result in the denial of ''virtually all'' asylum applications. This factor is but one factor that an adjudicator must consider in light of all other relevant factors and circumstances. 85 FR at 36283. Likewise, the Departments disagree that the exception for aliens who enter or attempt entry ''made in immediate flight,'' 8 CFR 208.13(d)(1)(i), 1208.13(d)(1)(i), is too narrow. The Departments believe this exception properly balances the need for orderly processing of aliens with urgent humanitarian considerations.

As described throughout this rule, asylum is a discretionary benefit. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). The Departments have a legitimate interest in maintaining order and security on U.S. borders through the administration of lawful admissions procedures and, as stated in the proposed rule, the Departments remain concerned by the immense strain on resources needed to process aliens who illegally enter the United States. 85 FR at 36283 (citing Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018)). Aliens who unlawfully enter the United States circumvent the requirement that all applicants for admission be inspected, *see* INA 235(a)(3), 8 U.S.C. 1225(a)(3); break U.S. law, *see* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A); INA 275(a)(1), 8 U.S.C. 1325(a)(1); and contribute to the ever-increasing strain on the government's limited resources. Given such limited resources, and subject to a full discretionary analysis of all relevant factors as described in the NPRM, the Departments have determined that failure to lawfully apply for admission, in other words, unlawful entry or attempted unlawful entry, should generally be considered a significant adverse factor in an asylum adjudication.

The Departments disagree with commenters' allegations that DHS procedures at the border have ''virtually shut down the processing of asylum applications'' and prevented asylum seekers from lawfully presenting themselves at the border. At various times since 2016, CBP has engaged in metering to regulate the flow of aliens present at land ports of entry on the southern border in order to ''address safety and health hazards that resulted from overcrowding at ports of entry.'' *See* DHS, OIG 18–84, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* 5–6 & n.11 (Sept. 27, 2018), *https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf.* Individuals who are subject to metering are not prevented from presenting at the port of entry.[59]

Claims that refugees who are unable to get a visa will have to overcome the significant negative discretionary factor are unfounded. The rule does not require any alien to obtain a visa in order to apply for asylum. Under the law, ''[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien's status, may apply for asylum,''

[59] The permissibility of this practice is the subject of ongoing litigation, and the Departments decline to further comment on the legality or propriety of the practice in this rulemaking. *See Al Otro Lado, Inc.* v. *McAleenan,* No. 17–cv–02366–BAS–KSC, 2020 WL 4015669 (S.D. Cal. July 16, 2020).

INA 208(a)(1), 8 U.S.C. 1158(a)(1), and nothing in the rule changes that statutory framework. Moreover, nothing in the rule changes the longstanding principle that the Secretary and the Attorney General may deny asylum as a matter of discretion, even to aliens who otherwise meet the statutory definition of a refugee. *See INS* v. *Cardoza-Fonseca,* 480 U.S. at 428 n.5, 444–45 (''It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.'*. . . [Congress] chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.'' (emphasis in original) (citation omitted)). Rather, consistent with the relevant authority, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), the Secretary and Attorney General are simply providing additional clarity and guidance to adjudicators to aid their consideration of asylum claims as a matter of discretion.

The Departments disagree with commenters' assertion that *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987), is ''fundamentally incompatible'' with this rule. As a threshold matter, the Departments reiterate that the rule incorporates as a discretionary factor consideration of whether an alien unlawfully entered or attempted to unlawfully enter the United States. 85 FR at 36283. *Matter of Pula* similarly allows for consideration of this factor as part of the discretionary analysis:

> Yet while we find that an alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications, we agree with the applicant that *Matter of Salim, supra,* places too much emphasis on the circumvention of orderly refugee procedures. *This circumvention can be a serious adverse factor,* but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. *This factor is only one of a number of factors which should be balanced in exercising discretion,* and the weight accorded to this factor may vary depending on the facts of a particular case.

19 I&N Dec. at 473 (emphases added).

The rule is consistent with *Matter of Pula* inasmuch as that factor must not be considered in a way that practically denies relief in all cases. The rule clearly states that the factor is one of many discretionary factors for an adjudicator to consider, consistent with *Matter of Pula's* holding that the totality of the circumstances should be examined. 85 FR at 36283 (''If one or more of these factors applies to the applicant's case, the adjudicator would consider such factors to be significantly adverse for purposes of the discretionary determination, though the adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.''); 8 CFR 208.13(d), (d)(2)(ii), 1208.13(d), (d)(2)(ii). Like *Matter of Pula,* the rule would not treat this factor as an absolute bar. *See* 8 CFR 1208.13(d) (''Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.'').

Similarly, the Departments disagree with commenters' assertions that this rule contravenes section 208(a)(1) of the Act, 8 U.S.C. 1158(a)(1). As explained, this rule does not bar individuals from applying for asylum. The rule merely articulates that unlawful entry or attempted unlawful entry are significant adverse factors when considering whether to grant asylum as a matter of discretion.

Commenters cited various Federal circuit court treatment that allegedly forecloses consideration of this factor as significantly adverse. Cases cited by the commenters, however, prohibit the use of this factor as a bar to asylum,[60] and the Departments reiterate that the articulated discretionary factors do not equate to asylum bars. Commenters also selectively quoted from cases for support, thus mischaracterizing several cases as foreclosing provisions of the NPRM.[61] Insofar as commenters cited to *Matter of Pula's* approach that considers persecution or strong likelihood of future persecution as factors that ''generally outweigh all but the most egregious adverse factors,'' 19 I&N Dec. at 474, the Departments reiterate that the rule supersedes *Matter of Pula* in that regard. *See* 85 FR at 36285. Given that non-discretionary statutory withholding of removal and CAT protection are available, the Departments believe the rule's revised approach that considers the enumerated discretionary factors under the totality of the circumstances is appropriate in all cases, including those in which the applicant has otherwise demonstrated asylum eligibility. *See id.*

Commenters also contend that this rule contradicts Federal precedents striking down the Departments' previous rule, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018).[62] Unlike the rule struck down in those cases, however, consideration of unlawful entry or attempted unlawful entry as a significantly adverse factor in a discretionary analysis is not an asylum bar. This factor is one of many factors that an adjudicator must consider in the totality of the circumstances. *See* 8 CFR 208.13(d), 1208.13(d) (''Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.'').

Further, commenters alleged that the Departments ''appear to seek a way around the courts' decisions'' by ''injecting'' the previous rule barring asylum into the NPRM as a discretionary analysis and that the NPRM failed to ''address how the purpose of INA 208(a) is effectuated by inclusion of unlawful entry as a significant adverse discretionary factor.'' The Departments reject the contention that the rule is merely ''injecting'' one rule into another. The rule struck down in *East Bay Sanctuary Covenant* and *O.A.* established a bar to asylum eligibility, and the courts in those cases held that the rule exceeded the Attorney General's authority under INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), to establish additional limitations on asylum eligibility. But both courts have acknowledged that the Attorney General has broader authority to deny asylum as a matter of discretion to otherwise eligible applicants under INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A). *See E. Bay Sanctuary Covenant* v. *Barr,* 964 F.3d 832, 849 (9th Cir. 2020) (explaining in the context of a different eligibility bar that ''the Attorney General's discretion to deny asylum under

[60] Commenters cited *Gulla,* 498 F.3d at 917, which states that ''it would be anomalous for an asylum seeker's means of entry to *render him ineligible* for a favorable exercise of discretion,'' *id.* (emphasis added), and *Huang,* 436 F.3d at 100, which contemplates whether ''illegal manner of flight and entry *were enough independently to support a denial of asylum,*'' *id.* (emphasis added). The Departments understand those cases to state that manner of entry cannot, on its own, bar an applicant from asylum relief. Further, the Departments note that in regards to manner of entry, *Gulla* found that the petitioner did not unlawfully enter or attempt to enter the United States, 498 F.3d at 919; thus, that case is not particularly relevant for purposes of the factor at issue in 8 CFR 208.13(d)(1)(i), 1208.13(d)(1)(i).

[61] For example, commenters stated that Federal circuit courts have given ''manner of entry'' ''little to no weight'' in discretionary determinations. Commenters quoted from *Zuh* v. *Mukasey,* 547 F.3d 504 (4th Cir. 2008). In context, however, the court first referenced *Matter of Pula*'s totality of the circumstances analysis and then stated that the ''use of fraudulent documents *to escape imminent capture or further persecution*'' should be afforded ''little to no weight.'' *Id.* at 511 n.4 (emphasis added). *Zuh* does not stand for the proposition that this factor should never be afforded greater weight.

[62] Commenters cited *E. Bay Sanctuary Covenant* v. *Trump,* 950 F.3d 1242 (9th Cir. 2020), and *O.A.* v. *Trump,* 404 F. Supp. 3d 109, 147 (D.D.C. 2019).

§ 1158(b)(1)(A)'' is broader than ''his discretion to prescribe criteria for eligibility for asylum'' under § 1158(b)(2)(C)); *O.A.,* 404 F. Supp. 3d at 151 (''[T]here is a vast difference between considering how the alien entered the United States as one, among many, factors in the exercise of a discretionary authority, and a categorical rule that disqualifies any alien who enters across the southern border outside a designated port of entry.''). Consistent with those decisions, this rule simply clarifies that unlawful entry or attempted unlawful entry is a significant adverse factor in a discretionary analysis. Further, the Departments point to their explanation at 85 FR at 36283:

> the Secretary and Attorney General have not provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion. Nevertheless, the Departments have issued regulations on discretionary considerations for other forms of relief, *e.g.,* 8 CFR 212.7(d), 1212.7(d) (discretionary decisions to consent to visa applications, admission to the United States, or adjustment of status, for certain criminal aliens), and the Departments believe it is similarly appropriate to establish criteria for considering discretionary asylum claims.

The Departments acknowledge that while that explanation does not specifically reference section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A), the explanation clearly states that the purpose of this section of the rule is to establish criteria to guide the exercise of discretion required in considering asylum claims. As explained in the NPRM and this final rule, asylum is a discretionary form of relief under section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A). Accordingly, this rule enables efficient and proper exercise of the discretion required by section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A).

Although the Departments agree with commenters that expediency is not the only relevant ''consideration when making a determination that would dictate the relief available to an asylum seeker,'' it is also true that ''the public has an interest in relieving burdens on the asylum system and the efficient conduct of foreign affairs.'' *See E. Bay Sanctuary Covenant,* 964 F.3d at 855. By disfavoring (though, not barring) asylum applicants who unlawfully enter the United States and by deterring meritless asylum claims, the Departments seek to ensure that those who need relief most urgently are better able to obtain it. As stated in the proposed rule, the Departments ''believe that the inclusion of the proposed factors in the rule will better ensure that immigration judges and asylum officers properly consider, in all cases, whether applicants for asylum merit the relief as a matter of discretion, even if the applicant has otherwise demonstrated eligibility for asylum.'' 85 FR at 36283. Adjudicators exercise independent judgment in each case before them, 8 CFR 1003.10(b), and this rule facilitates efficient adjudication of asylum applications, consistent with such exercise of independent judgment. Contrary to the suggestions of commenters, the rule does not codify expediency as the sole—or even one—factor to consider in determining asylum relief.

Commenters unpersuasively contend that the rule directly conflicts with Federal circuit case law. The commenters confuse the requirements for a grant of asylum by misconstruing a finding of eligibility as sufficient to grant asylum. Asylum eligibility is separate from the necessary discretionary analysis, as reflected in the statute: ''with respect to any form of relief that is granted in the exercise of discretion,'' an alien must establish satisfaction of the eligibility requirements for asylum and that the alien ''merits a favorable exercise of discretion.'' INA 240(c)(4)(A), 8 U.S.C. 1229a(c)(4)(A); *see also Cardoza-Fonseca,* 480 U.S. at 428 n.5 (explaining that ''a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General*''' (quoting INA 208(a)) (emphases in original)); *Matter of A–B–,* 27 I&N Dec. at 345 n.12, (stating that the ''favorable exercise of discretion is a discrete requirement'' in granting asylum and should not be disregarded ''solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA''), *abrogated on other grounds, Grace II,* 965 F.3d at 897–900. The rule does not predicate asylum eligibility on unlawful entry or attempted unlawful entry. Instead, the rule makes such factor a consideration in the discretionary analysis.

In response to commenters' other quoted excerpts from case law, the Departments considered that responding to unlawful entry or attempted unlawful entry require expenditure of valuable government resources. 85 FR at 36283. Not all aliens who unlawfully enter or attempt to unlawfully enter intend to apply for asylum, and apprehension and processing of these aliens continues to strain resources. Accordingly, the Departments codify this factor as part of the discretionary analysis, to be considered in the totality of the circumstances, to determine whether an applicant warrants a favorable exercise of discretion.

The Departments disagree with commenters' assertions that the rule, in practice, will deny relief to ''virtually all asylum cases'' or that the rule will limit asylum relief to applicants from contiguous nations or applicants who arrive by air. The Departments reiterate the independent judgment exercised by adjudicators in applying immigration law, and this rulemaking does not dictate particular outcomes. Adjudicators examine the unique factors in each case before them, in accordance with applicable law and regulations. Accordingly, the Departments find these assertions to be purely speculative.

The Departments also disagree that the rule particularly burdens children. As discussed elsewhere in this final rule, adjudicators may consider whether extraordinary circumstances exist or whether exceptional and extremely unusual hardships would arise if the application was denied. In the case of a child's unlawful entry or attempted unlawful entry, an adjudicator could consider an alien's juvenile status and other related factors stemming from the alien's age, as relevant to and presented in the case. *See* Section II.C.1.3 of this preamble for further discussion on this point. Nevertheless, the Departments recognize that aliens under the age of 18 often have no say in determining their manner of entry into the United States. Accordingly, the Departments have modified the language in the final rule to reflect that the unlawful entry of an alien under age 18 would not necessarily be a significant adverse discretionary factor.[63]

4.7.2. Failure of an Alien To Apply for Protection From Persecution or Torture in at Least One Country Outside the Alien's Country of Citizenship, Nationality, or Last Lawful Habitual Residence Through Which the Alien Transited Before Entering the United States

Comment: Commenters expressed general opposition to the proposed rule's requirement that adjudicators consider failure to apply for asylum in third countries through which applicants traveled to reach the United States to be a significant adverse factor. Commenters argued that placing great negative weight on the applicant's route to the United States is inconsistent with discretionary determinations, which,

[63] Such entry would remain a significant adverse discretionary factor for any adults traveling with the minor, however.

commenters argued, should be based on a consideration of all the equities.

Commenters asserted that, contrary to the NPRM's reasoning, failure to apply for asylum protection in a third country is often not evidence of misuse of the asylum system. Commenters asserted that there are numerous reasons that applicants would not apply for asylum in such countries, including lack of knowledge on how to apply and language barriers. Additionally, commenters cited violence and a fear of persecution as a reason that applicants may not apply for asylum in third countries. One commenter noted that the U.S. government has issued travel advisories urging Americans to reconsider travel plans to El Salvador, Honduras, Guatemala, and eleven Mexican states because of violence. Furthermore, the commenter noted that the U.S. government urges travelers to ''exercise caution'' when travelling to sixteen other Mexican states, and that the United States has issued its highest travel warning—''Do Not Travel''—for the remaining five Mexican states. The commenter asserted that these warnings indicate that the conditions in some Mexican states are as dangerous as those in Syria and Iraq, which also have the highest travel warning. Given these various warnings, the commenter asserted, it is not reasonable to expect individuals to apply for asylum in Mexico.

Commenters asserted that the NPRM's reasoning failed to adequately consider the realities of the asylum systems in Mexico, Guatemala, Honduras, and El Salvador. In the case of Mexico, the commenter argued that the asylum system there is restrictive, underfunded, and underdeveloped. Commenters similarly asserted that the asylum systems in Guatemala, Honduras, and El Salvador are rudimentary.

Commenters argued that the requirement to apply for asylum in a third country en route to the United States inappropriately advantaged asylum seekers coming from contiguous countries, as well as those who have the means to fly non-stop to the United States. With respect to asylum seekers who reached the United States by air travel, commenters asserted that the NPRM lacked a rationale as to why asylum seekers who had even a brief layover in another country would be required to apply for asylum in that country. Commenters noted that such a requirement is particularly harmful for those coming from countries where direct flights to the United States are not possible. Commenters asserted that this difference in treatment violated the Fifth Amendment of the United States Constitution. Commenters asserted that the exceptions outlined in the proposed regulation are identical to language in the Departments' July 16, 2019, IFR. In considering the legality of the IFR, commenters stated that the Ninth Circuit Court of Appeals found the rule to be arbitrary and capricious and inconsistent with the INA.

One commenter asserted that the proposed provision conflicts with two statutory provisions concerning when asylum seekers must apply for asylum in another country: Sections 208(a)(2)(A) and 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi). Specifically, the commenter asserted that the proposed provision is not consistent with these statutory sections because it would exclude large classes of individuals from asylum, it does not require adjudicators to consider the safety of the third countries, and it does not require adjudicators to consider the fairness of third country asylum procedures.

Response: This factor was promulgated as a way to ensure that aliens in need of protection apply at the first available opportunity. As stated in the proposed rule, the Departments believe that there is a higher likelihood that aliens who fail to apply for protection in a country through which they transit en route to the United States are misusing the asylum system. 85 FR at 36283; *see also* Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33831 (July 16, 2019). Because the Departments recognize that this may not always be the case, the rule provides exceptions for situations in which an alien was denied protection in the country at issue, the alien was a victim of a severe form of trafficking in persons, or the relevant country was not a party to certain humanitarian conventions, as provided in 8 CFR 208.13(d)(1)(ii), 1208.13(d)(1)(ii). In addition, the adjudicator may consider whether exceptional circumstances exist or whether denial of asylum would result in exceptional and extremely unusual hardship to the alien. 85 FR at 36285.

Further, because this factor is race-neutral on its face and applies equally to all aliens, it does not violate the Fifth Amendment's due process guarantee. *See Washington* v. *Davis,* 426 U.S. 229, 242 (1976) (''[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. . . . Standing alone, [disproportionate impact] does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.'' (citation omitted)). This factor was not motivated by discriminatory intent. The rule and this factor in particular apply equally to all asylum applicants. To the extent that any one group is disproportionately affected by the rule, such outcome was not based on discriminatory intent, but rather on the demographics of the affected population and the Departments' aim to ensure that asylum protection in the United States is available and timely granted to applicants who genuinely need it most. *See generally* 85 FR at 36283; *see also Regents of Univ. of Cal.,* 140 S. Ct. at 1915–16 (rejecting the claim that revoking an immigration policy that primarily benefitted Latinos supported an inference of invidious discrimination against Latinos, because any disparate impact could be explained by the demographic fact that ''Latinos make up a large share of the unauthorized alien population''). The Departments have determined that aliens who do not apply for protection in a country through which they transit are less likely to merit relief as a matter of discretion; thus, the Departments proposed such factor to be considered while also providing the opportunity for aliens to present evidence to the contrary. *See id.*

Moreover, this factor is not arbitrary. The rule requires adjudicators to consider, as part of their discretionary analysis, whether an alien transited through a country en route to the United States but did not apply for asylum there. If an alien did not apply for protection, regardless of whether transit was effectuated by foot, flight layover, or sea, the alien forwent the immediate opportunity to apply for protection in the transited country for the future opportunity to apply for protection in the United States. The Departments believe this choice is relevant to an adjudicator's discretionary analysis because it may indicate the urgency or legitimacy of an applicant's claim. Thus, adjudicators should consider, as relevant, whether an alien failed to apply for protection in a country through which the alien transited en route to the United States, in the totality of the circumstances, to determine whether the alien merits relief as a matter of discretion. Moreover, nothing in the rule categorically prohibits an adjudicator from concluding that, under the circumstances, an applicant's brief layover in transit is less probative of the urgency of the applicant's claim than a

longer stay. Nor does anything in the rule categorically prohibit an adjudicator from concluding that, under the circumstances, an applicant's layover in transit in a country known for human rights abuses is less probative of the urgency of the applicant's claim than a layover in a country with a well-recognized system for providing humanitarian protection. In any event, promulgating this factor in the rule ensures that adjudicators at least account for it in the exercise of discretion, even though its probative value may vary from case to case.

The Departments also disagree with commenters who claim the Departments ''merely refer[ ] back to its earlier rulemaking on the third country transit bar.'' The NPRM's citation to Asylum Eligibility and Procedural Modifications, 84 FR 33829, 33831 (July 16, 2019), was meant to clearly reiterate, while avoiding redundancy, the Departments' continued belief that, generally, aliens who do not apply for protection in a country through which they transit en route to the United States are more likely to have a non-meritorious asylum claim. As evidenced by the clause in the NPRM that states, ''as previously explained,'' the Departments explained this factor earlier in the proposed rule. 85 FR at 36282–83. The Departments provided extensive explanation of the BIA's decision in *Matter of Pula* in which the BIA held that ''whether the alien passed through any other countries or arrived in the United States directly from his country'' was a factor to consider in determining whether a favorable exercise of discretion is warranted. 19 I&N Dec. at 473–74. The Departments chose to codify that factor in the regulations. The Departments disagree with commenters who alleged that this factor ''ignores'' the fact that countries through which an alien may transit may be as dangerous as the country of origin and is based on an incorrect premise that there is a ''real opportunity'' to seek asylum in all countries party to the Convention. By becoming party to those treaties, the third countries through which an alien may have travelled are obligated, based on the treaties they have joined, to provide protection from removal to individuals who are likely to face persecution on account of a protected ground or torture. Accordingly, the Departments understand this factor to be consistent with the provisions of section 208 of the Act, 8 U.S.C. 1158.

For similar reasons, the Departments find commenters' assertion that there are numerous reasons that applicants would not apply for asylum in such countries, including lack of knowledge on how to apply and language barriers, as well as violence and a fear of persecution, as unpersuasive. As an initial point, aliens who apply for asylum in the United States do so despite the possibility of language barriers and lack of knowledge of application procedures, and commenters did not explain—and the Departments cannot ascertain—why these barriers would affect only other countries, but not the United States.

Additionally, the alleged failure to apply in other countries due to violence or a fear of persecution is based principally on anecdotes and speculation and is neither borne out by evidence nor distinguished from similar conditions in the United States. For example, the UNHCR has documented a notable increase in asylum and refugee claims filed in Mexico—even during the ongoing COVID–19 pandemic—which strongly suggests that Mexico is an appropriate option for seeking refuge for those genuinely fleeing persecution. *See, e.g.,* Summary of Statement by UNHCR Spokesperson Shabia Mantoo, *Despite Pandemic Restrictions, People Fleeing Violence and Persecution Continue to Seek Asylum in Mexico,* UNHCR (Apr. 28, 2020), *https://www.unhcr.org/en-us/news/briefing/2020/4/5ea7dc144/despite-pandemic-restrictions-people-fleeing-violence-persecution-continue.html* (''While a number of countries throughout Latin America and the rest of the world have closed their borders and restricted movement to contain the spread of coronavirus, Mexico has continued to register new asylum claims from people fleeing brutal violence and persecution, helping them find safety.''). Asylum and refugee claims filed in Mexico increased 33 percent in the first three months of 2020 compared to the same period in 2019, with nearly 17,800 claims in 2020. *Id.* Asylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year. UNHCR, Mexico Fact Sheet (Apr. 2019), *https://reporting.unhcr.org/sites/default/files/UNHCR%20Factsheet%20Mexico%20-%20April%202019.pdf.* Overall, ''[a]sylum requests have doubled in Mexico each year since 2015.'' Clare Ribando Seelke, Cong. Rsch. Serv., IF10215, *Mexico's Immigration Control Efforts* 2 (2020), *https://fas.org/sgp/crs/row/IF10215.pdf.*

Moreover, some private organizations acknowledge that asylum claims in Mexico have recently ''skyrocket[ed],'' that ''Mexico has adopted a broader refugee definition than the U.S. and grants a higher percentage of asylum applications,'' and that ''Mexico may offer better options for certain refugees who cannot find international protection in the U.S.,'' including for those ''who are deciding where to seek asylum [*i.e.,* between Mexico and the United States].'' Asylum Access, *Mexican Asylum System for U.S. Immigration Lawyers FAQ* 1, 7 (Nov. 2019), *https://asylumaccess.org/wp-content/uploads/2019/11/Mexican-Asylum-FAQ-for-US-Immigration-Lawyers.pdf.* If aliens coming to the United States through Mexico feared living in Mexico, it would be irrational for them to seek refuge there in large numbers; yet, that is precisely what the available data suggests.

Additionally, commenters do not indicate why violence in part of one country is different from violence existing in a part of the United States. Just as violence may occur in parts of the United States but individuals fleeing persecution consider the country ''safe'' and want to live here, localized episodes of violence in other countries do not mean the country, as a whole, is unsafe for individuals fleeing persecution. In other words, the presence of local or regional violence, particularly criminal violence, exists in *all* countries, even those generally considered ''safe,'' but such presence of local or regional violence does not render those countries too dangerous that individuals fleeing persecution could not take refuge anywhere in the country. *Cf. Cece,* 733 F.3d at 679 (Easterbrook, dissenting) (''Crime may be rampant in Albania, but it is common in the United States too. People are forced into prostitution in Chicago. . . . Must Canada grant asylum to young women who fear prostitution in the United States, or who dread the risk of violence in or near public-housing projects?''). For instance, per the United Nations Office on Drugs and Crime Chart on Victim of Intentional Homicide, the murder rate in Mexico of 29.1/100,000 in 2018, *see* United Nations Office on Drugs and Crime, *Mexico, Victims of Intentional Homicide, 1990–2018, https://dataunodc.un.org/content/data/homicide/homicide-rate,* was lower than that in American cities such as St. Louis, Baltimore, Detroit, New Orleans and Baton Rouge. *See, e.g.,* Missouri, FBI: UCR (2018); Maryland, FBI: UCR (2018); Michigan, FBI: UCR (2018); Louisiana, FBI: UCR (2018), *https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/offenses-known-to-law-enforcement* (Table 8). The murder rate in Baltimore, America's deadliest big city, is twice that of Mexico. Sean Kennedy, '*The Wire' is*

Finished, but Baltimore Still Bleeds, Wall St. J. (Feb. 7, 2020), *https://www.wsj.com/articles/the-wire-is-finished-but-baltimore-still-bleeds-11581119104.* In short, although the Departments acknowledge commenters' concerns, they are supported by little evidence, do not explain why their concerns do not also apply to the United States, and are ultimately outweighed by the overall need to ensure appropriate and consistent consideration of probative discretionary factors that the rule provides.

Furthermore, this factor does not conflict with sections 208(a)(2)(A) and 208(b)(2)(A)(vi) of the Act, 8 U.S.C. 1158(a)(2)(A), (b)(2)(A)(vi), as one commenter alleged. Those provisions pose bars to asylum eligibility, but this factor merely guides adjudicators' discretion to grant or deny asylum to otherwise eligible applicants. Generally, the safe third country provision, INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A), bars an alien from applying for asylum if the Attorney General determines that the alien could be removed to a country in which the alien's life or freedom would not be threatened and where the alien has access to a process for determining asylum claims or equivalent protection. The firm resettlement provision, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(a)(vi), bars asylum eligibility for an alien who firmly resettled in another country before arriving in the United States.

In contrast to those two provisions, this factor—regarding whether an alien failed to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States—is considered by an adjudicator in making a discretionary determination on the alien's asylum application. Whether an application warrants a favorable exercise of discretion is distinct from whether an alien is barred altogether from applying for asylum, as is the case with the safe third country provision, or from establishing eligibility for asylum, as is the case with the firm resettlement provision. To the extent that the commenter's concerns about the safety of a third country and availability of asylum procedures in that third country specifically refer to the safe third country provision in section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A), those are irrelevant to this distinct factor considered in discretionary determinations. To the extent that the commenter suggests specifically incorporating those considerations—the safety of a third country and availability of asylum procedures in that third country—into this factor, the Departments reiterate that an adjudicator may consider, as relevant, extraordinary circumstances and exceptional or extremely unusual hardship that may result if asylum is denied. *See* 85 FR at 36285.

Regardless, the Attorney General's discretion to deny asylum to otherwise eligible applicants is not limited by the safe third country or firm resettlement bars. *East Bay Sanctuary* and *O.A.* both presented the question whether the eligibility bar there conflicted with the statute's other eligibility bars, because the Attorney General's authority to ''by regulation establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum'' must be ''consistent with this section.'' INA 208(b)(2)(C), 8 U.S.C. 1108(b)(2)(C). Here, by contrast, the Attorney General would be acting under his authority under INA 208(b)(1)(*A*), which includes no similar ''consistent with'' requirement. Simply, the Secretary of Homeland Security or the Attorney General ''may'' deny asylum in their discretion. *Id.; see E. Bay Sanctuary Covenant,* 964 F.3d at 849 (''Unlike the broad discretion to deny asylum to aliens who are eligible for asylum, the discretion to prescribe criteria for eligibility is constrained by § 1158(b)(2)(C), which allows the Attorney General to 'establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum' only so long as those limitations and conditions are 'consistent with' § 1158.'').

4.7.3. Use of Fraudulent Documents To Enter the United States

Comment: Commenters expressed several general concerns regarding the regulatory provisions on fraudulent documents. First, commenters argued that the provisions would result in the denial of most asylum applications. Second, commenters argued that it is sometimes impossible for asylum seekers to obtain valid documents and that in some instances pursuing such documents could put them in greater danger. Third, commenters asserted that it is particularly difficult for women to obtain valid travel documents in some countries because they need to first obtain the approval of a male relative. Fourth, commenters asserted that the NPRM lacked a valid rationale as to why those travelling through multiple countries would be punished under the proposed rule and those who came directly to the United States from a contiguous country or a direct flight would be excused. Finally, one commenter argued that the proposed provisions are ultra vires because ''the law at INA 208 and 209 provide for specific waivers of the use of [fraudulent documents].''

Commenters argued that the NPRM's assertion that the use of fraudulent documents makes enforcement of immigration laws difficult and requires significant resources is not supported by evidence and is false. One commenter noted that under section 208(d)(5)(A)(i) of the Act (8 U.S.C. 1158(d)(5)(A)(i)) an individual cannot be granted asylum until he or she has completed a background check and his or her identity ''has been checked against all appropriate records or databases.'' The commenter noted that the statute's requirements are applicable to every person seeking asylum regardless of whether fraudulent documents were used. Thus, the commenter argued, making the use of fraudulent documents a significant adverse factor would not reduce the amount of resources needed to adjudicate asylum cases.

One commenter argued that the proposed fraudulent document provisions are contrary to congressional intent. Specifically, the commenter noted that on May 1, 1996, the Senate debated an immigration bill that would have summarily deported, among others, asylum seekers who used false documents to enter the United States. The commenter noted that Senator Patrick Leahy introduced an amendment to the bill that would remove the use of ''summary exclusion procedures for asylum applicants.'' The commenter quoted some of Senator Leahy's remarks in support of the amendment, in which he noted that people fleeing persecution will probably get fraudulent passports. The commenter noted there was bipartisan support of the amendment.

Commenters asserted that Federal courts have recognized that false documents may be needed to flee persecution. Citing *Gulla* v. *Gonzales,* 498 F.3d 911 (9th Cir. 2007), one commenter noted that Mr. Gulla, an Iraqi asylum seeker, used forged passports to flee government persecution on account of his religion and that the court concluded that reasoned use of false documentation in that case supported Mr. Gulla's asylum claim rather than detracted from it.

One commenter argued that the NPRM's rationale for the fraudulent document provisions distorted the BIA's reasoning in *Matter of Pula.* Specifically, the commenter argued that even though the BIA delineated a difference between the use of fraudulent

documents to escape persecution and falsifying a United States passport to assume the identity of a United States citizen, the BIA noted that an adjudicator would still be required to consider the totality of the circumstances in both cases. Accordingly, the commenter argued that the case does not provide justification for making the use of a fraudulent document a significantly adverse factor.

Response: As an initial point, commenters failed to explain why an alien genuinely seeking asylum would need to use false documents to enter the United States in the first instance, as distinguished from using false documents only to leave the alien's country of nationality. An alien need not necessarily have entered the United States to apply for asylum; rather, an alien ''arriv[ing] in the United States'' may apply for asylum. INA 208(a)(1), 8 U.S.C. 1158(a)(1). Thus, an alien may seek asylum at a port of entry without using or attempting to use any documents whatsoever. Moreover, large numbers of aliens enter the United States without presenting any documents at all, including those who subsequently seek asylum after turning themselves in or are otherwise apprehended by DHS. *See* INA 212(a)(6)(A), 8 U.S.C. 1182(a)(6)(A) (rendering inadmissible an alien who enters the United States without being admitted or paroled); *see also* Perla Trevizo, *How Do You 'Secure' the Border When Most Migrants Are Just Turning Themselves In?, Tuscon.com* (Dec. 15, 2018), *https://tucson.com/news/state-and-regional/how-do-you-secure-the-border-when-most-migrants-are-just-turning-themselves-in/article_deed8d48-fa50-11e8-837c-0b4b3be5a42a.html* (noting that ''large groups'' of aliens simply ''cross illegally to turn themselves in,'' with no mention of any entry documents, false or otherwise). The use of fraudulent documents undermines the integrity of the immigration system and is unnecessary for an alien to apply for asylum. In other words, because neither fraudulent documents nor even entry into the United States are requirements to make an asylum application, the use of such documents to enter or attempt to enter the United States strongly suggests that the motive of an alien using such documents is to enter the United States for reasons other than a genuine fear of persecution or a need for protection. Consequently, the Departments find it reasonable to consider that factor as a significantly adverse discretionary one for purposes of adjudicating an asylum application, and the commenters did not persuasively explain why that should not be the case.

Even if entry documents were a prerequisite to the ability to apply for asylum, the Departments nevertheless would find that this factor would deter the use of false documents, which create burdensome administrative costs in filtering valid from invalid documentation and dissipate human resources that could be used to ensure that meritorious claims are addressed efficiently. Those benefits, in the Departments' view, would also ultimately outweigh any costs associated with the denial of asylum applications due to the use of such documents.

Further, the Departments disagree that this factor would result in denial of most applications. Regardless of what documents aliens may use to depart their countries of nationality, there is no evidence that most asylum applicants use false documents to enter the United States; rather, most aliens seeking asylum either appear at a port of entry and request asylum without seeking to enter with any particular documents or enter the United States without inspection, *i.e.,* without presenting any documents at all.

Commenters' concerns are also speculative, and the Departments reiterate that this factor is one of many factors considered under the adjudicator's discretionary analysis—not a bar to asylum.

85 FR at 36283 (''[T]he adjudicator should also consider any other relevant facts and circumstances to determine whether the applicant merits asylum as a matter of discretion.''). Further, an alien may introduce relevant evidence of extraordinary circumstances, including challenges described by the commenters, for the adjudicator to consider. *See* 85 FR at 36283. The Departments also emphasize that an alien's use of fraudulent documents to enter the United States is a ground that renders the alien inadmissible. INA 212(a)(6)(C), 8 U.S.C. 1182(a)(6)(C). This clear, negative consequence underscores congressional disapproval of the use of fraudulent documents to enter the United States.

In the NPRM, the Departments explained why this factor considers use of fraudulent documents for aliens traveling through more than one country but not aliens arriving from a contiguous country. 85 FR at 36283 n.35. For aliens arriving from a contiguous country, an alien may simply be carrying the documents he or she used to depart that country, particularly in situations in which the exit control for the contiguous country is located in close physical proximity to the port of entry into the United States or the embarkation point for a trip by air or sea to the United States; thus the Departments will not consider this a significant adverse factor for such aliens. As further explained in the NPRM, the rule aligns with *Lin* v. *Gonzales,* 445 F.3d 127, 133 (2d Cir. 2006), and *Matter of Pula,* 19 I&N Dec. at 474, cases that draw a distinction between presentation of a fraudulent document to an immigration court and the use of a fraudulent document to escape immediate danger. 85 FR at 36283 n.35. To the extent other BIA cases reject such a distinction, the rule supersedes conflicting case law. Accordingly, aliens are not ''punished,'' as commenters alleged, if they travel through more than one country. Rather, the line drawn in *Lin* and *Pula* supports differential treatment. If an alien arrives directly (such as by air), there is an innocuous explanation for his carrying of fraudulent documents: He still has them because he used them to escape immediate danger. But if an alien travels through more than one such country, that justification for carrying fraudulent documents—escaping persecution—becomes far more attenuated. As explained elsewhere in the NPRM and this final rule, the Departments believe that if aliens who travel through more than one country, subject to some exceptions, are escaping persecution, they have an opportunity to seek protection in any of the countries through which they transit en route to the United States. If aliens arriving from a contiguous country are escaping persecution, the first place to seek protection would be the United States, and so the Departments will not consider such aliens' use of fraudulent documents in pursuit of protection as a significant adverse factor.

Contrary to commenters' assertions, section 208 of the Act, 8 U.S.C. 1158, does not provide a waiver for the use of fraudulent documents to enter the United States, and section 209 of the Act, 8 U.S.C. 1159, only waives a ground of inadmissibility related to the use of fraudulent documents, INA 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i), in conjunction with an application for adjustment of status for an alien who has already been granted asylum. Consequently, neither provision applies to the rule, which addresses solely discretionary determinations in connection with an asylum application. Moreover, the potential availability of a waiver of a ground of inadmissibility, which is itself discretionary, for an alien

who has already been granted asylum and is seeking lawful permanent resident status does not suggest that the basis for the ground of inadmissibility is not also a relevant discretionary consideration in the first instance.

Because this factor would discourage use of fraudulent documents and streamline the discretionary analysis regarding the use of fraudulent documents, the Departments believe the factor would reduce the overall time expended to address the issue of fraudulent documents on a systemwide basis because fewer aliens would use fraudulent documents and adjudicators would consider their use more consistently. Although the use of fraudulent documents to enter the United States is difficult to track in general and the Departments do not track the number of asylum applicants who present such documents, the Departments nevertheless expect less time to be expended overall. To the extent that this provision deters the use of fraudulent documents, the provision will conserve enforcement resources that may otherwise be spent ferreting out fraud and will support the overall integrity of the immigration systems and ensure that benefits are not inappropriately granted. The Departments find those benefits outweigh the various concerns raised by commenters.

The Departments follow applicable law and regulations. If the proposed amendments cited by commenters were not included in the version of the bill that became law, then the Departments do not follow or consider legislative history regarding such amendments. *See Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.,* 469 U.S. 189, 194 (1985) (''Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'').

The Departments again note the NPRM, which explains how the rule interacts with case law regarding this factor. 85 FR at 36283 n.35. Further, this rule supersedes previous regulations that case law may have interpreted in reaching decisions prior to promulgation of the rule at hand. To the extent that other circuits have disagreed with the Departments' reasonable interpretation, the Departments' proposed rule would warrant re-evaluation in appropriate cases under well-established principles. *See Brand X,* 545 U.S. at 982.

The rule requires adjudicators to consider this factor, like all the factors outlined in the NPRM, in light of all relevant factors. *See* 85 FR at 36283, 36285. In this regard, the rule aligns with the approach in *Matter of Pula,* contrary to the commenters' assertions. The Departments note, however, that the rule also supersedes *Matter of Pula* in some regards, as explicitly provided in the NPRM. 85 FR at 36285.

4.7.4. Spent More Than 14 Days in Any One Country

Comment: Commenters expressed general concerns with the proposed regulation's introduction of a bar that would make any person who spent more than 14 days in any country en route to the United States ineligible for asylum. Specifically, commenters asserted the new bar is cruel and arbitrary and capricious, and that it is designed to make most aliens who enter from the southern border ineligible for asylum.

Commenters asserted that the NPRM's reasoning as to the necessity for a 14-day bar is inadequate and that the policy would be contrary to the concept of firm resettlement. One commenter argued that the NPRM failed to explain how a 14-day stay in a country equates to an offer of firm resettlement, and another asserted that the length of stay in a country is irrelevant to the merits of an LGBTQ asylum seeker's claim. Additionally, one commenter stated that being given an application to seek protection in another country does not equate to an offer of firm resettlement. The same commenter argued the NPRM's use of a single Federal case to support the proposed provision—*Yang* v. *INS,* 79 F.3d 932 (9th Cir. 1996)—is not persuasive. The commenter stated that in *Yang,* refugees from Laos who spent 14 years in France with refugee status were denied asylum in the United States. The commenter asserted that using this case to support the position that denying asylum applications for anyone who spent 14 days in another country with no kind of lawful status is ''irrational.''

Commenters argued that the proposed 14-day bar would punish those who seek to comply with U.S. policies. Specifically, commenters noted that under the CBP ''metering'' policy, asylum seekers sometimes are required to wait more than 14 days (one commenter stated that the wait could span months) in order to make their asylum claims. Commenters also asserted that asylum seekers subject to MPP are often required to spend more than 14 days (up to weeks or months) in Mexico. Commenters expressed concern that asylum seekers subject to metering and MPP would be barred from asylum under the proposed rule. One commenter similarly argued that the United States has used COVID–19 as a ''pretext'' to close the Mexican border to all asylum seekers. The commenter implied that these policies could likewise cause an individual to be in a third country for longer than 14 days.

Commenters asserted that many asylum seekers travel to the United States by foot, bus, or train, which, commenters assert, often takes longer than 14 days. Commenters asserted that the length of an asylum seeker's journey is often extended due to the need to avoid detection from government officials and non-government actors trying to return the asylum seeker back to the country from which the individual is fleeing. Additionally, commenters noted that there could be other reasons that an asylum seeker's journey could be extended beyond 14 days, including robbery, kidnap, or rape. One commenter asserted that those who travel through southern Mexico face additional hurdles, asserting that the Mexican government refuses to issue travel documents and that the government threatens to fine transportation companies that sell tickets to those without travel documents.

One commenter expressed concern that the proposed regulation did not include an exception for children and other discrete populations, who, the commenter stated, might not have control over the amount of time spent in third countries en route to the United States.

Response: This factor is not a bar to asylum, as commenters alleged. This factor is considered, along with all the other factors outlined in the rule, as part of an adjudicator's discretionary analysis. Further, the NPRM clearly recognized that ''individual circumstances of an alien's presence in a third country or transit to the United States may not necessarily warrant adverse discretionary consideration in all instances,'' and subsequently provided various exceptions. 85 FR at 36284.

Consideration of this factor is not cruel or arbitrary and capricious. This factor is considered adverse only when an alien spends more than 14 days in a country that permits applications for asylum, refugee status, or similar protections. The Departments believe that an alien should apply for protection at the first available opportunity, but the Departments would not hold an alien responsible for failure to apply for protection that does not, in fact, exist. Asylum is a form of relief intended for aliens who legitimately need urgent protection. If any alien stays in one country for more than 14 days and that

country permits applications for various forms of protection but the alien fails to apply for such protections, then the Departments consider that failure to be indicative of a lack of urgency on the alien's part. This factor thus screens for urgency, an important consideration in light of the growing number of asylum applications the Departments receive: The Departments have seen record numbers of asylum applications, along with record numbers of asylum denials, in the past decade. For comparison, in FY 2008, 42,836 asylum applications were filed while, in FY 2019, 213,798 asylum applications were filed. *See* EOIR, *Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* These record numbers have slowed the adjudication process for all asylum seekers, including those who urgently need protection. Thus, the Departments expect that considering this factor will assist the efficient adjudication of asylum claims.

The NPRM does not equate either a 14-day stay in one country or the offer to seek protection, on their own, as firm resettlement, contrary to commenters' assertions. For amendments to the firm resettlement bar, commenters should refer to Section II.C.7 of the preamble to the NPRM, 85 FR at 36285–86, and Section II.C.4.8 of the preamble to this final rule, revised at 8 CFR 208.15, 1208.15.

Contrary to commenters' allegations, the proposed treatment of an alien who spends more than 14 days in a country en route to the United States as a significant adverse factor does not conflict with firm resettlement. First, an alien found to have firmly resettled is barred from asylum relief. INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The provision at hand, however, is not a mandatory bar but a discretionary factor to be considered by the adjudicator, subject to exceptions in cases where the alien's application for protection in the third country was denied, the alien is a victim of a severe form of human trafficking defined in 8 CFR 214.11, or the alien was present in or transited through only countries that were not parties to the Refugee Convention, Refugee Protocol, or CAT at the relevant time. 8 CFR 208.13(d)(2)(i)(A)(*1*)–(*3*), (d)(2)(i)(B)(*1*)–(*3*); *see also* 85 FR at 36824. Second, as proposed by the NPRM, the firm resettlement bar would apply ''when the evidence of record indicates'' that it would apply. 85 FR at 36286. Then, the alien bears the burden of proof to demonstrate that the bar does not apply, consistent with 8 CFR 1240.8(d). *See id.* Accordingly, the discretionary factor of whether an alien spent more than 14 days in any one country that provides applications for refugee, asylee, or other protections prior to entering or arriving in the United States is different from but related to the firm resettlement bar: If an alien successfully demonstrates that the firm resettlement bar does not apply, then an adjudicator would consider that factor as part of a discretionary analysis regarding the asylum application.

The Departments disagree that the reference to *Yang,* 79 F.3d at 935–39, is irrational. That case clearly demonstrates why the Departments are promulgating this factor for consideration. As stated in the NPRM, that case ''uph[eld] a discretionary firm resettlement bar, and reject[ed] the premise that such evaluation is arbitrary and capricious or that it prevents adjudicators from exercising discretion.'' 85 FR at 36284 (citing *Yang,* 79 F.3d at 935–39). Such reasoning is relevant to all cases in which this factor is considered, whether the alien spent 14 days or 14 years in another country. Further, contrary to the commenters' assertion, even if the alien spent 14 days or more in another country, this factor is not a bar to asylum; rather, it is considered in light of all other relevant factors and various exceptions. *See id.*

For aliens subject to MPP, those aliens who have entered the United States and were processed under MPP are no longer en route to the United States and have already applied for admission to the United States, whereas, this factor considers whether an alien stayed for more than 14 days in one country ''[i]mmediately prior to his arrival in the United States or en route to the United States.'' 8 CFR 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A). If an alien claims that he was subject to metering and waited more than 14 days in Mexico, he or she may introduce such evidence as an extraordinary circumstance. Moreover, such aliens may apply for protection in Mexico; if that application is denied, then the factor would not apply. In addition, the Departments reject any contention that COVID–19 has been used as a pretext to close the southern border. The government has taken steps at the Canadian and Mexican border to curb the introduction and spread of the virus, which continues to affect the United States and the entire world. *See* DHS, *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (updated Oct. 22, 2020), *https://www.dhs.gov/news/2020/06/16/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus;* Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 FR 16559 (Mar. 24, 2020); Security Bars and Processing, 85 FR 41201 (July 9, 2020) (proposed rule).

For discrete populations, if circumstances exist that extend an alien's stay in one country to surpass 14 days, an adjudicator will consider such circumstances to determine whether they constitute extraordinary circumstances. Further, an adjudicator will evaluate whether such alien falls into one of the three exceptions to this factor.

4.7.5. Transits Through More Than One Country Between His Country of Citizenship, Nationality, or Last Habitual Residence and the United States

Comment: Commenters asserted that the proposed provision pertaining to transit through more than one country en route to the United States is arbitrary and capricious and contrary to congressional intent. They stated that the rule would inappropriately advantage asylum seekers coming from Mexico and Canada. Commenters similarly asserted that the proposed rule would advantage those coming from countries where direct flights to the United States are available and those who could afford to purchase tickets on such flights. They asserted that there was no rationale as to why asylum seekers travelling by air with one or more layovers in another country should be treated differently from those who took a direct flight. And they further expressed concern that the proposed factor would be particularly onerous on women and LGBTQ asylum seekers.

Commenters averred that the proposed factor of transit through more than one country conflicts with Federal court precedent. Specifically, commenters noted that a Federal district court invalidated a prior regulation concerning a third country transit ban. Commenters expressed concern that the Departments are trying to implement the ban a second time by making it a factor in discretionary determinations and asserted that the proposed provision would likewise be struck down by the courts.

Commenters expressed concern with two of the NPRM's proposed exceptions to the proposed third country transit factor. First, one commenter contended that exempting travel through countries that are not party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to

the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment is overly narrow. Specifically, the commenter argued that since 146 countries are party to the 1951 convention and 147 countries are party to the Protocol, the exception would be inapplicable to many asylum seekers' journeys. Second, commenters expressed concern that the proposed exception of applying for asylum in countries visited en route to the United States is not reasonable. Commenters asserted that the asylum systems of many nations through which asylum seekers commonly travel (such as Guatemala, Honduras, and El Salvador) are not well developed and that the countries are sometimes just as dangerous as the ones from which they are fleeing.

Response: The Departments disagree that this factor is arbitrary and capricious or contrary to congressional intent. Although not a bar, this discretionary factor is consistent with case law regarding firm resettlement and safe third countries. *See* 85 FR at 36284. Further, taken together with the exceptions, the factor is consistent with section 208(a)(2)(A) of the Act, 8 U.S.C. 1158(a)(2)(A).

Similar to the aforementioned factors that consider whether an alien stayed in one country for more than 14 days and whether an alien failed to seek protection in a country through which the alien transited en route to the United States, this factor aims to ensure that asylum is available for those who have an urgent need for protection. The Departments generally believe that aliens with legitimate asylum claims would not forego the opportunity to seek protection in countries through which they traveled if they had an urgent need. However, the Departments acknowledge that circumstances may exist in which an alien did, in fact, travel through more than one country and has an urgent need for asylum; accordingly, the Departments outlined three exceptions to this factor, *see* 85 FR at 36284; 8 CFR 208.13(d)(2)(i)(A)(*1*)–(*3*), (B)(*1*)–(*3*), 1208.13(d)(2)(i)(A)(*1*)–(*3*), (B)(*1*)–(*3*), in addition to the general consideration of extraordinary circumstances or exceptional and extremely unusual hardship that may result if the application is denied. *See* 85 FR at 36283–84. For these reasons, the Departments did not promulgate this factor in an arbitrary and capricious manner.

Relatedly, this factor does not improperly advantage asylum seekers from Canada, Mexico, or countries with direct flights to the United States. As background, asylum and refugee provisions were incorporated into U.S. law based on the United States' international obligations, in part, from the 1951 Convention relating to the Status of Refugees and 1967 Protocol. Signatories to those agreements comprise an ''international regime of refugee protection.'' UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: II. Background,* ¶ 3, EC/SCP/54 (July 7, 1989), *https://www.unhcr.org/en-us/excom/scip/3ae68cbe4/implementation-1951-convention-1967-protocol-relating-status-refugees.html.* To that end, the Departments believe this system operates to ensure aliens may apply for protection as soon as possible, not to ensure that aliens receive protection specifically from the United States. Congress has authorized the Departments to bar an alien from applying for asylum in the United States if the alien may be removed to a third country that affords a full and fair process for determining asylum claims or equivalent temporary protections, pursuant to a bilateral or multilateral agreement. INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A). The United States shares the burden of processing asylum claims with other countries pursuant to various agreements. *See, e.g.,* Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Dec. 5, 2002, *https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html; DHS, Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador, https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf.* Thus, asylum seekers from countries in closer proximity to the United States or with direct flights to the United States are not ''advantaged,'' and asylum seekers from countries that are farther away from the United States or without direct flights to the United States are not ''punished.'' If anything, aliens from countries farther away may have more opportunities to seek protection than those whose closest—or potentially only—option is the United States. In an ''international regime of refugee protection,'' it makes sense that aliens closer to the United States may obtain asylum more easily in the United States, just as aliens closer to other countries may obtain asylum more easily in those countries. Including this factor will encourage aliens to seek asylum in countries that are closest to them and encourage all treaty signatories to do their fair share in providing safe harbor for refugees.

For discussion of this rule's effect on women and LGBTQ asylum seekers, *see* Section II.C.1.3 of this preamble. The Departments note here, however, that the rule applies to all asylum seekers regardless of gender or sexual orientation.

Moreover, this factor is not an eligibility bar for asylum; it is merely one factor to be considered as relevant, along with various other factors outlined in the rule. The previous rulemaking cited by commenters, Asylum Eligibility and Procedural Modifications, 84 FR 33829 (July 16, 2019), barred asylum relief to aliens who failed to apply for protection in a third country through which they traveled en route to the United States. While that rule encompasses similar considerations, it is fundamentally different because the 2019 rule constituted a mandatory bar to asylum. This rule considers this factor as part of an adjudicator's discretionary analysis. Adverse judicial treatment of the 2019 rule does not directly apply to this rulemaking, which the Departments propose to issue under a different statutory authority. *See E. Bay Sanctuary Covenant,* 964 F.3d at 849 (distinguishing ''the broad discretion to deny asylum to aliens who are eligible for asylum'' from the narrower ''discretion to prescribe criteria for eligibility'').

The Departments disagree with commenters that the exception for aliens who were present in or transited through countries that were, at the relevant time, not parties to the Refugee Convention, Refugee Protocol, or CAT is too narrow. That exception is fashioned to ensure that aliens have an opportunity to apply for protection—whether that be in the United States or in a country through which they transit. If a country does not offer such protection, then an alien would not be held to that standard and could avail themselves of the third exception. Regarding comments that the exceptions to this factor are insufficient due to danger in and underdevelopment of most countries through which aliens travel en route to the United States, the Departments note that, by becoming party to those treaties, the third countries through which an alien may have transited are obligated by treaty to provide protection from removal to individuals who are likely to face

persecution on account of a protected ground or torture. *See also* Section III.C.4.7.2 of this preamble, *supra* (discussing the availability of protection in countries outside the United States through which an alien may transit). Accordingly, the Departments believe the rule is consistent with section 208 of the Act (8 U.S.C. 1158). The Departments note that regardless of whether an alien claims any of the exceptions, an alien may still assert that denial of their asylum application would result in extraordinary circumstances or produce exceptional and extremely unusual hardship.

4.7.6. Subject to § 1208.13(c) But for the Reversal, Vacatur, Expungement, or Modification of a Conviction or Sentence

Comment: Commenters expressed general concerns with the provision of the proposed regulation relating to reversed or vacated criminal convictions, asserting that it would lead to many asylum applications being inappropriately denied.

One commenter asserted that the proposed regulation would inappropriately create a categorical approach to considering vacated convictions in discretionary determinations. The commenter asserted that adjudicators should consider vacated convictions on a case-by-case basis and argued that a vacated conviction could provide positive equities that should be considered.

Commenters asserted that the proposed regulation is inconsistent with due process. Specifically, one commenter asserted that the proposed regulation would bar from asylum relief individuals who had criminal sentences that were vacated, reversed, expunged, or modified unless there was an express finding that the person is not guilty. The commenter asserted that there could be instances where a prosecutor decides to decline to pursue a case further after learning of an underlying error in the criminal proceedings without first making a determination as to the defendant's innocence or guilt. The commenter asserted that the proposed regulation could cause some individuals in this position with otherwise meritorious claims to be barred from asylum. The commenter cited *Nelson* v. *Colorado,* 137 S. Ct. 1249, 1255–56 (2017), and argued that such an outcome would violate due process principles.

One commenter expressed concern that the proposed regulation is inconsistent with the INA and the BIA decision, *Matter of Devison,* 22 I&N Dec. 1362 (BIA 2000). The commenter asserted that the Act and precedent establish that juvenile charges and convictions are not criminal convictions and thus should not be considered under the proposed regulation. Similarly, the commenter cited research suggesting that a child's comprehension of the consequences for engaging in criminal activity varies based on age. Accordingly, the commenter asserted, individuals should not be subjected to excessive punishments for actions that they took when they were young.

Response: As an initial point, the Departments note that this provision is fully consistent with long-standing case law allowing adjudicators to appropriately consider as an adverse discretionary factor ''criminal conduct which has not culminated in a final conviction for purposes of the Act.'' *Matter of Thomas,* 21 I&N Dec. 20, 23–24 (BIA 1995) (collecting cases); *cf. Villanueva-Franco* v. *INS,* 802 F.2d 327, 329–30 (9th Cir. 1986) (finding that the Board could consider alien's extensive criminal record, which included an expunged felony conviction for assaulting a police officer, in weighing whether voluntary departure was merited as a matter of discretion); *Parcham* v. *INS,* 769 F.2d 1001, 1005 (4th Cir. 1985) (''Evidence of an alien's conduct, without a conviction, may be considered in denying the discretionary relief of voluntary departure.''); *Matter of Seda,* 17 I&N Dec. 550, 554 (BIA 1980) (noting that ''a plea of guilty [that] results in something less than a conviction'' is ''a significant adverse factor to be considered in whether a favorable exercise of discretion is warranted'' for voluntary departure), *overruled on other grounds by Matter of Ozkok,* 19 I&N Dec. 546, 552 (BIA 1988). Commenters did not persuasively explain why the Departments should abandon this long-standing principle in considering all conduct in making a discretionary determination, especially conduct that initially led to a criminal conviction.

Additionally, commenters' concerns that this factor will result in improper denials of asylum applications are speculative. This factor is not a bar to asylum. *Compare* Procedures for Asylum and Bars to Asylum Eligibility, 84 FR 69640, 69654–56 (Dec. 19, 2019) (proposing additional bars to asylum eligibility based on criminal convictions and clarifying when an order vacating or modifying a conviction or sentence will preclude the application of the proposed bars). Considered relative to all the other factors proposed in NPRM, outcomes will vary on a case-by-case basis, given consideration of extraordinary circumstances or exceptional and unusual hardship resulting from a denial of asylum. 85 FR at 36283.

The Departments disagree that this factor creates a ''categorical approach,'' as commenters alleged. A categorical approach often applies when determining whether a particular conviction qualifies as an offense that would render the alien ineligible for discretionary relief. 8 CFR 208.13(c), 1208.13(c); *see Kawashima* v. *Holder,* 565 U.S. 478, 483 (2012). This factor merely counsels adjudicators that *if* a conviction qualifies, it should be considered an adverse factor notwithstanding any subsequent vacatur or reversal of that sentence (unless the alien was found not guilty). But this rule takes no position on what approach should apply—categorical or circumstance-specific—in determining whether a conviction would so qualify. Moreover, this factor does not affect existing case law allowing the consideration of criminal activity as a discretionary factor, even when that activity has not resulted in a conviction. The rule, as proposed and in this final iteration, however, considers this factor as relevant to each case, along with consideration of extraordinary circumstances or exceptional and extremely unusual hardship that may befall an alien if asylum is denied. In this way, the rule is consistent with the commenter's suggestion that criminal activity must be considered on a case-by-case basis.

The rule does not violate due process. Consistent with long-standing case law, the rule requires adjudicators to consider, as part of the discretionary analysis, convictions that remain valid for immigration purposes. *See* 85 FR at 36284. Due process requires that an alien receive a full and fair hearing that provides a meaningful opportunity to be heard. *See Kerciku* v. *INS,* 314 F.3d 913, 917 (7th Cir. 2003). This rule does not violate due process because it does not deprive aliens of their right to a hearing before an immigration judge, 8 CFR 1240.10, or their right to appeal to the BIA, 8 CFR 1003.1(b).

Moreover, because asylum is a discretionary form of relief, aliens have no constitutionally protected interest in a grant of asylum. *See Nativi-Gomez* v. *Ashcroft,* 344 F.3d 805, 807–09 (8th Cir. 2003) (explaining that an alien has no expectation that discretionary relief will be granted and, consequently, no protected liberty interest in such relief (citing *Ashki* v. *INS,* 233 F.3d 913, 921 (6th Cir. 2000)). Accordingly, this rule presents distinct issues from *Nelson,* 137 S. Ct. at 1255–56, cited by a commenter. *Nelson* holds only that a state may not continue to deprive a

person of his property—there, thousands of dollars in costs, fees, and restitution—after his conviction has been reversed or vacated. The case applied the balancing test in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), which balances the private interest affected, the risk of erroneous deprivation of such interest through procedures used, and the governmental interest at stake. Because, unlike the monetary exactions at issue in *Nelson,* the rule affects no constitutionally protected liberty or property interest, that case and the *Mathews* balancing test do not apply.

The Departments will continue to apply *Matter of Devison,* 22 I&N Dec. 1362 (BIA 2000), as relevant; however, the commenter misunderstands the holding in that case. In that case, as referenced by a commenter, the BIA held that an adjudication as a ''youthful offender'' constituted a determination of juvenile delinquency rather than a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). *Matter of Devison,* 22 I&N Dec. at 1366. ''In its reasoning, the Board drew a critical distinction between a finding of delinquency, which involves 'status' rather than guilt or innocence, and deferred adjudication or expungement. Deferred adjudications constitute convictions under the INA while findings of delinquency do not.'' *Uritsky* v. *Gonzales,* 399 F.3d 728, 730 (6th Cir. 2005) (describing the BIA's holding in *Matter of Devison*) (internal citation omitted). Accordingly, juvenile adjudications of delinquency will continue to be evaluated in accordance with applicable statutes and regulations. But, because *Matter of Devison* does not hold that juvenile convictions cannot qualify as criminal convictions under the Act, the Departments decline to apply it as suggested by the commenter. The rule does not change or reinterpret the definition or disturb case law regarding criminal convictions; in fact, the rule codifies long-standing case law through promulgation of this factor. *See* 85 FR at 36284. To the extent commenters expressed disagreement with the definition of ''conviction'' under the Act, that issue is outside the scope of this rulemaking.

Finally, to the extent commenters queried whether particular types of cases with specific facts would necessarily be denied, the Departments find such queries speculative or hypothetical. Moreover, the Departments do not generally provide advisory opinions on asylum applications, especially in a rulemaking. Rather, the Departments expect that their adjudicators will address each case based on its own particular facts and the applicable law.

4.7.7. More Than One Year of Unlawful Presence in the United States Prior To Filing an Application for Asylum

Comment: Commenters generally expressed concern that consideration of unlawful presence in discretionary determinations would lead to the denial of most asylum applications. One commenter expressed concern that the proposed provision fails to account for practical realities such as official ports of entry being ''effectively closed'' to asylum seekers for years and that it could take more than a year to recover from the trauma that led an individual to flee his or her country.

Commenters asserted that inclusion of the proposed unlawful presence factor in discretionary determination is ultra vires. Specifically, commenters noted that section 208(a)(2)(d) of the Act (8 U.S.C. 1158(a)(2)(d)) provides two instances in which an asylum application can be filed outside of the one-year deadline: (1) Changed circumstances that affect eligibility for asylum, and (2) extraordinary circumstances relating to the delay of filing the application within one year. Commenters asserted that the proposed regulation would frustrate this statutory framework because a person who filed more than one year after his or her last entry into the United States but meets one of the above-identified exceptions could still see their application denied under the proposed rule as a matter of discretion. Commenters also noted that there could be instances where the exceptions would not be applicable until after the one-year deadline has expired. Commenters stated that deadline exceptions are especially important for LGBTQ asylum seekers. Commenters stated that the process to understanding one's identity as an LGBTQ individual can take more than one year and requires safety, security, and a support system that is often not available during flight from their home countries. Similarly, commenters asserted that it could take over a year to detect an HIV infection because of the need for ''culturally competent and clinically appropriate'' medical care that is often not available to asylum seekers outside of the United States.

Commenters argued that the proposed regulation conflicts with congressional intent. One commenter detailed the legislative history surrounding the one-year filing deadline. Specifically, the commenter noted that the Senate version of the bill in which the deadline was debated raised the deadline from 30 days to one year and that an amendment to the House version changed the wording of one of the exceptions from ''changed country conditions'' to ''personal circumstances'' in order to broaden the exception for applications that would be accepted after the statutory deadline. The commenter also highlighted a floor speech that the commenter argued evidenced congressional intent to create broad exceptions to the one-year deadline in order to reduce the chance of arbitrary denials.

One commenter argued that the proposed regulation conflicts with agency policy. Specifically, the commenter argued that in *Matter of Y–C–,* 23 I&N Dec. 286, 287 (BIA 2002), the BIA stated that a failure to file within the one-year deadline does not result in an absolute bar to filing an asylum application. The commenter also asserted that the proposed regulation is in conflict with 8 CFR 208.4(a)(4)–(5) and 8 CFR 1208(a)(4)–(5), which, the commenter asserted, provide broad definitions for the changed and extraordinary circumstances exceptions. The commenter similarly asserted that the proposed regulation is in conflict with 8 CFR 208.4(a)(2)(B) and 8 CFR 1208.4(a)(2)(B), which require applicants to establish the exceptions ''to the satisfaction'' of the adjudicator. The commenter noted that USCIS guidance states the standard is one of ''reasonableness,'' which, the commenter asserted, is lower than that of ''clear and convincing evidence.'' The commenter asserted that USCIS's articulation of the standard evidences agency acknowledgement of congressional intent to have the exceptions be broadly available.

One commenter asserted that the proposed regulation is inconsistent with the United States' obligations under the 1967 Protocol. Specifically, the commenter asserted that the UNHCR Executive Committee opposed the one-year filing deadline when it was under consideration because it was concerned with the impact it would have on the ability of the United States to offer protection to those fleeing persecution. The commenter similarly asserted that President Clinton opposed the one-year filing deadline out of a concern for it being inconsistent with international treaty obligations.

Response: This factor, like the other factors, is not a bar to asylum. The Departments proposed this factor as one of many that an adjudicator must consider when determining whether an asylum application warrants a favorable exercise of discretion. 85 FR at 36283. Commenters' concerns that consideration of this factor would result

in the denial of most asylum applications are speculative, untethered to the inherent case-by-case nature of asylum adjudications, and based on the erroneous underlying premise that this factor functions as an eligibility bar.

Moreover, this factor would, of its own force, result in the denial of only a small number, if any, of asylum claims. For aliens who entered the United States unlawfully and who accrue at least one year of unlawful presence, the statutory one-year bar in INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), would likely apply independently, regardless of this provision. And aliens who arrive in the United States lawfully and maintain lawful status do not accrue unlawful presence and, thus, would not be subject to this provision. INA 212(a)(9)(B)(ii), 8 U.S.C. 1182(a)(9)(B)(ii). Even if such aliens fell out of status, their previous status may demonstrate extraordinary circumstances, 8 CFR 208.4(a)(5)(iv), 1208.4(a)(5)(iv), which would excuse the statutory one-year filing deadline for a ''reasonable period,'' and that ''reasonable period'' is likely to be less than the one year of unlawful presence required to trigger this provision. *See* Asylum Procedures, 65 FR 76121, 76123–24 (Dec. 6, 2000) (''Generally, the Department expects an asylum-seeker to apply as soon as possible after expiration of his or her valid status, and failure to do so will result in rejection of the asylum application. Clearly, waiting six months or longer after expiration or termination of status would not be considered reasonable.''). Commenters' concerns also do not account for the exceptions to the accrual of unlawful presence, INA 212(a)(9)(B)(iii), 8 U.S.C. 1182(a)(9)(B)(iii), or for situations in which the Attorney General or Secretary may grant an asylum application notwithstanding this factor. In short, commenters' concerns that this provision will result in the denial of most asylum application is wholly unfounded.

This factor is consistent with the Act. The rule preserves consideration of the two statutory provisions, cited by commenters, in which aliens may file an asylum application outside of the one-year deadline—changed circumstances and extraordinary circumstances. *See* 85 FR at 36285. Further, the rule provides consideration of whether exceptional and extremely unusual hardship may befall an alien if asylum was denied. For the discrete populations referenced by the commenters who file outside of the one-year deadline, adjudicators may consider those circumstances in accordance with the rule.[64] Accordingly, the rule does not frustrate the statutory framework.

The Departments disagree that the rule conflicts with congressional intent and agency policy. First, the Departments note that legislative history is secondary to the text of the statute itself. *See Park 'N Fly, Inc.,* 469 U.S. at 194 (''Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.''). The Supreme Court has explained the difficulty in examining legislative history because, oftentimes, both support and opposition may be found, thereby ''creat[ing] more confusion than clarity.'' *Lamie* v. *U.S. Trustee,* 540 U.S. 526, 539 (2004); *see also Milner* v. *Dep't of Navy,* 562 U.S. 562, 572 (2011) (''We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.''). The Departments read the plain language of the statute conferring discretionary authority to the Attorney General to adjudicate asylum applications in promulgating this section of the rule, which guides the exercise of such discretion through consideration of various factors. Accordingly, in regard to this particular regulatory provision, the Departments rely on the text of the statute rather than the legislative history.

Second, the rule does not conflict with agency policy. This factor, as previously explained, does not function as an absolute bar to asylum; therefore, it does not conflict with case law holding that extraordinary circumstances may excuse untimely filing. Moreover, this factor does not conflict with current regulations, as alleged by a commenter. The rule does not change the definitions for changed circumstances or extraordinary circumstances in 8 CFR 208.4(a)(4)–(5), 1208.4(a)(4)–(5), and the rule repeatedly stated that the adjudicator will consider this factor, along with all of the factors, as part of the discretionary analysis. Thus, it does not offend 8 CFR 208.4(a)(2)(B), 1208.4(a)(2)(B).

In regard to one commenter's concern that the rule's ''clear and convincing evidence'' standard would displace USCIS's current ''reasonableness standard'' for excusing a late-filed application, the commenter conflates the burden for showing extraordinary circumstances excusing the general one-year filing deadline with the burden for showing exceptional and extremely unusual hardship warranting an exercise of discretion by the Secretary or Attorney General. *Compare* 8 CFR 208.4(a)(5), 1208.4(a)(5) (''The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals . . . that the delay was reasonable under the circumstances''), *with* 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii) (Secretary or Attorney General may favorably exercise discretion where one or more adverse discretionary factors are present in ''cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien''). The two standards do not conflict because they apply in different contexts and serve different purposes.[65] The ''to the satisfaction of the asylum officer'' standard reflects the statutory requirement that an alien must demonstrate extraordinary circumstances ''to the satisfaction of the Attorney General'' to excuse a late-filed asylum application. INA 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). It reflects a showing to be made by the alien in order to receive initial consideration of the asylum application, irrespective of its merits. The ''clear and convincing evidence'' standard reflects the showing necessary to warrant the Secretary's or Attorney General's favorable exercise of discretion when any significantly adverse factor—whether an unpaid tax obligation, or the denial of two previous applications—is present. This standard is consistent with prior standards set for the application of that discretion to immigration benefits. *See* 8 CFR 212.7(d), 1212.7(d). It represents a concluding consideration to determine whether a grant of asylum is ultimately appropriate and goes directly to the merits of the asylum application. The two standards therefore do not conflict.

The rule does not circumvent the United States' obligations under the 1967 Protocol. In accordance with its non-refoulement obligations under the 1967 Protocol, the United States continues to offer statutory withholding of removal and protection under the

[64] *See supra* Section II.C.1.3 for further discussion on vulnerable populations.

[65] For example, an alien may establish ineffective assistance of counsel as an extraordinary circumstance to excuse a failure to meet the one-year asylum application filing deadline. 8 CFR 208.4(a)(5)(iii), 1208.4(a)(5)(iii). That showing, however, simply allows the application to be filed and says little about whether the application should ultimately be granted as a matter of discretion, particularly if there are unrelated adverse factors to be considered, such as unpaid tax obligations. 8 CFR 208.13(d)(2)(i)(E)(2), 1208.13(d)(2)(i)(E)(2).

CAT regulations.[66] The Departments also find commenters' assertions unpersuasive that the UNHCR Executive Committee and former-President Clinton opposed the one-year deadline. As an initial matter, concerns regarding solely the one-year deadline are outside the scope of this regulation because the rule does not amend the deadline, nor could it. And, in any event, the Departments are not aware that any court has endorsed the UNHCR Executive Committee's and President Clinton's theory that the existing one-year time bar on asylum applications violates international law.

4.7.8. Tax Violations

Comment: Commenters asserted that tax violations are not related to the merits of an asylum application and that the proposed regulation would punish asylum seekers for not understanding tax law. Commenters asserted that another result of EAD regulations is that many asylum seekers work in the informal economy and are paid ''off the books'' to support themselves while their applications are pending. Commenters argued that it is not reasonable to expect asylum seekers (some of whom, one commenter noted, do not speak English) to navigate the complexities of tax law to determine if they are required to file taxes. Another commenter asserted that even if an asylum seeker determined that he or she was not required to file, it would be difficult prove in court due to employment in the informal economy. The commenter also noted that in seeking to comply with the proposed rule, asylum seekers may turn to, and be defrauded by, notarios.

One commenter asserted that, contrary to the NPRM's reasoning, consideration of this factor would require more adjudicative time. Specifically, the commenter asserted that longer asylum interviews and hearings would be required to determine whether an asylum seeker was required to file taxes.

Commenters further asserted that immigration judges are not qualified to make determinations as to whether an individual is required to file taxes and that by granting them such power the proposed rule would infringe upon the province of the Department of the Treasury. Commenters asserted that the proposed rule would open the DOJ to numerous and costly lawsuits under the APA where plaintiffs would allege that an immigration judge's misapplication of the tax code led to denials of asylum applications. Moreover, commenters argued that such lawsuits would ''effectively bankrupt'' the United States.

Commenters asserted that the proposed provisions relating to tax violations would violate the U.S. Constitution in two ways. First, commenters argued that the proposed provisions conflict with the Eighth Amendment's proscription against cruel and unusual punishment. Specifically, commenters asserted that if an applicant presents a meritorious claim, it would be cruel and unusual punishment to consider the ''minor civil error'' of not filing taxes on time a ''strict liability offense'' that completely bars the applicant from asylum protection. Second, commenters argued that the proposed regulation would violate the Equal Protection Clause because the proposed rule would create harsher penalties for asylum seekers who do not file than for citizens and LPRs. Specifically, commenters asserted that by barring individuals from eligibility for asylum protection, the proposed rule would create harsher penalties for asylum seekers for tax non-compliance than for citizens and LPRs who would not face such severe consequences.

Commenters also asserted that many asylum seekers would not be able to comply with the proposed tax provisions due to USCIS's rules pertaining to Employment Authorization Documents (''EAD''). Commenters asserted that under the EAD rules, it is not possible for asylum seekers to receive a social security number (''SSN'') prior to obtaining an EAD. One commenter asserted that the IRS website is unclear on whether asylum seekers without EADs would be eligible to receive Individual Taxpayer Identification Numbers (''ITIN''). The commenter asserted that even if an asylum seeker is eligible for an SSN or an ITIN, it could still be difficult for the applicant to obtain the identity documents needed to apply for an SSN or an ITIN from his or her home country.

Response: In general, the comments on this provision suggest either that aliens seeking asylum should be excused from filing Federal, state, or local income tax returns or that the Departments should ignore clear violations of law when aliens fail to do so. Neither suggestion is well-taken by the Departments, as either countenancing or ignoring violations of the law is inconsistent with each's mission. Moreover, the comments fail to acknowledge clear case law that income tax violations are a significant adverse discretionary factor in the immigration adjudication context. *See, e.g., Matter of A–H–,* 23 I&N Dec. 774, 782–83 (A.G. 2005) (noting that tax violations ''weigh against asylum'' because they exhibit ''disrespect for the rule of law''); *cf. In re Jean Gilmert Leal,* 2014 WL 4966499, *2 (BIA Sept. 9, 2014) (noting in the context of an application for adjustment of status that it is ''well settled'' that ''failure [to file tax returns] is a negative discretionary factor because it reflects poorly on the applicant's respect for the rule of law and his sense of obligation to his community'').

The Departments also note that consideration of tax returns filed by aliens are already enshrined in multiple places in immigration law. *See, e.g.,* 8 CFR 210.3(c)(3) (alien applicant for legalization program may establish proof of employment through, inter alia, Federal or state income tax returns); *id.* 214.2(a)(4) (alien dependents of certain visa holders who obtain employment authorization ''are responsible for payment of all Federal, state and local income, employment and related taxes and Social Security contributions on any remuneration received''); *id.* 214.2(5)(ii)(E) (restricting employment eligibility for certain visa dependents when the proposed employment is contrary to the interest of the United States, defined as, inter alia, employment of visa holders or dependents ''who cannot establish that they have paid taxes and social security on income from current or previous United States employment''); *id.* 214.2(g)(4), (5)(ii)(E) (same, but for a different visa category); *id.* 244.9(a)(2)(i), 1244.9(a)(2)(i) (income tax returns may serve as proof of residence for purposes of an application for Temporary Protected Status (''TPS'')); *id.* 1244.20(f)(1) (adjudicator may require proof of filing an income tax return before granting a fee waiver for a TPS application); *id.* 1245.13(e)(3)(iii)(E) (alien applicant for adjustment of status may establish proof of physical presence in the United States through, inter alia, income tax records). To the extent that commenters raised concerns about an alien's ability to navigate existing tax systems in the United States—a question that is beyond

[66] *See R–S–C–* v. *Sessions,* 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017) (similar); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016) (similar); *Maldonado,* 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by the FARRA and its implementing regulations). For further discussion on international law principles as they relate to this rulemaking, see section II.C.6.8 *infra.*

the scope of this rule—they neither acknowledged the many existing provisions linking aliens, benefits, and income tax returns nor persuasively explained why adherence to tax laws is an inappropriate discretionary factor to consider in the context of the rule.

The Departments disagree with commenters regarding the relation of tax violations to the statutory discretionary analysis. As the proposed rule explained, the Departments see no concern with treating an asylum applicant's failure to file tax forms, when required by law, as a negative factor in an asylum adjudication when all other individuals required to file tax returns in the United States are subject to negative consequences for failure to file required tax forms. *See* 85 FR at 36284. The Departments believe that adherence to U.S. tax law is applicable to a favorable exercise of discretion, and this factor evaluates such adherence as part of an adjudicator's discretionary analysis.

The Departments find commenters' concerns associated with working in the ''informal economy'' to be unpersuasive. Aside from the fact that working without authorization is unlawful, the Departments emphasize the potential dangers of working without authorization, including exploitation, and, thus, strongly discourage aliens from doing so. Although not the purpose of this regulation, if the rule deters aliens from working without authorization, then the Departments find that to be a positive unintended consequence. Further, to the extent that commenters assert this rule will have negative consequences on aliens who are violating the law—either by working without authorization or by failing to file tax returns—the Departments find continuing illegal activity to be an insufficiently persuasive basis to alter the rule.

To the extent that commenters are opposed to the EAD regulations or expressed concern in regard to notario fraud, such concerns are outside the scope of this rulemaking. Moreover, aliens who require an EAD but do not possess one should not be engaged in employment, and aliens who have not engaged in employment will—unless they have another source of taxable income—generally not be required to file income tax returns that are the subject of the rule. Further, the Departments recognize that notario fraud exists, but it exists independently of the rule and has existed for many years. To the extent that notario fraud exists in tax preparation services, again, that fraud exists outside of this rule and flows from long-standing state and Federal tax obligations, not any provision proposed in the rule. To the extent that commenters oppose this portion of the rule because they believe it will lead aliens to engage in unlawful behavior (*i.e.,* working without an EAD), the Departments note that nothing in the rule requires any individual to engage in unlawful behavior. Similarly, to the extent that commenters oppose the rule because they believe it will cause aliens to fulfill an existing legal obligation (*i.e.,* filing income tax returns) by utilizing individuals who themselves may engage in unlawful behavior (*i.e.,* notarios), the Departments also note that nothing in the rule requires aliens to hire individuals who engage in illegal behavior. Further, even if aliens turn to notarios to prepare and file tax returns, they would do so not in response to the rule, but in response to the myriad laws documented above that already incentivize or require aliens to file income tax returns. Moreover, under *Matter of A–H–,* 23 I&N at 782–83, immigration judges may already consider tax violations as a significantly adverse factor, and commenters point to no evidence of their predicted dire consequences from that decision. The Departments therefore believe any such speculative harm is outweighed by the policy benefits of codifying this factor by rule and providing clear guidance to adjudicators about how to weigh this factor when exercising discretion to grant or deny asylum. In short, commenters' concerns minimize personal responsibility and agency, are outside the scope of the rulemaking, and are outweighed by the policy benefits of the rule.

Commenters' concerns about tax law are similarly outside the scope of this rulemaking. Everyone, U.S. citizens and non-citizens alike, are required to comply with the tax laws. *See* 85 FR at 36284 (citing 26 U.S.C. 6012, 7701(b); 26 CFR 1.6012–1(a)(1)(ii), (b)). This rule does not change tax law, which, as relevant to this rulemaking, requires certain aliens to file tax forms without regard to their primary language or the complexity of the tax code. Nevertheless, the IRS has assistance available in multiple languages, *see* Internal Revenue Serv., *Help Available at IRS.gov in Different Languages and Formats* (last updated Apr. 3, 2020), *https://www.irs.gov/newsroom/help-available-at-irsgov-in-different-languages-and-formats,* and there are numerous legitimate agencies, clinics, and nonprofits that can also be solicited for assistance with tax law compliance, *see, e.g.,* Internal Revenue Serv., *Free Tax Return Preparation for Qualifying Taxpayers* (last updated Nov. 9, 2020), *https://www.irs.gov/individuals/free-tax-return-preparation-for-qualifying-taxpayers* (discussing the IRS's Volunteer Income Tax Assistance (''VITA'') program); *see also* Internal Revenue Serv., *IRS Publication 3676–B, https://www.irs.gov/pub/irs-pdf/p3676bsp.pdf* (explaining the types of tax returns prepared under the VITA program). This rule requires consideration of an asylum applicant's compliance with tax laws as part of the adjudicator's discretionary analysis and merely provides direction to adjudicators regarding how to assess, as a discretionary factor, an alien's failure to adhere to the law. It does not substantively change tax law in any way.

The Departments disagree with commenters' concerns that evaluating this factor will require more adjudicative time. As discussed above, consideration of a failure to file income tax returns is already an adverse factor for purposes of asylum adjudications. *See Matter of A–H–,* 23 I&N at 783. Thus, its further codification in applicable regulations will not appreciably require additional adjudicatory time. Further, even if it did, the benefit of clarity and guidance provided by this rule to the discretionary analysis outweighs any minimal, additional adjudicatory time.

The Departments are confident that asylum officers and immigration judges possess the competence and professionalism necessary to timely interpret and apply the relevant regulations and statutes when considering this factor. *See* 8 CFR 1003.10(b) (''immigration judges shall exercise their independent judgment and discretion''). Immigration judges have undergone extensive training; further, immigration judges already interpret and apply complex criminal law as it affects an alien's immigration status. In light of this, the Departments disagree with commenters who claim that immigration judges are not qualified to make determinations based on this factor. Relatedly, the Department declines to address commenters' speculative assertions that misapplication of the tax code by immigration judges will open up the Departments to litigation, which will, in turn, bankrupt the Departments. As discussed, *supra,* the Departments have already been considering the failure to file income tax returns as a discretionary factor for many years, and such considerations have not led to the dire consequences predicted by commenters.

Likewise, the Departments disagree that this factor improperly infringes on the purview of the Treasury Department. This factor evaluates the tax status of aliens only as it applies to their immigration status, which is clearly within the jurisdiction of the Departments. 8 CFR 208.2, 208.9(a), 1208.2, 1003.10(b). This factor does not determine tax-related responsibilities or consequences for such aliens.

Commenters misapply the Eighth Amendment's protection against cruel and unusual punishment. The Eighth Amendment applies in the context of criminal punishments, protecting against disproportional punishments as they relate to the offense. *See Roper* v. *Simmons,* 543 U.S. 551, 560 (2005) (''[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense.'' (cleaned up)).

Denial of an asylum application, however, is not a criminal punishment. As an initial matter, immigration proceedings are civil in nature. *See INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1038–39 (1984) (''A deportation proceeding is a purely civil action[.]''). Courts have held the Eighth Amendment inapplicable to deportation because, as a civil proceeding, it is not a criminal punishment. *See Sunday* v. *Att'y Gen. U.S.,* 832 F.3d 211, 219 n.8 (3d Cir. 2016) (collecting cases); *Elia* v. *Gonzales,* 431 F.3d 268, 276 (6th Cir. 2005); *Bassett* v. *U.S. Immigration and Naturalization Serv.,* 581 F.2d 1385, 1387–88 (10th Cir. 1978); *cf. Lopez-Mendoza,* 468 U.S. at 1038–39. The underlying principle of these cases is that the power to exclude aliens through deportation constitutes an ''exercise of the sovereign's power to determine the conditions upon which an alien may reside in this country,'' rather than an exercise of penal power. *Trop* v. *Dulles,* 356 U.S. 86, 98, 101 (1958) (holding that Congress cannot strip citizenship as a punishment under the Eighth Amendment, but distinguishing denaturalization of a citizen from deportation of an alien); *see also Fong Yue Ting* v. *United States,* 149 U.S. 698, 705 (1893) (noting that the power to exclude aliens is an inherent function of sovereignty).

Accordingly, denial of asylum, regardless of the reasoning underlying such denial, cannot be construed as a criminal punishment subject to the Eighth Amendment because it is adjudicated in a civil proceeding as a form of discretionary relief. Further, this factor is not a ''strict liability offense,'' as asserted by the commenters, because it is only a factor to consider as part of the discretionary component of asylum eligibility under the Act. INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); *see* 85 FR at 36283.

Commenters also misapply the Equal Protection Clause. This rule applies to all aliens and does not impose any classifications that would trigger heightened scrutiny under the clause. Thus, this factor does not offend principles of equal protection under the Constitution.

Finally, to the extent that commenters are concerned certain aliens may have difficulties meetings their tax obligations due to DHS's EAD rules, the Departments again note that these discretionary factors are not bars to eligibility. The Departments note, however, that asylum seekers who lack an EAD should generally not have a tax liability as they are prohibited from engaging in employment. Any other comments regarding specific IRS requirements for the issuance of SSNs or ITINs are outside the scope of this rule.

4.7.9. Two or More Prior Asylum Applications Denied for Any Reason

Comment: One commenter noted that there are many reasons that an asylum applicant may have had two or more prior asylum applications denied, including ineffective assistance of counsel, mental disability that prevented the applicant from properly articulating the claim, and pursuing the claim pro se. The commenter asserted that it would be inappropriate in such circumstances to deny future bona fide asylum applications.

One commenter asserted that it was inappropriate to include the proposed provision concerning denial of two or more asylum applications as a factor in discretionary determinations. Instead, the commenter argued, the presence of such a factor should be considered on a case-by-case basis and together with all of the circumstances.

Response: This factor, like the other factors, is considered under the totality of the circumstances. Further, it is not a bar to asylum; it is one of various factors that adjudicators should consider in determining whether an application merits a favorable exercise of discretion.

The Departments reiterate that consideration of this factor, as well as the other factors, does not affect the adjudicator's ability to consider whether extraordinary circumstances exist or whether denial of asylum would result in exceptional and extremely unusual hardship to the alien. 85 FR at 36285; 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii). Accordingly, an adjudicator may consider the circumstances referenced by the commenter—ineffective assistance of counsel, mental disability, lack of counsel—and determine whether they constitute extraordinary circumstances. Further, the Departments reiterate that such aliens may still apply for other forms of relief, such as non-discretionary withholding of removal and protection under the CAT.

4.7.10. Withdrawn a Prior Asylum Application With Prejudice or Been Found To Have Abandoned a Prior Asylum Application

Comment: One commenter asserted that the proposed provisions concerning withdrawn and abandoned asylum applications are in conflict with a true discretionary determination. Specifically, the commenter asserted that discretionary determinations require consideration of the factor in light of the totality of circumstances, as opposed to the proposed ''strict liability'' standard.

Commenters asserted that, contrary to the NPRM's reasoning, there could be many valid reasons that an applicant would choose to withdraw or abandon an asylum application. One commenter noted that pursuing a family-based visa or Special Immigrant Juvenile (''SIJ'') status are two such examples. Another commenter noted that asylum seekers could be forced to abandon applications for reasons beyond their control, including a failure by the government to inform the asylum seeker of a court date, governmental notice that did not correctly state the time and place of a hearing, or a proceeding occurring in a language a respondent did not understand. Another commenter asserted that MPP has caused some asylum seekers at the southern border to abandon their applications. Specifically, the commenter asserted that some asylum seekers who had been returned to Mexico under MPP were subsequently kidnapped, which caused them to miss their hearings. The commenter asserted that immigration judges have been instructed to enter an order of removal in such instances, even when the judge has serious concerns that the asylum seeker did not appear as a result of kidnapping or violence.

One commenter acknowledged the existence of notarios and other bad actors who seek to abuse the asylum system by filing asylum applications without their clients' knowledge or consent and by engaging in ''ten year visa'' schemes. Rather than addressing abuse, the commenter argued that the proposed regulation would punish asylum seekers who have been victims

of such fraud because it could result in future applications being rejected on discretionary grounds.

One commenter asserted that asylum offices have ''piloted projects'' encouraging representatives to waive the asylum interview and have the matter referred directly to an immigration court. The commenter asserted that applicants may have relied on such action by asylum offices to assume the government did not have an objection to filing an asylum application for the purpose of being placed in removal proceedings. The commenter asserted that ICE should initiate removal proceedings in such situations if the individual has ''compelling reasons'' to pursue cancellation of removal.

Response: The Departments reiterate that this factor, along with all the other factors, is considered as part of the discretionary analysis. The rule does not propose a ''strict liability standard,'' as alleged by commenters, and this factor's presence does not bar asylum. The NPRM stated clearly that ''[i]f the adjudicator determines that any of these nine circumstances apply during the course of the discretionary review, the adjudicator may nevertheless favorably exercise discretion in extraordinary circumstances, such as those involving national security or foreign policy considerations, or if the alien demonstrates, by clear and convincing evidence, that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.'' *See* 85 FR at 36283–84. Accordingly, while the presence of this factor constitutes an adverse factor, adjudicators will consider extraordinary circumstances or exceptional and extremely unusual hardship—of which commenters referenced numerous examples—that may have led an applicant to withdraw or abandon a prior application.

This rule does not ''punish'' asylum seekers for the conduct of their attorneys. Although the actions of an attorney may bind an alien absent egregious circumstances, *Matter of Velasquez,* 19 I&N at 377, nothing in the rule prohibits an alien from either alleging such circumstances to avoid the withdrawal or raising a claim of ineffective assistance of counsel.[67] If an alien has concerns about the conduct of his or her representative, the alien should file an ineffective assistance of counsel claim or immigration fraud claim. *See, e.g., Sow* v. *U.S. Att'y Gen.,* 949 F.3d 1312, 1318–19 (11th Cir. 2020) (ineffective assistance of counsel); *see also Viridiana* v. *Holder,* 646 F.3d 1230, 1238–39 (9th Cir. 2011) (distinguishing between an ineffective assistance of counsel claim and immigration consultant fraud and explaining that fraud by an immigration consultant may constitute an extraordinary circumstance). Overall, however, concerns about the impact of unscrupulous attorneys are largely speculative and remain capable of appropriate redress. Thus, the Departments decline to preemptively attempt to resolve speculative or hypothetical concerns.

Further, should unusual circumstances warrant, applicants may present evidence so that adjudicators may consider whether it constitutes an extraordinary circumstance or exceptional and extremely unusual hardship, as previously described. *Viridiana,* 646 F.3d at 1238–39. Accordingly, the Departments disagree that consideration of this factor punishes asylum seekers who are victims of fraud.

Finally, regarding commenters' notation that asylum seekers may have relied on previous USCIS pilot programs to assume the government did not have an objection to filing an asylum application for the purpose of being placed in removal proceedings, the Departments disagree that it would ever have been appropriate or authorized to file an asylum application without an actual fear of persecution or torture and an intent to seek such relief or protection. Indeed, the I–589 form itself requires the alien's attestation as to the truth of the information provided and an acknowledgement of the consequences of filing a frivolous application.

4.7.11. Failed To Attend an Interview Regarding His or Her Asylum Application

Comment: Commenters asserted that the proposed provision concerning failure to attend an interview regarding his or her asylum application is unfair, and that presence of the proposed factor should be one factor considered in context with the totality of the circumstances.

Commenters asserted that the proposed ''extraordinary circumstances'' exception is unfair because it would not recognize valid explanations that, as one commenter noted, do meet the current ''good cause'' standard. For example, one commenter asserted that valid exceptions that may not rise to the level of extraordinary circumstances include lack of child care on the day of the interview, issues with public transportation, medical issues, or an interpreter cancelling at the last minute. One commenter asserted that the NPRM does not clarify what explanations would rise to the level of extraordinary circumstances.

One commenter asserted that the proposed regulation would increase the court backlog and that USCIS factors in the possibility that applicants may not appear for interviews to ensure that no interview slot is wasted. Specifically, the commenter asserted that under current USCIS policy, USCIS will typically wait 46 days before turning over a case to an immigration court, so as to give the applicant time to establish good cause and reschedule a missed interview. By not giving USCIS such flexibility, the commenter argued, more cases would be referred to the immigration courts, thereby increasing the backlog.

One commenter expressed concern with the proposed exception regarding the mailing of notices. The commenter argued that it is unfair to require applicants to prove that the government sent the notice to the correct address. The commenter also asserted that it is important for USCIS to send the notice to both the applicant and the applicant's representative. By just sending the notice to a representative, the commenter argued, a representative who had a falling out with his or her client (as a result of, the commenter highlighted, ineffective assistance of counsel or dispute over payment) may not inform the applicant of an upcoming interview, which could cause the applicant to miss the interview. The commenter noted that in the current COVID–19 environment, a representative may not be able to go to the office to receive mail in a timely fashion, which means that some applicants may not learn of the interview until it is too late. Conversely, the commenter argued, sending the notice only to applicants could lead to missed interviews because applicants who do not understand English may disregard the notice due to a misunderstanding of its importance.

Response: This factor is not an absolute bar to asylum; instead, this factor is considered as part of the

[67] An alien may also file a claim with DOJ's Fraud and Abuse Prevention Program (Program), which investigates complaints of fraud, scams, and unauthorized practitioners and addresses these issues within EOIR. *See* EOIR, *Fraud and Abuse Prevention Program* (last updated Mar. 4, 2020), *https://www.justice.gov/eoir/*fraud-and-abuse-prevention-program. The Program also supports investigations into fraud and unauthorized practice, prosecutions, and disciplinary proceedings initiated by local, state, and Federal law enforcement and disciplinary authorities. *Id.* From the efforts of this Program, and others, the Departments seek to ensure that aliens in proceedings before them are not victims to unscrupulous behavior by their representatives.

adjudicator's discretionary analysis. The proposed rule clearly stated that presence of this factor constitutes an adverse factor, 85 FR at 36283, not an asylum bar. Further, the alien may argue that (1) exceptional circumstances prevented the alien from attending the interview or (2) the interview notice was not mailed to the last address provided by the alien or the alien's representative and that neither received notice of the interview. *See* 8 CFR 208.13(d)(2)(i)(H)(1)–(2), 1208.13(d)(2)(i)(H)(1)–(2) (proposed). Such exceptions are evidence that this factor does not constitute a bar to asylum.

The exceptions provided in proposed 8 CFR 208.13(d)(2)(i)(H)(1), 1208.13(d)(2)(i)(H)(1) broadly allow for ''exceptional circumstances.'' If the rule identified exact circumstances sufficient to negate this factor—departing the United States or withdrawing the application for another reason, as suggested by the commenter—it would unnecessarily limit aliens to a narrow set of permissible reasons for why an alien might have missed an interview. The Departments recognize that a number of reasons may cause an alien's absence at an interview, including unanticipated circumstances by the Departments, and the broad language allows for such possibility. Contrary to the commenter's allegations, the Departments included language specifically referencing failure to receive the notice. *See* 8 CFR 208.13(d)(2)(i)(H)(2), 1208.13(d)(2)(i)(H)(2) (proposed).

This factor is not arbitrary or unfair. The current administrative process required after an alien misses an interview demonstrates the necessity of this factor's inclusion in a discretionary analysis. While asylum officers may currently follow a process for missed interviews, as commenters described, missed interviews increase overall inefficiencies because a case does not timely progress as the Departments intend. Commenters' reasoning that the rule increases inefficiencies at the hearing stage in place of rescheduling the interview in the first instance is nonsensical. If a missed interview is rescheduled, the case is prolonged at the outset, thereby increasing overall time to adjudicate the application. Moreover, the application may still be adjudicated in a hearing at a later date, adding even more time overall for adjudication. If a missed interview triggers scheduling of a hearing, as outlined in this rule, the case efficiently proceeds to the hearing stage where an adjudicator will balance all factors, including the missed interview, in a discretionary analysis. At bottom, the rule encourages aliens to attend their interviews after filing an asylum application, which increases the likelihood of being granted asylum and, thus, reduces the likelihood of cases being referred to an immigration judge. Accordingly, the Departments disagree that this factor is arbitrary or unfair or would increase the backlog. Rather, the current system allows aliens to prolong adjudication of their applications at the expense of slowing the entire system, such that other aliens fail to receive timely adjudication of their applications. The Departments believe this current system is unfair and seek to resolve these inefficiencies through this rulemaking.

As commenters aptly pointed out, these cases may involve significant issues that must be determined and further explored in an interview. The interview is a vital step in adjudication of an asylum application. *See* DHS, *Establishing Good Cause or Exceptional Circumstances* (last updated Aug. 25, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/*establishing-good-cause-or-exceptional-circumstances (''You must attend your scheduled asylum interview or the asylum office will treat your case as a missed interview (failure to appear).''). Other regulatory provisions already attest to the importance of this interview through imposition of blunt consequences. *See, e.g.,* 8 CFR 208.7(a)(iv)(D), 1208.7(a)(4) (providing that an alien will be denied an EAD upon failure to appear for an interview, absent extraordinary circumstances); *see also* 8 CFR 208.10(b)(1), 1208.10 (providing that failure to attend an interview may result in ''dismissal of the application''). In addition, aliens who are inadmissible or deportable and fail to attend their interview risk being deemed to have waived their right to an interview, the dismissal of their application, and being placed in removal proceedings where they may ultimately be ordered removed by an immigration judge. 8 CFR 208.14(c)(1). The NPRM's consideration of this factor further reflects the urgency and importance of attending such interviews but for the most exceptional reasons. For that reason, and not, as commenters alleged, to punish asylum seekers, the Departments include it as a factor for consideration.

Commenters' concerns about problems that may arise between an alien and his or her representative are speculative. Regardless of the rulemaking, such concerns are not without redress: an alien could file an ineffective assistance of counsel claim, *see, e.g., Sow,* 949 F.3d at 1318–19, or an alien could claim that immigration consultant fraud (or the like) is an extraordinary circumstances, *see Viridiana,* 646 F.3d at 1238–39.

Commenters' concerns about aliens providing a correct address to the Departments are also beyond the scope of this rulemaking. Aliens are already required to notify DHS of changes of address, INA 265, 8 U.S.C. 1305, and may face criminal, INA 266(b), 8 U.S.C. 1306(b), or civil, INA 237(a)(3)(A), 8 U.S.C. 1227(a)(3)(A), repercussions for not doing so. The rule does not alter the long-standing requirement that aliens notify the Government of their current address.

This exception employs a lower standard of preponderance of the evidence. Meeting such burden varies depending on the case; therefore, the Departments decline to expand on the exact method of proof or documents necessary to meet that burden.

4.7.12. Subject to a Final Order of Removal, Deportation, or Exclusion and Did Not File a Motion To Reopen To Seek Asylum Based on Changed Country Conditions Within One Year of the Changes in Country Conditions

Comment: Commenters expressed concern that the proposed discretionary factor pertaining to failure to file a motion to reopen after a final order had been entered and within one year since changed country conditions emerged would lead to the denial of most asylum applications. As with other proposed discretionary factors, commenters asserted that the proposed rule was not creating a true discretionary determination as a result of the weight given to the presence of this proposed factor. One commenter asserted that by giving this and other proposed factors significant negative weight, the Departments would be inappropriately deviating from *Matter of Pula,* which, the commenter argued, is well-established precedent. Commenters asserted that the proposed discretionary factor should be considered on a case-by-case basis and in context with all the circumstances.

One commenter asserted that the proposed factor is ultra vires and conflicts with congressional intent because it ''directly contradicts'' section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), which states circumstances for which there are no time limits for filing a motion to reopen. The commenter argued that the one case cited by the NPRM in support of the proposed provision, *Wang* v. *BIA,* 508 F.3d 710, 715–16 (2d Cir. 2007), concerned a different provision of the INA. Specifically, the commenter

asserted that the asylum seeker in *Wang* was subject to a 90-day limit on filing a motion to reopen and was arguing for equitable tolling in light of ineffective assistance of counsel. The commenter thus argued it is ''irrational'' for the government to use the case to justify the regulation.

Another commenter expressed opposition to the rule because it presumes that the exact date of a country condition change can be precisely determined, which in turn presumes that country conditions ''turn on a dime.'' Because, the commenter alleged, the NPRM did not provide guidance on determining when a change exactly occurs, the commenter predicted ''protracted disputes'' over when a change occurs, which would be ''antithetical to judicial economy.'' One commenter expressed disagreement with the NPRM's reasoning that the proposed provision would increase ''efficiency in processing.'' Specifically, the commenter asserted that the NPRM failed to explain why adjudicating a motion to reopen filed 13 months after the presence of changed country conditions would be less efficient than adjudicating a similar motion filed 11 months after the change.

Response: This factor, like all other factors discussed herein, is part of the adjudicator's discretionary analysis. 85 FR at 36285. This factor's presence does not bar asylum; an alien who files a motion to reopen based on changed country conditions more than one year following such changed conditions may still show that extraordinary circumstances exist or that denial of asylum would result in an exceptional and extremely unusual hardship to the alien. 8 CFR 208.13(d)(2)(ii), 1208.13(d)(2)(ii) (proposed). Accordingly, applications are indeed considered on a case-by-case basis, and concerns that this factor would result in denial of most asylum applications is speculative.

Further, commenters did not engage the Departments' animating thrust behind this provision—to discourage dilatory claims, encourage the timely adjudication of new claims, and improve overall efficiency. Those benefits far outweigh any alleged concerns raised by commenters, especially since the presence of ''changed country conditions'' is a clear statutory basis for filing a motion to reopen. INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii). Both the Departments and aliens have a clear interest in raising and adjudicating claims for asylum in a timely fashion. To that end, there is nothing unreasonable or inappropriate about considering a lengthy delay in raising a claim as an adverse discretionary factor because such delays undermine the efficiency of the overall system and may, as a secondary effect, delay consideration of other meritorious claims.

Consideration of this factor does not impermissibly deviate from *Matter of Pula.* As explicitly stated in the NPRM, the rule's approach supersedes *Matter of Pula.* 85 FR at 36285. Because ''[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change,'' *Encino Motorcars, LLC,* 136 S. Ct. at 2125, the Departments permissibly superseded *Matter of Pula's* approach. See Section II.C.4.7 of this preamble for further discussion regarding the permissibility of superseding that case.

This factor also aligns with the statute. As commenters correctly stated, section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), provides ''there is no time limit'' to file a motion to reopen to apply for relief under section 208 of the Act, 8 U.S.C. 1158, or section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), based on changed country conditions. The rule does not institute a time limit in contravention of the statute.

Nor was the Departments' reference to *Wang,* 508 F.3d at 715–16, irrational. That case demonstrated the importance of aliens exercising due diligence in their cases. The citation was not meant to illustrate an identical fact pattern justifying the entire regulation, as one commenter alleged.

Although the Departments acknowledge it may be difficult to ascertain the precise date on which country conditions changed, the Departments also do not believe that ascertaining one specific day is necessarily required in most cases or that an inability to ascertain the precise date undermines the rule's efficacy. Even if country circumstances do not ''change on a dime'' and adjudicators can project only a range of dates, many cases would fall clearly inside or outside the one-year window. For example, if evidence showed that country conditions changed over a three-month period and the applicant filed two years outside the period, an adjudicator would be able to find this adverse factor notwithstanding difficulty in ascertaining a single day on which country conditions changed. In the Departments' view, the one-year window provides ample time for aliens to file a claim. And, in any event, the Departments doubt that it will be so difficult to ascertain a precise date in many cases. When a discrete event—*e.g.,* a ceasefire in a civil war—changes a country's conditions, determining a precise date will be straightforward. Accordingly, the rule would not produce ''protracted disputes'' about the date country conditions changed.

Moreover, commenters did not plausibly or persuasively explain why an alien with a genuine well-founded fear of persecution would delay in filing an asylum application for a significant length of time, and it strains credulity that such an alien would wait more than a year to seek asylum, absent some extraordinary circumstance. The rule requires that the alien exercise due diligence with regard to the case. 85 FR at 36285. If, for some reason, the alien is unable to meet that one-year deadline for reasons related to commenters' concerns that pinpointing the exact date a country condition changed will be problematic, an alien may present such an event as an extraordinary circumstance in accordance with the rule. *See id.*

The Departments have a significant interest in expedient, efficient adjudication of asylum cases. *See Talamantes-Penalver* v. *INS,* 51 F.3d 133, 137 (8th Cir. 1995) (''Enforcement of this nation's immigration laws is enhanced by the speedy adjudication of cases and the prompt deportation of offenders.''). Establishing this factor strongly encourages and underscores the importance of expedient resolution of asylum cases; however, the Departments note that expediency and efficiency do not trump extraordinary circumstances that may exist or exceptional or extremely unusual hardship that may result if asylum is denied.

The Departments have determined that the appropriate timeframe within which an alien should be able to file a motion to reopen based on changed country conditions is one year from a changed country condition. Currently, the regulation at 8 CFR 1208.4(a)(4)(ii) provides that an alien should file an asylum application

> within a reasonable period, given those ''changed circumstances.'' If the applicant can establish that he or she did not did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a ''reasonable period.''

Case law broadly applies this ''reasonable period'' standard. *See Pradhan* v. *Holder,* 352 F. App'x. 205, 207 (9th Cir. 2009) (explaining that, based on the record, the immigration judge properly denied an asylum application filed 11 months after the applicant learned of changed country conditions and his family kept him apprised of the political climate in the country); *cf. Ljucovic* v. *Barr,* 796 F.

App'x. 898, 899 (6th Cir. 2020) (dismissing for lack of jurisdiction a petition challenging the BIA's denial of a motion to reopen asylum proceedings four years following awareness of a changed condition because the petitioner did not exercise due diligence and file within a reasonable period of time). This factor would be no more difficult to apply than 8 CFR 1208.4's ''reasonable period'' standard, and, for purposes of the discretionary analysis, this rule determines that a reasonable period of time is one year within the date of the changed country condition. Further, just as 8 CFR 1208.4 allows adjudicators to consider ''delayed awareness'' in evaluating ''what constitutes a reasonable period'' when determining whether an alien may apply for asylum, this factor similarly allows adjudicators to consider whether extraordinary circumstances or exceptional or extremely unusual hardship would arise when determining whether to exercise discretion to grant or deny asylum.

Because Congress determined it reasonable for aliens to file an initial application within one year of arrival, INA 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B), the Departments similarly find it reasonable to use a one-year timeline, rather than 11 months or 13 months as suggested by commenters, in evaluating this factor as part of a larger discretionary analysis, subject to the exceptions previously described. The Departments recognize that any specific deadline is inherently both over- and under-inclusive to some extent, but the benefits of a clear deadline that is both familiar to applicants and adjudicators and straightforward to administer outweigh any purported benefits attributable to an unfamiliar and uncommon deadline—*e.g.,* 13 months—or one that is more difficult to apply—*e.g.,* a ''reasonable period''—particularly in the context of a discretionary analysis.

4.8. Firm Resettlement

Comment: Commenters asserted that the proposed firm resettlement provisions conflict with international law. Commenters stated that Congress considered the language in section 208(b)(A)(vi) of the Act, 8 U.S.C. 1158(b)(A)(vi), to be equivalent to Article 1E of the Refugee Convention, which only considered refugees to be resettled when they permanently took up residence in a third country or were afforded rights comparable to third country nationals. One commenter stated that the permanent residency requirement is further evidenced in the 1950 amendments of the Displaced Persons Act. *See* An Act to Amend the Displaced Persons Act of 1948, Public Law 81–555, 64 Stat. 219 (1950). The commenter asserted that the amendments were designed to ensure that those who temporarily resided in parts of Europe following their flight from Nazi persecution would remain eligible for protection in the United States. Under the proposed rules, the commenter argued, these same individuals would be inappropriately barred from asylum.

Commenters expressed concern that, under proposed 8 CFR 208.15(a)(1), individuals unaware of third country resettlement laws in countries through which they fleetingly passed could be punished and that those attempting to firmly resettle in a third country could face a number of challenges incompatible with the congressional intent of the concept of firm resettlement. Commenters argued, for example, that those attempting to firmly resettle could face restrictions on freedom of movement, unfair immigration procedures, government corruption, violence, and the practical inability to obtain legally guaranteed documents permitting asylees the right to live and work in the country while an application is pending. Commenters similarly asserted that, contrary to the NPRM's reasoning, the number of resettlement opportunities has not grown in recent years, and that considering whether a third country is a signatory to the Refugee Convention is not sufficient to determine whether firm resettlement is possible. A firm resettlement inquiry, commenters argued, requires a case-by-case consideration of the facts and circumstances.

Commenters asserted that proposed 8 CFR 208.15(a)(1) would replace a clear standard that is well-established in Federal case law and international law with an ambiguous standard that would require adjudicators to speculate in regard to what applicants could have done in third countries through which they transited. Accordingly, commenters argued, the proposed provision would result in lengthy litigation. One commenter asserted that the proposed provision is not legally defensible, as evidenced by the recent transit bar litigation invalidating a similar provision.

Commenters also stated opposition to proposed 8 CFR 208.15(a)(2). Commenters expressed concern that the proposed one-year bar would apply even if there is no possibility of ever obtaining a permanent or indefinitely renewable status in the country. Commenters also asserted that the proposed provision would inappropriately exclude most asylum seekers who were returned to Mexico under MPP because MPP often requires aliens to wait in Mexico for more than a year. Another commenter stated that UNHCR estimates that approximately 16 million refugees have spent five years in countries where they could not be considered firmly resettled and that they would be inappropriately barred from asylum under the proposed provision. Commenters expressed concerns that the proposed provision does not include exceptions for individuals who are victims of trafficking, lack the financial means to leave a third country, or fear persecution in the third country.

Commenters asserted that examples in the United States demonstrate the problems with proposed 8 CFR 208.15(a)(2). Commenters asserted that recipients of Deferred Action for Childhood Arrivals—who commenters noted are granted permission to stay in the United States in two-year increments—would be considered firmly resettled under the proposed rule even though their status could be rescinded at any time. Second, commenters similarly asserted that many undocumented individuals in the United States have lived here for decades, but that they cannot be considered firmly resettled because they are denied the opportunity to fully and meaningfully participate in public life and they live and work under the fear of removal.

Commenters opposed proposed 8 CFR 208.15(a)(3). One commenter stated that the proposed provision is unclear as to when presence in a country of citizenship occurred. The commenter asked, ''[d]oes it mean that the applicant must have been present there *sometime* before coming to the United States, anytime in their whole lives?'' The commenter asserted that it is unfair and unreasonable to consider someone firmly resettled in a country of citizenship without also considering factors such as whether such individual has the right to reside in the country and could be reasonably expected to do so. Commenters asserted that proposed 8 CFR 208.15(b) conflicts with *Matter of A–G–G–,* 25 I&N Dec. 486 (BIA 2011), which commenters asserted requires DHS to present evidence that a mandatory bar applies. Commenters stated that, under the proposed provision, if DHS or an immigration judge raises the issue that the firm resettlement bar might apply, then the burden of proof shifts to the respondent. This burden shifting, commenters argued, would increase the number of

unjust asylum application denials because pro se asylum seekers—especially non-English speakers and detainees—lack access to the knowledge or resources necessary to satisfy their burden of proof. Moreover, one commenter stated that if the proposed provision grants authority to DHS counsel to determine that firm resettlement applies, even if an immigration judge disagrees, then the subsection would inappropriately usurp immigration judges' authority.

One commenter asserted that the proposed rule would inappropriately permit the firm resettlement circumstances of a parent to be imputed to children and that a child's case must be considered separately from his or her parents' cases. Commenters similarly asserted that it is unreasonable to expect children to comport their movements and behavior in accordance with the proposed regulation.

Commenters noted that refugees—in addition to asylum applicants—are subject to a statutory bar based on firm resettlement. *See* INA 207(c)(1), 8 U.S.C. 1157(c)(1). At least one commenter suggested that refugee admission applicants and asylum applicants should be subject to the same standards. Commenters noted that, because Congress enacted laws to protect refugees and intended the firm resettlement bar to exclude refugees from protection only in narrow circumstances, the proposed standard for firm resettlement was an ''affront to Congressional intent.''

Response: Despite a lengthy history of international law, regulatory enactments, and circuit court interpretations, *see Matter of A–G–G–,* 25 I&N Dec. at 489–501 (explaining firm resettlement history), Congress ultimately codified the firm resettlement bar to asylum in IIRIRA without including any specific firm resettlement requirements, just as it had previously codified a firm resettlement bar to refugee admission without any specific requirements, INA 207(c)(1), 8 U.S.C. 1157(c)(1). Rather, the statutory language only states that asylum shall not be granted to an alien who ''was firmly resettled in another country prior to arriving in the United States.'' INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). Accordingly, the Departments are using their regulatory authority to interpret this ambiguous statutory language.[68] *See Matter of R–A–,* 24 I&N Dec. at 631 (explaining that agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations because there is a presumption that Congress left statutory ambiguity for the agencies to resolve). A clearer interpretation will help adjudicators in making firm resettlement determinations. Circuit courts have previously provided diverging interpretations of the firm resettlement requirements. *See Matter of A–G–G–,* 25 I&N Dec. at 495–500 (explaining differing circuit court approaches under the prior firm resettlement regulations).

In addition, as discussed further herein, efforts by the Board to provide clarity have not been fully successful, as its four-step framework reflects an unwieldy amalgamation of two competing approaches offered by Federal courts: The ''direct offer approach'' and the ''totality of the circumstances approach.'' *Id.* at 496–98, 501. Further, as described more fully below, its framework is not directed by any applicable statute or regulation,[69] contains internal tension, is in tension with other regulations regarding the parties' burdens, introduces ambiguous concepts such as indirect evidence of an offer of firm resettlement of ''a sufficient level of clarity and force,'' *id.* at 502, and relies principally on the concepts of an ''offer'' [70] and of ''acceptance'' of firm resettlement, even though the INA does not require an offer or acceptance for the provisions of INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(ii), to apply. *See Matter of A–G–G–,* 25 I&N Dec. at 501–03 (discussing the various aspects of its four-step framework). Ultimately, the best reading of the Board's cases is that the availability of some type of permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status—regardless of whether the alien applies for such status or has such status offered—is sufficient to raise the possibility of the firm resettlement bar, and that reading is incorporated into the rule.[71] *See id.* at 503 (''The regulations only require that an offer of firm resettlement was available, not that the alien accepted the offer.''). Based on these considerations and others, as described more fully below, the Departments have concluded that the current framework—with its case-by-case development and four-step framework that is divorced from any statute or regulation—invites confusion and inconsistent results because of immigration judges' potentially subjective judgments about how the framework should apply to the particular evidence in any given case. The Departments accordingly believe that the rule-based approach contained in this final regulation is more appropriate. *See Lopez* v. *Davis,* 531 U.S. 230, 244 (2001) (observing that ''a single rulemaking proceeding'' may allow an agency to more ''fairly and efficiently'' address an issue than would ''case-by-case decisionmaking'' (quotation marks omitted)).

In interpreting the statutory language, the Departments considered the history

[68] The Departments acknowledge that the concept of firm resettlement is a statutory bar to both refugee admission, INA 207(c)(1), 8 U.S.C. 1157(c)(1), and the granting of asylum, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi). The two separate bars were enacted 16 years apart.

[69] Although the Board in *Matter of A–G–G–,* 25 I&N Dec. at 501, asserted that its framework follows the language of 8 CFR 1208.15, nothing in the text of that regulation actually outlines a particular framework to follow when considering issues of firm resettlement, and the regulation certainly does not delineate the four steps put forth by the Board. Further, the Board's reading of 8 CFR 1240.8(d) to suggest that DHS bears the initial burden at step one of its framework of establishing evidence that the firm resettlement bar applies, *Matter of A–G–G–,* 25 I&N Dec. at 502, is likewise atextual, and is further called into significant doubt by a recent decision of the Attorney General, *see Matter of Negusie,* 28 I&N Dec. 120, 154–55 (A.G. 2020) (''Consistent with the clear statutory mandate that an alien has the burden of proving eligibility for immigration relief or protection, the regulations make plain that if evidence in the record indicates that [a] bar may apply, then the applicant bears the additional burden of proving by a preponderance of the evidence that it does not. Although the evidence in the record must raise the possibility that the bar 'may apply,' *id.* § 1240.8(d), neither the statutory nor the regulatory scheme requires an extensive or particularized showing of the bar's potential applicability, and evidence suggesting the bar's applicability may come from either party. While the immigration judge must determine whether the evidence indicates that the . . . bar may apply—and, thus, whether the alien bears the burden of proving its inapplicability—that determination is an evidentiary one that does not stem from any burden on DHS. This conclusion is underscored by other statutory and regulatory provisions that specify when DHS is required to assume an evidentiary burden. Placing an initial burden on DHS to establish the applicability of the . . . bar would be contrary to the relevant statutory and regulatory scheme, and would unnecessarily tax its limited resources.'' (footnote, citations, and internal quotations omitted)).

[70] The Board's efforts to refine the concept of an ''offer'' have not improved the clarity of the application of the firm resettlement bar, as adjudicators may understandably be confused about how to consider whether an alien accepted an offer that was ''available,'' but not necessarily made. *Matter of A–G–G–,* 25 I&N Dec. at 502–03. Similarly, the Board adopted a ''totality of the evidence'' standard, *id.* at 503, but did not explain if that standard was intended to encompass the Federal courts' ''totality of the circumstances'' approach or to constitute something different.

[71] As discussed herein, the Departments recognize that other parts of *Matter of A–G–G–* are superseded by this rule because, inter alia, they are unwieldy to apply, in tension with other regulations or with other parts of the decision itself, do not represent the best implementation of the statute, do not appreciate the actual availability of firm resettlement in many countries, and are outweighed by the benefits of the rule as a policy matter. Thus, the Departments have provided ''reasoned explanation[s]'' for their departures from *Matter of A–G–G–* to the extent that there are actual departures. *See Encino Motorcars, LLC,* 136 S. Ct. at 2125 (citing *Brand X,* 545 U.S. at 981–82).

of the firm resettlement concept and determined that prior interpretations do not fully address the need for clarity and specific delineation of the meaning of firm resettlement. Moreover, prior adjudicatory interpretations do not effectively appreciate the availability of firm resettlement in many countries. Thus, the Departments believe that a broader interpretation of firm resettlement is necessary to ensure that the United States' overburdened asylum system is available to those with a genuine need for protection, and not those who want to live in the United States for other reasons and simply use the asylum process as a way to achieve those goals. *See* 85 FR at 36285–86. The Departments' interpretation also comports with the overall purpose of the asylum statute, which is ''not to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. at 122 (quotation marks omitted).

The Departments' definition creates three grounds for a finding of firm resettlement.[72] The first ground captures aliens who have resided, or could have resided, permanently or indefinitely in a country but who have chosen not to pursue such opportunities. The Departments have determined that the firm resettlement bar should apply regardless of whether the alien received a direct offer of resettlement from the third country. The Departments believe that aliens should reasonably be required to pursue settlement opportunities when fleeing persecution and entering a new country, rather than forum shopping for their destination. *See Matter of A–G–G–,* 25 I&N Dec. at 503 (explaining the purpose of the firm resettlement bar ''is to limit refugee protection to those with nowhere else to turn''). This requirement is also supported by the fact that, as discussed in the NPRM, 43 additional countries have signed the Refugee Convention since 1990, evincing an increasing ability of an alien to find safe haven outside his or her home country. *See* 85 FR at 36285–86 & n.41. Contrary to commenters' claims, this first ground does not apply to aliens if the third country grants only temporary or unstable statuses. For the first ground of the firm resettlement bar to apply, the alien must be able to reside permanently or indefinitely in the third country, and temporary or unstable statuses would not meet that definition. Similarly, in order for this first ground to apply to aliens who ''could have'' resided in a permanent or indefinite status, the immigration judge must make a finding that the alien was eligible for, and otherwise would be granted, permanent or indefinite status under the laws of the third country. Moreover, the Departments disagree with commenters that the rule should retain the exception for aliens who reside in a third country but have the conditions of their stay ''substantially and consciously restricted.'' *See* 8 CFR 1208.15(b) (current). The Departments note that the language of the current regulation is more apt to cause confusion because it is not clear why—or perhaps even how—a country would offer citizenship or permanent legal residence to someone yet ''substantially and consciously'' restrict that person's residence. Further, the Departments believe that interpreting the firm resettlement bar to apply to any type of permanent or indefinite status advances the goal of limiting asylum forum shopping by persons who have the ability to live in a third country.

The second ground captures aliens who are living for an extended period of more than one year in a third country without suffering persecution. By living safely in a third country for more than a year without suffering persecution, the alien has evinced the ability to live long term in that country and is thereby ''firmly'' resettled as interpreted by the Departments. The dictionary definition of ''firm'' is ''securely or solidly fixed in place,'' not ''uncertain,'' and ''not subject to change or revision.'' *Firm,* Merriam Webster, *https://www.merriam-webster.com/dictionary/firm.* The Departments believe that this ground reasonably meets this definition, as an alien who is living in a third country for more than a year can be considered to be ''fixed in place'' and not thought to be present in the third country only temporarily.

Consistent with the purpose of the asylum statute, the Departments believe that asylum should not be made available to persons who ''have long since abandoned'' traveling to the United States in their flight from persecution. *See Rosenberg* v. *Yee Chien Woo,* 402 U.S. 49, 57 n.6 (1971). Rather, travel to the United States should be ''reasonably proximate'' to the flight from persecution and not be interrupted by ''intervening residence in a third country.'' *Id.*[73] In including this ground, the Departments do not believe that legal presence should be a requirement of firm resettlement, as persons can live indefinitely without status in a country. For example, according to a 2017 study, the median duration of residence for the United States' undocumented population is approximately 15 years. *See* Pew Research Center, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time* (June 12, 2019), *https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/.* It is reasonable to conclude that such persons should be considered ''firmly resettled'' in the United States and do not intend to live in the United States only temporarily, and by the same reasoning, aliens who have resided for long periods in other countries—even without legal presence or status—can similarly be considered ''firmly resettled.'' Further, spending more than a year in a third country shows that the alien can support himself or herself or has the ability to receive necessary support. Separately, the Departments note that, contrary to commenters' concerns, the second ground would not apply to physical residence in Mexico after an alien was returned to Mexico under the MPP, because such aliens would already be considered to have arrived in the United States. Thus, time spent in Mexico solely as a direct result of returns to Mexico after being placed in MPP will not be considered for purposes of that specific element of the firm resettlement bar.[74]

The Departments also recognize that this second ground does not follow the language of the Refugee Convention or the Refugee Protocol, which require the alien to be recognized by the third country as possessing the same rights and obligations as citizens of that country. *See* 1951 Convention Relating to the Status of Refugees, Art. 1(E). In codifying the statutory firm resettlement bar as part of IIRIRA, however, Congress

[72] In comparison to the NPRM, this final rule expands the language in 8 CFR 208.15(a)(1) and 1208.15(a)(1) by breaking the first ground into three subparagraphs and changing the syntax to improve readability and clarity and to avoid confusion. The changes in the final rule are stylistic and do not reflect an intent to make a substantive change from the NPRM regarding 8 CFR 208.15(a)(1) and 1208.15(a)(1).

[73] By requiring that an alien live in any ''one'' third country for more than a year before triggering this ground, the Departments also recognize that it would not necessarily exclude aliens who make their flight in stages, *Yee Chien Woo,* 402 U.S. at 57 n.6, as aliens who remain in multiple countries over multiple years before coming to the United States are unlikely to have their travel to the United States viewed as ''reasonably proximate'' to their flight.

[74] An alien who physically resided voluntarily, and without continuing to suffer persecution, in Mexico for one year or more after departing the alien's country of nationality or last habitual residence and prior to arrival in or entry into the United States would potentially be subject to the bar, regardless of whether the alien was placed in MPP upon arrival in the United States.

did not include such a requirement, and, as a result, the Departments have chosen to interpret this ambiguous statutory language as not requiring the third country to provide the alien with rights comparable to that of citizens. *See Matter of R–A–,* 24 I&N Dec. at 631 (explaining presumption that Congress left statutory ambiguity for the agencies to resolve (citing *Brand X,* 545 U.S. at 982)).

The third ground captures aliens who maintain, or maintained and then later renounced, citizenship in a third country and were present in that country after fleeing their home country. By possessing citizenship in a third country and being physically present in that country, the alien has established that he or she has the ability to live with full citizenship rights in a third country, negating his or her need to apply for asylum in the United States. In response to a commenter's concerns about the timing of the alien's presence in the third country, the Departments clarify that the physical presence in the third country must occur after the alien leaves the home country where the alleged persecution occurred or where the well-founded fear of persecution would occur and before arriving in the United States.

Regarding commenters' concerns about the burden of proof, the Departments note that the existing burden framework outlined by the BIA is, at the least, not required by statute and appears to be in significant tension with existing regulations.[75] The burden associated with the firm resettlement bar as applied in removal proceedings is clarified in the existing language of 8 CFR 1240.8(d), which provides that the respondent has the burden of establishing eligibility for any requested benefit or privilege. That regulation then states that, if ''the evidence indicates that one or more of the grounds for mandatory denial'' of relief may apply, the alien has the burden of proving that such grounds do not apply. 8 CFR 1240.8(d). The existing regulation is thus clear that, if the evidence indicates that the firm resettlement bar may apply, then an applicant has the burden of proving that it does not. Although the evidence in the record must itself support the applicability of a bar, the regulations do not specify who must introduce that evidence, and relevant evidence may come from either party. Moreover, 8 CFR 1240.8(d) does not specify who may raise an issue of eligibility, only that the issue may be raised when the evidence indicates that a ground should apply. Because it is illogical to expect an alien applying for asylum to raise the issue that he or she is barred from receiving asylum, the rule appropriately acknowledges the reality that either DHS or the immigration judge may raise the issue based on the evidence, regardless of who submitted the evidence.

Similarly, although the immigration judge must determine whether the evidence indicates that the firm resettlement bar may apply—and, thus, whether the alien bears the burden of proving that it does not apply—that determination is simply an evidentiary one and does not place any burden on DHS. As noted, evidence that ''indicates that one or more of the grounds for mandatory denial of the application for relief may apply [*e.g.,* the firm resettlement bar],'' 8 CFR 1240.8(d), may be in the record based upon submissions made by either party; the regulation requires only that evidence be in the record, not that it be submitted by DHS. Put more simply, the regulations do not place an independent burden on DHS to establish a prima facie case. This conclusion is underscored by other regulations that, in contrast, specify when DHS is required to assume an evidentiary burden. *See, e.g.,* 8 CFR 208.13(b)(1)(ii) (''Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, [DHS] shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.''). Placing a prima facie burden on DHS would be contrary to the relevant regulatory scheme and would unnecessarily tax the agency's limited resources without any statutory or regulatory justification, especially when ''[t]he specific facts supporting a petitioner's asylum claim . . . are peculiarly within the petitioner's grasp.'' *Angov,* 788 F.3d at 901. To the extent that commenters asserted that circuit case law conflicts with the Departments' rule, such conflicts would warrant re-evaluation in appropriate cases by the circuits under well-established principles. *See Brand X,* 545 U.S. at 982. Further, as noted in the NPRM, 85 FR at 36286, the rule overrules prior BIA decisions that are inconsistent, in accordance with well-established principles. *See Encino Motorcars, LLC,* 136 S. Ct. at 2125 (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'' (citing *Brand X,* 545 U.S. at 981–82)).

In response to one commenter's concerns, the burden of proof provision does not allow DHS to make the final determination on whether the firm resettlement bar applies in EOIR proceedings; that authority continues to reside with DOJ for aliens whose asylum applications are referred for review by an immigration judge. *See* 8 CFR 208.14(c)(1), 1003.10(b), 1240.1(a)(1)(ii).

In response to concerns about imputing parents' firm resettlement to their minor children, the Departments note that the BIA has imputed parental attributes to children under other INA provisions on multiple occasions. *See, e.g., Holder,* 566 U.S. at 595–96 (2012) (describing various provisions of the Act in which parental attributes are imputed to children). Moreover, as noted in the NPRM, 85 FR at 36286, although the Departments have not previously established a settled policy regarding the imputation of the firm resettlement of parents to a child, the imputation in this rule is consistent with both case law and recognition of the practical reality that a child generally cannot form a legal intent to remain in one place. *See, e.g., Matter of Ng,* 12 I&N Dec. 411, 412 (Reg'l Comm'r 1967) (firm resettlement of father is imputed to a child who resided with his resettled family); *see also Vang* v. *INS,* 146 F.3d 1114, 1116–17 (9th Cir. 1998) (''We follow the same principle in determining whether a minor has firmly resettled in another country, *i.e.,* we look to whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute the parents' status to the minor.'').

Here, it is reasonable to assume that minor children who are traveling with their parents would remain with their parents in any third country and, therefore, should also be subject to the firm resettlement bar. Moreover, the rule provides an exception when the alien

[75] The Board's framework also contains internal tension that has resulted in confusion on this point. In *Matter of A–G–G–,* the Board indicated that DHS bears the burden of making a prima facie showing that an offer for firm resettlement exists and will typically do so through the submission of documentary evidence. *Matter of A–G–G–,* 25 I&N Dec. at 501 (''DHS should first secure and produce direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely.''). It then went on to say, however, that prima facie evidence may already be part of the record as evidence, including testimony, which is typically offered by a respondent, not DHS. *Id.* at 502 n.17. Consequently, immigration judges may become confused about how to apply the firm resettlement bar in cases in which the evidence of record submitted by a respondent, including the respondent's testimony, indicates that the bar may apply but in which DHS has not affirmatively produced its own evidence of firm resettlement. This rule resolves that tension, reaffirms that immigration judges should follow the requirements of 8 CFR 1240.8 as appropriate, and reiterates that evidence in the record may raise the applicability of 8 CFR 1240.8 regardless of who submitted the evidence.

child can establish that he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable temporary legal immigration status (such as asylee, refugee, or similar status) from his or her parent.[76] *See* 85 FR at 36294; 8 CFR 208.15(b), 1208.15(b).

The Departments acknowledge comments noting that the NPRM altered the definition of ''firm resettlement'' applicable to asylum applicants, but did not alter the definition applicable to refugee admission applicants, which is a distinction the Departments noted in the NPRM. 85 FR at 36285 n.40. The Departments did not propose to change 8 CFR 207.1(b) in the NPRM, *see id.,* and they do not believe such a change is warranted in this final rule, notwithstanding commenters' concerns regarding the two definitions.

Although the statutory provisions applying the firm resettlement bar in the refugee and asylum contexts are virtually identical, ''[a] given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'' *Envtl. Def.* v. *Duke Energy Corp.,* 549 U.S. 561, 574 (2007). The United States Refugee Admissions Program (''USRAP'') and the asylum system serve distinct missions and populations and, thus, warrant different approaches. The asylum statute is not designed ''to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. at 122 (quotation marks omitted). In contrast, the USRAP has long focused on resolving protracted refugee situations and providing relief to refugees who have not been able to find a durable solution to their need for protection in the country of first flight. Moreover, due to the lengthy referral, vetting, and application process in the refugee resettlement program, *see generally* USCIS, *Refugee Processing and Security Screening* (June 3, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/refugee-processing-and-security-screening,* time spent in a third country or otherwise awaiting overseas resettlement may not necessarily indicate that an alien was firmly resettled in the country hosting such populations.

Further, as a program explicitly addressing persons in foreign countries—rather than a form of relief available to aliens who arrive at or are inside the United States—the USRAP implicates issues of foreign relations and diplomacy in ways different than the asylum program. Additionally, although the current regulatory definitions of ''firm resettlement'' are similar, *compare* 8 CFR 207.1(b), *with* 8 CFR 208.15 *and* 1208.15, they are not identical. Rather, the definition applicable to refugee admission applicants requires that the alien entered the country of putative resettlement ''as a consequence of his or her flight from persecution,'' 8 CFR 207.1(b), whereas the definition applicable to asylum applicants indicates that entry into a country that was a necessary consequence of flight from persecution is one element of a potential exception to the general definition of ''firm resettlement.'' In other words, existing regulations already recognize distinctions in the definitions applicable to the two programs.

In short, although the Departments acknowledge commenters' concerns about the two different definitions, they do not believe changes to 8 CFR 207.1(b) are warranted at the present time. Nevertheless, the Departments do expect to study the issue closely and, if appropriate, may propose changes at a future date.

Finally, the Departments are noting two additional changes that the final rule makes regarding the issue of firm resettlement. First, consistent with the Departments' understanding that time spent in Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of that specific element of the firm resettlement bar, that point is being clarified explicitly in this final rule. Second, EOIR is making a conforming change to 8 CFR 1244.4(b) to align it with the both the appropriate statutory citation and the corresponding language in 8 CFR 244.4(b). Aliens described in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), including those subject to the firm resettlement bar contained in INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), are ineligible for TPS. That statutory ineligibility ground is incorporated into regulations in both chapter I and chapter V of title 8; however, while the title I provision, 8 CFR 244.4(b), cites the correct statutory provision, INA 208(b)(2)(A)(vi), 8 U.S.C. 1158(b)(2)(A)(vi), the title V provision, 8 CFR 1244.4(b), maintains an outdated reference to an incorrect statutory provision. The final rule corrects that outdated reference.

4.9. ''Rogue Officials''/''Color of Law''

Comment: As an initial matter, commenters asserted that the terms ''color of law'' and ''official acting in his or her official capacity'' are not ambiguous and therefore are not open to agency interpretation. Commenters asserted that the rule seeks to codify the BIA's decision in *Matter of O–F–A–S–,* 27 I&N Dec. 709 (BIA 2019), *vacated by* 28 I&N Dec. 35, but that the standard set out in *Matter of O–F–A–S–* is an impossible burden. Specifically, commenters averred that ''if an official claims to be acting in an official capacity, is wearing an official uniform, or otherwise makes it known to the applicant that [he or she is] a government official, a CAT applicant would have no reason to know whether the official is acting lawfully or as a 'rogue' official.'' Commenters argued that to meet his or her burden, an applicant would have to obtain detailed information from a government official who has tortured or threatened him or her in order to establish that the actor was not acting in a rogue capacity.

Commenters also argued that the phrase ''under color of law'' calls for a more nuanced determination than the analysis required by the proposed regulation or the BIA's decision in *Matter of O–F–A–S–* would indicate. Quoting *Screws* v. *United States,* 325 U.S. 91, 111 (1945), commenters stated that ''[i]t is clear that under 'color' of law means under 'pretense' of law . . . . If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt words to express the idea.'' Following this analysis, commenters asserted that any proposed rule must emphasize that acting ''under color of law'' does not require the government official to be on duty, following orders, or to be acting on a matter of official government business.

Commenters similarly claimed that the proposed definition of ''rogue official'' is contrary to Federal and state jurisprudence because the proposed rule dismisses and invalidates the entire concept of ''color of law'' as being synonymous with ''acting in his or her official capacity.'' Commenters asserted that the Supreme Court views the terms as interchangeable because the

[76] The Department's experience in administering the firm resettlement bar indicates that cases in which a parent's firm resettlement would not be imputed to a minor child would be rare. Even in those rare cases, however, the Departments' use of child-appropriate procedures, as discussed elsewhere in the rule, which take into account age, stage of language development, background, and level of sophistication, would assist the child in ensuring that the child's claim is appropriately considered. *See, e.g.,* USCIS, *Interviewing Procedures for Minor Applicants* (Aug. 6, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves.*

''traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' '' *West* v. *Atkins,* 487 U.S. 42, 49 (1988) (quoting *United States* v. *Classic,* 313 U.S. 299, 326 (1941)).

Commenters explained that, in alignment with the Supreme Court's interpretation, some circuits have defined ''color of law'' to mean the ''misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'' *See Iruegas-Valdez* v. *Yates,* 846 F.3d 806, 812–13 (5th Cir. 2017) (finding that the public official in question need not be high-level or follow ''an officially sanctioned state action''); *Garcia* v. *Holder,* 756 F.3d 885, 891–92 (5th Cir. 2014); *Ramirez-Peyro* v. *Holder,* 574 F.3d 893, 900–01 (8th Cir. 2009). Citing the Eighth Circuit, commenters asserted that this means that ''the focus is whether the official uses their position of authority to further their actions, even if for 'personal' motives.'' *Ramirez-Peyro,* 574 F.3d at 900–01. Commenters further asserted that the color-of-law analysis should be one of ''nexus''—*i.e.,* ''does the conduct relate to the offender's official duties?''

Commenters further quoted *Ramirez-Peyro,* 574 F.3d at 901, stating that ''it is not contrary to the purposes of the [Convention] and the under-color-of-law standard to hold Mexico responsible for the acts of its officials, including low-level ones, even when those officials act in contravention of the nation's will and despite the fact that the actions may take place in circumstances where the officials should be acting on behalf of the state in another, legitimate, way.'' Quoting *Khouzam* v. *Ashcroft,* 361 F.3d 161, 171 (2d Cir. 2004), commenters asserted that, ''when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.'' Commenters also cited a recent decision from the Ninth Circuit Court of Appeals, in which the court held that even a rogue official is still a public official for purposes of the CAT. *See Xochihua-Jaimes* v. *Barr,* 962 F.3d 1175, 1184 (9th Cir. 2020) (''We rejected BIA's 'rogue official' exception as inconsistent with *Madrigal* [, 716 F.3d at 506.]'').

Ultimately, commenters argued that the CAT requires protection for those that have suffered any act of torture at the hands of state officials, even ''rogue officials,'' as such evidence demonstrates that the foreign state cannot or will not protect the applicant from torture. Moreover, the commenter asserted that it does not matter that some countries cannot control large numbers of rogue officials. *See, e.g., Mendoza-Sanchez* v. *Lynch,* 808 F.3d 1182, 1185 (7th Cir. 2015) (''It's simply not enough to bar removal if the [Mexican] government may be trying, but without much success, to prevent police from torturing citizens at the behest of drug gangs.''). Commenters averred that the correct inquiry in CAT claims is whether a government official committed torture, not whether the applicant can demonstrate that the official was not acting in a ''rogue capacity.''

Commenters stated that the proposed changes to the ''rogue official'' standard also conflict with the standard established by the Attorney General in *Matter of O–F–A–S–,* 28 I&N Dec. 35 (A.G. 2020), which was issued subsequent to the proposed rule's publication. For example, at least one commenter stated that the Attorney General ''rejected'' the use of the term ''rogue official,'' while the proposed rule would codify the use of the same term. Commenters further stated that the Attorney General's decision in *Matter of O–F–A–S–* created difficulty in providing comment on the proposed rule because it changed the state of the law that the rule would affect.[77]

Commenters argued that exempting public officials from the concept of acquiescence in instances in which the public official ''recklessly disregarded the truth, or negligently failed to inquire'' seems indistinguishable from ''willful blindness,'' a term recognized by the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits in the CAT analysis context. *See, e.g., Khouzam,* 361 F.3d at 170–71; *Myrie* v. *Att'y Gen. of U.S.,* 855 F.3d 509, 517 (3rd Cir. 2017), *Romero-Donado* v. *Sessions,* 720 Fed. App'x 693, 698 (4th Cir. 2018); *Iruegas-Valdez* v. *Yates,* 846 F.3d 806, 812 (5th Cir. 2017); *Torres* v. *Sessions,* 728 Fed. App'x 584, 588 (6th Cir. 2018); *Lozano-Zuniga* v. *Lynch,* 832 F.3d 822, 831 (7th Cir. 2016); *Fuentes-Erazo* v. *Sessions,* 848 F.3d 847, 852 (8th Cir. 2017); *Zheng* v. *Ashcroft,* 332 F.3d 1186, 1194–95 (9th Cir. 2003); *Medina-Velasquez* v. *Sessions,* 680 Fed. App'x 744, 750 (10th Cir. 2017). Commenters asserted that the rule should instead codify this ''near-universal standard.'' Further, commenters recommended codifying court decisions that have found government acquiescence even where parts of government have taken preventive measures. *See, e.g., Rodriguez-Molinero* v. *Lynch,* 808 F.3d 1134, 1139 (7th Cir. 2015) (noting it is not required to find the entire Mexican government complicit); *De La Rosa* v. *Holder,* 598 F.3d 103, 110 (2d Cir. 2010).

In addition, some commenters argued that the standard to demonstrate acquiescence is unreasonable because applicants would be required to demonstrate the legal duties of a government official who failed to act and also demonstrate whether the official was charged with preventing those actions but failed to act. Commenters asserted this would be an impossible standard to meet. Commenters also contended that the proposed rule's reliance on the Model Penal Code is irrelevant to what might occur in a foreign country.

Commenters argued that the proposed rule's amendments to 8 CFR 208.18(a)(1), (7) and 1208.18(a)(1), (7) will prevent many individuals from meeting the burden to establish eligibility for protection under the regulations issued pursuant to the legislation implementing the CAT. Commenters were concerned that an individual would be unable to determine that an officer is a rogue officer when ''every discernable fact (including but not limited to uniforms, weapons, badges, police cars, etc.) indicates the officer is legitimate.'' Therefore, commenters asserted, requiring this kind of detailed information would be unreasonable or impossible. Commenters similarly asserted that the requirement that an applicant demonstrate that the government official who has inflicted torture did so under color of law and is not a rogue official ignores the actual circumstances under which people flee.

Commenters also expressed concern that individuals who were tortured would have no recourse because they would be unable to report the rogue official to other potentially rogue officials. For example, commenters stated that, in many countries (such as the Democratic Republic of the Congo), members of the police or military are intentionally organized into paramilitary groups so that the government can deny responsibility for human rights violations. Commenters asserted that, in such circumstances, individuals who are subjected to harm or in danger of such harm would face an insurmountable burden of proof.

[77] To the extent commenters' concerns with the ability to comment may relate to the period of time provided for comment, the Departments responses are set forth below in Section II.C.6.3 of this preamble.

Commenters asserted that it is extremely rare for a government to openly acknowledge that it condones torture. Rather, when evidence of torture occurs, the government will claim the perpetrator was a ''bad apple'' who acted on his or her own. Commenters asserted that this rule would accept the ''bad apple'' excuse on its face, preventing torture victims from receiving protection. Similarly, commenters asserted that most governments would not publicly admit that they torture their citizens and that, without such admissions, it would be difficult for victims of torture to prove that the injury was caused by a government official acting in an official capacity as opposed to on the official's private initiative. Commenters also asserted that the proposed changes appear specifically to restrict typical claims from Central America, where individuals are ''tortured at the hands of non-state actors such as gangs and cartels and where government actors are frequently complicit in these actions.'' Finally, one commenter asserted that, if an agency is going to demand such a high burden to establish torture, the agency should be the one to take on the burden of demonstrating the difference because the agency has more capacity to obtain the required information than the individual requesting the relief.

Response: The Departments disagree with commenters' assertions that the term ''acting in an official capacity'' is unambiguous and thus not subject to agency interpretation, as multiple decisions from the BIA, the Attorney General, and circuit courts attest. As demonstrated most recently by the Attorney General's decision in *Matter of O–F–A–S–,* 28 I&N Dec. at 36–37, the term ''acting in an official capacity'' is a term that has been subject to different interpretations since it was implemented in the regulations. *See* Regulations Concerning the Convention Against Torture, 64 FR 8490 (Feb. 19, 1999). As explained by the Attorney General subsequent to the NPRM, whether an individual acted in an official capacity has been the subject of multiple inaccurate or imprecise formulations. *Matter of O–F–A–S–,* 28 I&N Dec. at 36–37. On the one hand, then-Attorney General Ashcroft first articulated that the official capacity requirement means torture ''inflicted under color of law.'' *Id.* at 36. Subsequently, every Federal court of appeals to consider the questions has read the standard in the same manner. *Id.* at 37 (citing *Garcia,* 756 F.3d at 891; *United States* v. *Belfast,* 611 F.3d 783, 808–09 (11th Cir. 2010); *Ramirez-Peyro,* 574 F.3d at 900). However, at the same time, some Federal courts have viewed immigration judges as applying an amorphous, different concept of ''rogue official,'' which has not been accepted by circuit courts. *Id.* (citing Federal court of appeals decisions reviewing immigration court decisions applying an alleged ''rogue official'' analysis).

As the NPRM made clear, there is not a ''rogue official'' exception *per se* for CAT protection. 85 FR at 36286. Rather, ''rogue official'' is simply a shorthand label for an official who is not acting under color of law, and the actions of such an official are not a basis for CAT protection because the individual is not acting in an official capacity. The Attorney General confirmed this view that a ''rogue official'' is one who is not acting under color of law. *Matter of O–F–A–S–,* 28 I&N Dec. at 38 (''To the extent the Board used 'rogue official' as shorthand for someone not acting in an official capacity, it accurately stated the law. By definition, the actions of such officials would not form the basis for a cognizable claim under the CAT.''). Thus, there is no longer any confusion regarding the definition of a ''rogue official,'' and, consistent with the rule, such an official is one who is not acting under color of law.

Nevertheless, as the Attorney General also noted, ''continued use of the 'rogue official' language by the immigration courts going forward risks confusion . . . because 'rogue official' has been interpreted to have multiple meanings.'' *Id.* Accordingly, the Departments are removing that term from the final rule to avoid any further confusion. Its removal, however, does not result in any substantive change to the rule. Regardless of whether an official who is not acting in an official capacity is described as a ''rogue official,'' the actions of such an official are not performed under color of law and, thus, do not form the basis of a cognizable claim under the CAT.

Regarding commenters' concerns about the Attorney General's decision in *Matter of O–F–A–S–,* the Attorney General determined that it was necessary to provide a clarification of the ambiguous term ''acting in an official capacity'' without waiting for the Departments' NPRM to be finalized. That he issued his decision does not prevent the Departments from codifying that definition subsequently.

Moreover, the Departments disagree that the Attorney General's decision in *Matter of O–F–A–S–,* 28 I&N Dec. at 35, conflicts with the language of this rule. In *Matter of O–F–A–S–,* the Attorney General explained that ''acting in an official capacity'' means actions performed ''under color of law.'' *Id.* This rule amends the current regulatory language to clarify that the conduct supporting a CAT claim must be carried out under color of law, which is fully consistent with the Attorney General's decision. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1) (expressly using the phrase ''under color of law'').[78] Therefore, the regulatory text articulates that the test for determining whether an individual acted in an official capacity is whether the official acted under color of law. *See* 8 CFR 208.18(a)(1), 1208.18(a)(1).

This amendment aligns the regulatory language with congressional intent and circuit case law finding that ''in an official capacity'' means ''under color of law.'' The Senate, in recommending that the United States ratify the CAT, explicitly stated that ''the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted 'under color of law.' '' S. Exec. Rep. No. 101–30, at 14 (1990). Further, as stated by the Attorney General in *Matter of O–F–A–S–,* every Federal court of appeals to consider the question has held that action ''in an official capacity'' means action ''under color of law.'' 28 I&N Dec. at 37 (citing *Garcia,* 756 F.3d at 891; *Belfast,* 611 F.3d at 808–09; *Ramirez-Peyro,* 574 F.3d at 900); *see also Ali* v. *Reno,* 237 F.3d 591, 597 (6th Cir. 2001) (adopting the ''under color of law'' standard in an opinion preceding *Matter of Y–L–,* 24 I&N Dec. 151).

The Senate's understanding of ''acquiescence'' for purposes of the CAT was that a finding of acquiescence requires a showing that the public official was aware of the act and that the public official had a legal duty to intervene to prevent the act but failed to do so. *See* S. Exec. Rep. No. 101–30, at 14 (''In addition, in our view, a public

[78] In clarifying this definition of a public official as one acting under color of law, the rule also makes clear that, for purposes of the CAT regulations, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless the act is done while the official is ''acting in his or her official capacity. 85 FR at 36287; 8 CFR 208.18(a)(1) and 1208.18(a)(1). The Departments recognize that this change departs from the language considered in *Barajas-Romero* v. *Lynch,* 846 F.3d 351, 362–63 (9th Cir. 2017), which allowed for the consideration of a CAT claim even when the alleged torture was carried out by a public official not acting in an official capacity. Nevertheless, the Departments have provided reasoned explanations for this regulatory change and, thus, can implement that change in accordance with well-established principles. *See Encino Motorcars, LLC,* 136 S. Ct. at 2125 (''Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'').

official may be deemed to 'acquiesce' in a private act of torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity.''). As noted in the NPRM, however, the term ''awareness'' has led to some confusion. *See* 85 FR at 36287 (citing *Scarlett* v. *Barr,* 957 F.3d 316 (2d Cir. 2020)). Commenters asserted that the Departments, rather than creating a new definition for awareness, should instead codify the ''willful blindness'' standard as articulated by the circuit courts of appeals. But the final rule does just that: As noted in the NPRM, the Departments proposed to clarify that, in accordance with decisions from several courts of appeals and the BIA, '' 'awareness'—as used in the CAT 'acquiescence' definition—requires a finding of either actual knowledge or willful blindness.'' 85 FR at 36287; *see also* 8 CFR 208.18(a)(1), 1208.18(a)(1). The Departments, however, seeking to avoid further ambiguity, further define the term ''willful blindness'' to mean that the public official or other person acting in an official capacity was ''aware of a high probability of activity constituting torture and deliberately avoided learning the truth.'' 85 FR at 36287. The Departments further clarify that it is not enough that such a public official acting in an official capacity or other person acting in an official capacity was ''mistaken, recklessly disregarded the truth, or negligently failed to inquire.'' *Id.*

As explained in the NPRM, the Departments' definition of ''acquiescence'' aligns with congressional intent to require both an actus reus and a mens rea. *Id.* The Senate, during ratification of the CAT, included in its list of understandings the two elements required for a finding of acquiescence: Actus reus and mens rea. *See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Treaty Doc. 100–20: Hearing Before the S. Comm. on Foreign Relations,* S. Hrg. No. 101–718, 101st Cong., 2d Sess. 14 (1990) (''[T]o be culpable under the [CAT] . . . the public official must have had prior awareness of [the activity constituting torture] and must have breached his legal responsibility to intervene to prevent the activity.'' (statement of Mark Richard, Deputy Assist Att'y Gen., Criminal Division, Department of Justice)); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36198 (1990). The definition further aligns with subsequent understandings that reduced the requirement from knowledge to mere awareness. *See Zheng,* 332 F.3d at 1193 (''The [Senate Committee on Foreign Relations] stated that the purpose of requiring awareness, and not knowledge, 'is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.' '').

Regarding commenters' assertions that the proposed rule would create a burden that would be impossible for an applicant to meet, the Departments note that, currently, applicants must still demonstrate a legal duty and that this requirement does not change with this final rule. Even when applying the ''willful blindness'' standard articulated by various circuit courts of appeals, the applicant must demonstrate a legal duty and that the government official breached that legal duty. *See, e.g., Khouzam,* 361 F.3d at 171 (''From all of this we discern a clear expression of Congressional purpose. In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.'').

Regarding commenters' concerns about the burden applicants would have in establishing that an official was not a rogue official, the Departments reiterate that this rule codifies the analysis that, for an individual to be acting in an official capacity, he or she must be acting under color of law. As stated above, this standard aligns with the standard required by the Attorney General in *Matter of O–F–A–S–,* as well as the various circuit courts of appeals to have considered the issue. Therefore, the burden continues to require that an applicant demonstrate that an individual acted under color of law to demonstrate eligibility. The final rule does not raise or change the burden on the applicant, but merely provides clarity on the analysis. Moreover, the NPRM lists the main issues to consider in determining whether an official was acting under the color of law: Whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information; whether the officer was on duty and in uniform at the time of his conduct; and whether the officer threatened to retaliate through official channels if the victim reported his conduct to authorities. 85 FR at 36287. The Departments believe these issues would be known by the alien, who could at least provide evidence in the form of his or her personal testimony if other witnesses or documents were unavailable. *See* 8 CFR 1208.16(c)(2) (''The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [for a claim for protection under the CAT] without corroboration.'').

5. Information Disclosure

Comment: Commenters raised concerns that the rule's confidentiality provisions violate asylum seekers' right to privacy in their asylum proceedings, are ''expansive and highly concerning,'' and would put asylum seekers at ''grave risk of harm.'' Commenters were particularly concerned about cases involving gender-based violence. Commenters explained that broad disclosure language would deter asylum seekers from pursuing relief or revealing details of their alleged persecution for fear that their persecutor would learn about their asylum claim and subject them or their families to further harm. This fear, according to commenters, would be compounded by the fact that persecutors could potentially learn such information online without needing to be physically present in the United States. For example, commenters were concerned that disclosures in Federal litigation could be accessed by anyone because the litigation is public record.

One commenter noted that the exception for state or Federal mandatory reporting requirements at 8 CFR 208.6(d)(1)(iii) and 1208.6(d)(1)(iii) is ''completely open ended and provides no safeguards against publication'' to the public. Another commenter raised concerns about the exception allowing for an asylum application to be filed in an unrelated case as evidence of fraud. The commenter explained that, in practice, this would mean that information from one applicant's case would be accessible to another applicant, potentially putting the asylum applicant in danger.

Response: The Departments are fully cognizant of the need to protect asylum seekers, as well as their relatives and associates in their home countries, by preventing the disclosure of information contained in or pertaining to their applications. There are specific situations, however, in which the disclosure of relevant information is necessary to protect the integrity of the system, to ensure that those engaged in fraud do not obtain benefits to which they are not entitled, and to ensure that unlawful behavior is not inadvertently and needlessly protected. The existing confidentiality provisions do not provide for an absolute bar on disclosure, but even their exceptions may encourage fraud or criminal behavior. *See Angov,* 788 F.3d at 901

(''This points to an unfortunate reality that makes immigration cases so different from all other American adjudications: Fraud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated.''). Ultimately, there is no utility in protecting a false or fraudulent asylum claim, in restricting access to evidence of child abuse, or in restricting access to evidence that may prevent a crime, and the rule properly calibrates those concerns as outweighing the blunt shield of confidentiality for an assortment of unlawful behaviors that exists under the current regulations.

Here, the Departments have determined that additional, limited disclosure exceptions are necessary to protect the integrity of proceedings, to ensure that other types of criminal activity are not shielded by the confidentiality provisions, and to ensure that the government can properly defend itself in relevant proceedings. By their text, these additional disclosure exceptions are limited to specific circumstances in which the disclosure of such information is necessary and the need for the disclosure outweighs countervailing concerns. This rule includes clarifying exceptions explicitly allowing release of information as it relates to any immigration proceeding under the INA or legal action relating to the alien's immigration or custody status. This will ensure that the government can provide a full and accurate record in litigating such proceedings.

The rule also includes provisions for protecting the integrity of proceedings and public safety. These include provisions aimed at detecting fraud by allowing the Departments to submit similar asylum applications in unrelated proceedings; pursuing state or Federal criminal investigations, proceedings, or prosecutions; and protecting against child abuse. For example, the fraud exception will allow the Departments to consider potentially fraudulent similar applications or evidence in an immigration proceeding in order to root out non-meritorious claims, which will in turn allow the Departments to focus limited resources on adjudicating cases with a higher chance of being meritorious. *See, e.g., Angov,* 788 at 901–02 (''[Immigration f]raud, forgery and fabrication are so common—and so difficult to prove—that they are routinely tolerated. . . . [I]f an alien does get caught lying or committing fraud, nothing very bad happens to him. . . . Consequently, immigration fraud is rampant.'').

Regarding commenters' concerns with the exception to allow disclosure as required by any state or Federal mandatory reporting requirements, the Departments note that the exception simply makes clear that government officials must abide by such laws. This provision is designed to prevent any inconsistencies and ensure that government officials comply with any mandatory reporting requirements. Accordingly, despite commenters' concerns with the breadth of this provision, the Departments disagree that any limiting language would be appropriate.

The Departments have considered commenters' concerns that an applicant's application will be submitted in another proceeding and thereby be made available to the other applicant, though they note that existing exceptions already cover ''[t]he adjudication of asylum applications'' and ''[a]ny United States Government investigation concerning any . . . civil matter,'' which, arguably, already encompass the use of applications across proceedings. 8 CFR 208.6(c)(1)(i), (v), 1208.6(c)(1)(i), (v). The Departments are maintaining the exceptions in the NPRM to ensure clarity on this point and to ensure that existing regulations are not inappropriately used to shield unlawful behavior. Because cases involving asylum fraud are ''distressingly common,'' *Angov,* 788 at 902, the need to root out fraudulent asylum claims greatly outweighs the concerns raised by commenters. Moreover, legitimate asylum seekers generally should be unaffected by this exception. Finally, the Departments reiterate that only ''relevant and applicable'' information is subject to disclosure under that exception; thus, rather than an open-ended exception, this exception ensures that only a limited amount of information is subject to disclosure under that exception.

Finally, as noted above, the Departments are making conforming edits to 8 CFR 208.6(a) and (b) and 8 CFR 1208.6(b) to make clear that the disclosure provisions of 8 CFR 208.6 and 1208.6 apply to applications for withholding of removal under the INA and for protection under the regulations implementing the CAT, and not solely to asylum applications. That point is already clear in 8 CFR 208.6(d) and 1208.6(d), and the Departments see no reason not to conform the other paragraphs in those sections for consistency. Relatedly, the Departments are also making edits to 8 CFR 208.6(a), (b), (d), and (e) and 8 CFR 1208.6(b), (d), and (e) to make clear that applications for refugee admission pursuant to INA 207(c)(1), 8 U.S.C. 1157(c)(1), and 8 CFR part 207 are subject to the same information disclosure provisions as similar applications for asylum, withholding of removal under the INA, and protection under the regulations implementing the CAT. The Departments already apply the disclosure provisions to such applications as a matter of policy and see no basis to treat such applications differently than those for protection filed by aliens already in or arriving in the United States.

6. Violates Domestic or International Law

6.1. Violates Immigration and Nationality Act

Comment: Commenters expressed a general belief that the rule violates the INA, such as by rendering it ''impossible'' or ''near impossible'' to obtain refugee status.

Multiple commenters stated that it appears the proposed rule is an ''unreasonable interpretation'' of sections 208 and 240 of the INA, 8 U.S.C. 1158 and 1229a, because two members of Congress have issued a statement in opposition to the rule.

Response: This rule implements numerous changes to the Departments' regulations regarding asylum and related procedures, including amendments to the expedited removal and credible fear screening process, changes to the standards for frivolous asylum application findings, a provision to allow immigration judges to pretermit applications in certain situations, codification of standards for consideration during the review of applications for asylum and for statutory withholding of removal, and amendments to the provisions regarding information disclosure. Each of these changes, as discussed with more specificity elsewhere in Section II.C of this preamble, is designed to better align the Departments' regulations with the Act and congressional intent. As also discussed, *supra,* the rule does not end asylum or refugee procedures, nor does it make it impossible for aliens to obtain such statuses. To the contrary, by providing clearer guidance to adjudicators and allowing them to more effectively consider all applications, the rule should allow adjudicators to more efficiently reach meritorious claims.

The Departments disagree that the statements of certain members of Congress about their personal opinion regarding the rule are sufficient to demonstrate that the rule is an ''unreasonable interpretation'' of the Act. Indeed, the statements of certain

members of Congress in 2020 is not clear evidence of the legislative intent behind the 1996 enactment of IIRIRA, which established the key statutory provisions related to this rule.

6.2. Violates Administrative Procedure Act

Comment: Commenters raised concerns that the rule does not comply with the APA. Commenters alleged that the rule is arbitrary and capricious under the APA because it does not offer ''reasoned analysis'' for the proposed changes. Commenters explained that ''reasoned analysis'' requires the Departments to display awareness that they are changing positions on a policy, to provide a legitimate rationale for departing from prior policy, and to identify the reasons for the change and why the change is a better solution to the issue.

In alleging this failure, commenters argued that the Departments did not analyze or rely on data or other evidence in formulating these changes. Moreover, commenters also claimed that the Departments did not consider possible alternatives to the changes and failed to consider important aspects of the various changes, including the impacts on the applicants and their communities. Commenters claimed that this rule is nothing more than a pretext for enshrining anti-asylum seeker sentiments, as evidenced by the thin or complete lack of justification for the various changes.

In addition, commenters claimed that this rule overlaps with other recent rules promulgated by the Departments, including rules involving asylum and adjusting fee amounts. Commenters claimed that it is arbitrary and capricious for the Departments to ''carve up [their] regulatory activity to evade comprehensive evaluation and comment.'' For example, one commenting organization stated that the rule treats domestic violence differently from another recent rule, in that the other rule bars relief for persons who have committed gender-based violence, while this rule bars relief from persons who have survived gender-based violence.

One commenting organization stated that the Departments are implementing this rule to enhance their litigating positions before EOIR and the Federal courts, which the commenter alleged is arbitrary and capricious where ''there is no legitimate basis for the regulation other than to enhance the litigating position'' of the Departments, particularly when the Departments are parties to the litigation.

Response: The Departments disagree that the promulgation of this rule is arbitrary and capricious under the APA. The APA requires agencies to engage in ''reasoned decisionmaking,'' *Michigan,* 576 U.S. at 750, and directs that agency actions be set aside if they are arbitrary or capricious, 5 U.S.C. 706(2)(A). This, however, is a ''narrow standard of review'' and ''a court is not to substitute its judgment for that of the agency,'' *Fox Television,* 556 U.S. at 513 (quotation marks omitted), but is instead to assess only whether the decision was ''based on a consideration of the relevant factors and whether there has been a clear error of judgment,'' *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). Arbitrary and capricious review is ''highly deferential, presuming the agency action to be valid.'' *Sacora* v. *Thomas,* 628 F.3d 1059, 1068 (9th Cir. 2010). It is ''reasonable for the [agency] to rely on its experience'' to arrive at its conclusions, even if those conclusions are not supported with ''empirical research.'' *Id.* at 1069. Moreover, the agency need only articulate ''satisfactory explanation'' for its decision, including ''a rational connection between the facts found and the choice made.'' *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983); *see also Dep't of Commerce* v. *New York,* 139 S. Ct. 2551, 2569 (2019) (''We may not substitute our judgment for that of the Secretary, but instead must confine ourselves to ensuring that he remained within the bounds of reasoned decisionmaking.'' (citation and quotation marks omitted)).

Under this deferential standard, and contrary to commenters' claims, the Departments have provided reasoned explanations for the changes in this rule sufficient to rebut any APA-related concerns. The NPRM describes each provision in detail and provides an explanation for each change. *See* 85 FR at 36265–88. The Departments explained that these various changes will, among other things, maintain a streamlined and efficient adjudication process for asylum, withholding of removal, and CAT protection; provide clarity in the adjudication of such claims; and protect the integrity of such proceedings. *Id.* As noted in Section II.A of this preamble, the animating principles of the NPRM were to provide clearer guidance to adjudicators regarding a number of thorny issues that have caused confusion and inconsistency and even bedeviled circuit courts; to improve the efficiency and integrity of the overall system in light of the overwhelming number of cases pending; to correct procedures that were not working well, including procedures for the identification of meritless or fraudulent claims; and to provide a consistent approach for the overall asylum adjudicatory framework in light of numerous—and often contradictory or confusing—decisions from the Board and circuit courts regarding multiple important terms that are not defined in the statute.

For example, the Departments explained that the changes to use asylum-and-withholding-only proceedings for positive credible fear findings, to increase the credible fear standard for withholding of removal and CAT protection claims, to apply certain bars and the internal relocation analysis in credible fear interviews, to pretermit legally insufficient asylum applications, and to expand the grounds for a frivolous asylum finding are all intended to create a more streamlined and efficient process for adjudicating asylum, withholding of removal, and CAT protection applications. *See* 85 FR at 36266–67 (explaining that asylum-and-withholding-only proceedings will ensure a ''streamlined, efficient, and truly 'expedited' '' removal process); *id.* at 36277 (explaining that the pretermission of legally insufficient asylum applications will eliminate the need for a hearing); *id.* at 36273–76 (explaining that frivolous applications are a ''costly detriment, resulting in wasted resources and increased processing times,'' and that the new grounds for a finding of frivolousness will ''ensure that meritorious claims are adjudicated more efficiently'' and will prevent ''needless expense and delay''); *id.* at 36268–71 (explaining that raising the credible fear standard for withholding and CAT applications will allow the Departments to more ''efficiently and promptly'' distinguish between aliens whose claims are more or less likely to ultimately be meritorious); *id.* at 36272 (explaining that applying certain eligibility bars in credible fear interviews will help to eliminate unnecessary removal delays in section 240 proceedings and eliminate the ''waste of adjudicatory resources currently expended in vain'').

Similarly, the Departments also explained in the NPRM that many of the changes are intended to provide clarity to adjudicators and the parties, including the addition of definitions and standards for terms such as ''particular social group,'' ''political opinion,'' ''persecution,'' ''nexus,'' and ''internal relocation;'' the delineation of discretionary factors in adjudicating asylum applications; the addition of guidance on the meaning of

''acquiescence'' and the circumstances in which officials are not acting under color of law in the CAT protection context; and the clarification of the use of precedent in credible fear review proceedings. *See* 85 FR at 36278 (explaining that the rule's definition of ''particular social group'' will provide ''clearer guidance'' to adjudicators regarding whether an alleged group exists and, if so, whether the group is cognizable); *id.* at 36278–79 (explaining that the rule's definition of ''political opinion'' will provide ''additional clarity for adjudicators''); *id.* at 36280 (explaining that the rule's definition of ''persecution'' will ''better clarify what does and does not constitute persecution''); *id.* at 36281 (explaining that the rule's definition of ''nexus'' will provide ''clearer guidance'' for adjudicators to ''uniformly apply''); *id.* at 36282 (explaining that the rule's definition of ''internal relocation'' will help create a more ''streamlined presentation'' to overcome the current lack of ''practical guidance''); *id.* at 36283 (explaining that, for asylum discretionary determinations, the Departments have not previously provided general guidance in agency regulations for factors to be considered when determining whether an alien merits asylum as a matter of discretion); *id.* at 36286–87 (explaining that guidance for CAT acquiescence and for the circumstances in which an official is not acting under color of law standards is meant to provide clarity because current regulations ''do not provide further guidance''); *id.* at 36267 (explaining that the inclusion of language regarding the consideration of precedent in credible fear review proceedings is intended to provide a ''clear requirement'').

The Departments also explained that many of the changes are intended to protect the integrity of proceedings. *See* 85 FR at 36288 (explaining the expansion of information disclosure is necessary to protect against ''suspected fraud or improper duplication of applications or claims''); *id.* at 36283 (explaining that the inclusion of a discretionary factor for use of fraudulent documents is necessary due to concerns that the use of fraudulent documents makes the proper enforcement of the immigration laws ''difficult'' and ''requires an immense amount of resources''); *id.* (explaining that the inclusion of a discretionary factor for failure to seek asylum or protection in a transit country ''may reflect an increased likelihood that the alien is misusing the asylum system''); *id.* at 36284 (explaining that making applications that were previously abandoned or withdrawn with prejudice a negative discretionary factor would ''minimize abuse of the system'').

The Departments also disagree with commenters that the rule does not provide support for the specific grounds that would be insufficient to qualify as a particular social group or to establish a nexus.[79] The Departments provided numerous citations to BIA and Federal court precedent that the Departments relied on in deciding to add these specific grounds. *See* 85 FR at 36279 (list of cases supporting the grounds that generally will not qualify as a particular social group); *id.* at 36281 (list of cases supporting the grounds that generally will not establish nexus).

In addition to the explicit purposes detailed in the NPRM, the Departments also considered, contrary to commenters' claims, the effects that such changes may have on applicants. The Departments noted that the proposed changes ''are likely to result in fewer asylum grants annually.'' 85 FR at 36289. Moreover, the Departments recognized that any direct impacts would fall on these applicants. *Id.* at 36290. The Departments acknowledge that these impacts are viewed as ''harsh'' or ''severe'' by commenters, but the Departments also note, as discussed, *supra,* that many of the commenters' overall assertions about the effects of this rule are unfounded or speculative.[80] In addition, the Departments made the decision to include the various changes in this rule because, after weighing the costs and benefits, the Departments determined that the need to provide additional clarity to adjudicators; to enhance adjudicatory efficiencies; and to ensure the integrity of proceedings outweighed the potential costs to applicants, especially since the changes, particularly those rooted in existing law, would naturally fall more on applicants with non-meritorious claims. In fact, the enhanced adjudicatory efficiencies would be expected to allow adjudicators to focus more expediently on meritorious claims, which would be a benefit offsetting any costs to those applicants filing non-meritorious applications. Overall, as shown in the NPRM and the final rule, the Departments engaged in ''reasoned decision making'' sufficient to mitigate any APA concerns.

The Departments also disagree with commenters' claim that the Departments purposefully separated their asylum-related policy goals into separate regulations in order to prevent the public from being able to meaningfully review and provide comment. The Departments reject any assertions that they are proposing multiple rules for any sort of nefarious purpose. Each of the Departments' rules stand on its own, includes an explanation of its basis and purpose, and allows for public comment, as required by the APA. *See Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania,* 140 S. Ct. 2367, 2386 (2020) (explaining that the APA provides the ''maximum procedural requirements'' that an agency must follow in order to promulgate a rule). To the extent commenters noted some overlap or joint impacts, however, the Departments regularly consider the existing legal framework when a specific rule is proposed or implemented. For example, with respect to the potential impacts of DHS fee changes, DHS conducts a biennial review of USCIS fees and publishes a Fee Rule that impacts all populations before USCIS. *See, e.g.,* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 62280, 62282 (Nov. 14, 2019) (explaining that, in accordance with 31 U.S.C. 901–03, USCIS conducts ''biennial reviews of the non-statutory fees deposited into the [Immigration Examinations Fee Account]''). It is natural that there would be some impact on aliens who intend to seek asylum, but any such change to those fees must be considered with respect to USCIS's overall fee structure. Thus, any such changes were properly outside the scope of this rule. Moreover, nothing in any rule proposed by the Departments, including the NPRM underlying this final rule, precludes the public from meaningfully reviewing and commenting on that rule.

Finally, commenters are incorrect that the rule is related to enhancing the government's litigating positions. As explained in the NPRM and this response section, the Departments detailed a number of reasons for promulgating this rule, including to increase efficiency, to provide clarity to adjudicators, and to protect the integrity of proceedings. To the extent the rule

[79] For further discussion regarding the changes related to particular social groups, see Section II.C.4.1 of this preamble, and for further discussion regarding the changes related to nexus, see Section II.C.4.4.

[80] The Departments also note that aliens with otherwise meritorious claims who are denied asylum under genuinely new principles in the rule—*e.g.,* the new definition of ''firm resettlement''—may remain eligible for other forms of protection from removal, such as statutory withholding of removal or protection under the CAT. Thus, contrary to the assertions of many commenters, the rule would not result in the ''harsh'' or ''severe'' consequence of an alien being removed to a country where his or her life would be in danger.

corresponds with interpretations of the Act and case law that the Departments have set forth in other contexts, the Departments disagree that such correspondence violates the APA. Instead, it shows the Departments' consistent interpretation and the Departments' intent to better align the regulations with the Act through this rulemaking.

6.3. 30-Day Comment Period

Comment: Commenters raised concerns with the 30-day comment period, arguing that the Departments should extend the comment period to at least 60 days or should reissue the rule with a new 60-day comment period. Due to the complex nature of the rule and its length, commenters requested additional time to comment, asserting that such time is needed to meet APA requirements that agencies provide the public with a ''meaningful opportunity'' to comment. Commenters also claimed that the 30-day comment period was particularly problematic due to the COVID–19 pandemic, which caused disruption and limited staff capacity for some commenters. Moreover, commenters stated that there should be no urgency to publish the rule due to the southern border being ''blocked'' due to COVID–19. Finally, commenters referenced the companion data collection under the Paperwork Reduction Act, which allowed for a 60-day comment period.

Response: The Departments believe the 30-day comment period was sufficient to allow for meaningful public input, as evidenced by the almost 89,000 public comments received, including numerous detailed comments from interested organizations. The APA does not require a specific comment period length, *see* 5 U.S.C. 553(b), (c), and although Executive Orders 12866, 58 FR 51735 (Sept. 30, 1993), and 13563, 76 FR 3821 (Jan. 18, 2011), recommend a comment period of at least 60 days, a 60-day period is not required. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit has stated that, although a 30-day period is often the ''shortest'' period that will satisfy the APA, such a period is generally ''sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,'' even when ''substantial rule changes'' are proposed. *Nat'l Lifeline Ass'n* v. *Fed. Commc'ns Comm'n,* 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984)).

Further, litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp.* v. *FCC,* 78 F.3d 620, 629–30 (D.C. Cir. 1996) (15-day comment period); *Northwest Airlines, Inc.* v. *Goldschmidt,* 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period). In addition, the Departments are not aware of any case law holding that a 30-day comment period was insufficient, and the significant number of detailed public comments is evidence that the 30-day period was sufficient for the public to meaningfully review and provide informed comment. *See, e.g., Little Sisters of the Poor,* 140 S. Ct. at 2385 (''The object [of notice and comment], in short, is one of fair notice.'' (citation and quotation marks omitted)).

One commenter noted that the comment period in the rule regarding the edits to the Form I–589, Application for Asylum and for Withholding of Removal, was 60 days, while the comment period for the substantive portions of the rule was only 30 days. In most cases, by statute, the Paperwork Reduction Act requires a 60-day comment period for proposed information collections, such as the Form I–589. 44 U.S.C. 3506(c)(2)(A). Although the statute allows an exception for proposed collections of information contained in a proposed rule that will be reviewed by the Director of the Office of Management and Budget under 44 U.S.C. 3507, *see* 44 U.S.C. 3506(c)(2)(B), the Departments sought a 60-day comment period to provide the public with additional time to comment on the form changes. In contrast, as explained above, there is no similar statutory requirement for the proposed rule itself.

6.4. Agency Is Acting Beyond Authority

Comment: At least one organization emphasized the Departments' reliance on *Brand X,* 545 U.S. at 982, as a justification for the portions of the rule overruling circuit court decisions relating to asylum. *See* 85 FR at 36265, n.1. One organization claimed the Departments ''ignore[d]'' the Supreme Court's decision in *Kisor* v. *Wilkie,* 139 S. Ct. 2400 (2019), which ''follows the recent trend towards limiting deference to an agency's interpretation of its own rules.'' According to the organization, *Brand X* can be interpreted to mean that, where statutory or regulatory terms are generally ambiguous and the agency has not ruled on a particular issue, circuit court law addressing the issue in question governs only until ''the agency has issued a dispositive interpretation concerning the meaning of a genuinely ambiguous statute or regulation.'' The organization also noted that *Chevron* deference requires a Federal court to accept an agency's ''reasonable construction of an ambiguous statute,'' emphasizing that the distinction between ''genuinely ambiguous language'' and ''plain language'' is crucial. *See Chevron,* 467 U.S. at 843–44, n.11.

The organization then alleged that the Departments' reliance on *Brand X* ''to entirely eviscerate Federal court caselaw'' is misplaced and contrary to controlling law. According to the organization, the Departments failed to demonstrate that each instance of the statutory language they seek to overrule is ''genuinely ambiguous,'' and the organization cited *Kisor,* 139 S. Ct. 2400, to support its claim that deference to ''agency regulations should not be afforded automatically.'' The organization claimed that *Kisor* limits the ability to afford deference unless (1) a regulation is genuinely ambiguous; (2) the agency's interpretation is reasonable regarding text, structure, and history; (3) the interpretation is the agency's official position; (4) the regulation implicates the agency's expertise; and (5) the regulation reflects the agency's ''fair and considered judgment.'' The organization contended that the Departments failed to meet these criteria, alleging that the proposed rule attempts to ''re-write asylum law rather than interpret the statute.''

Multiple commenters claimed that the rule is in opposition to the asylum criteria established by Congress and expressed concern that the rule was drafted without congressional input.

Response: The Departments did not ignore *Kisor,* 139 S. Ct. 2400. *Kisor* examined the scope of *Auer* deference, which affords deference to an agency's ''reasonable readings of genuinely ambiguous regulations.'' *Id.* at 2408 (citing *Auer* v. *Robbins,* 519 U.S. 452 (1997)). Here, ambiguous regulations are not at issue; instead, the Departments amended the regulations based on their reading of ambiguities in the statute, in accordance with Congress's presumed intent for the Departments to resolve these ambiguities. *See* 85 FR at 36265 n.1 (citing *Brand X,* 545 U.S. at 982).

The Departments disagree that the rulemaking ''eviscerates'' case law. As explained in the NPRM, ''administrative agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations, because there is 'a presumption that Congress, when it left ambiguity in a statute meant for

implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' '' *Matter of R–A–,* 24 I&N Dec. at 631 (quoting *Brand X,* 545 U.S. at 982) (quotation marks and citations omitted); *see also* 85 FR at 36265 n.1; *Ventura,* 537 U.S. at 16 (''Within broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question. In such circumstances a judicial judgment cannot be made to do service for an administrative judgment. Nor can an appellate court intrude upon the domain which Congress has exclusively entrusted to an administrative agency. A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'' (alteration, citations, and quotation marks omitted)). Moreover, '' 'judicial deference to the Executive Branch is especially appropriate in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations.'' *Cuellar de Osorio,* 573 U.S. at 56–57 (quoting *INS* v. *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999)).

Further, the Departments disagree that the rulemaking rewrites asylum law or that it conflicts with the asylum criteria established by Congress. Congress statutorily authorized the Attorney General to, consistent with the statute, make discretionary asylum determinations, INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), establish additional limitations and conditions on asylum eligibility, INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), and establish other conditions and limitations on consideration of asylum applications, INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). The changes made by this rulemaking are consistent with those congressional directives. Regarding commenters' concerns that the rule was drafted without congressional input, the Departments once again point to Congress's statutory delegation of authority to the Attorney General. *See* INA 103(g)(1), (2), 8 U.S.C. 1103(g)(1), (2) (granting the Attorney General the ''authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens,'' and directing the Attorney General to ''establish such regulations . . . and perform such other acts as the Attorney General determines to be necessary for carrying out this section''). Congress, in other words, has already delegated to the Attorney General the power to promulgate rules such as this one, and no further congressional input is required.

6.5. Violates Separation of Powers

One organization emphasized that the Departments only have authority to ''faithfully interpret'' a statute, not to rewrite it. The organization contended that ''[r]ulemaking is not an opportunity for an agency to engage in an unauthorized writing exercise that duplicates the legislative role assigned to Congress.'' Another commenter claimed there is an ''urgent need'' for checks and balances on the ''power'' of immigration authorities in the asylum process, alleging that the U.S. government is allowing ICE and CBP to put lives in danger due to ''lack of oversight.'' One commenter contended that revising asylum law ''is not an executive branch function.''

Response: The Departments are not rewriting statutes. As explained throughout this final rule in various sections, the Departments are statutorily authorized to promulgate this rule under section 208(b)(1)(A) of the Act, 8 U.S.C. 1158(b)(1)(A) (authority to make discretionary asylum determinations), section 208(b)(2)(C) of the Act, 8 U.S.C. 1158(b)(2)(C) (authority to establish additional limitations and conditions on asylum eligibility), and section 208(d)(5)(B) of the Act, 8 U.S.C. 1158(d)(5)(B) (authority to establish other conditions and limitations on consideration of asylum applications). In section 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), Congress has conferred upon the Secretary broad authority to administer and enforce the immigration laws and to ''establish such regulations . . . as he deems necessary for carrying out his authority'' under the immigration laws. Under section 103(g)(1), (2) of the Act, 8 U.S.C. 1103(g)(1), (2), Congress provided the Attorney General with the ''authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens,'' and directed the Attorney General to ''establish such regulations . . . and perform such other acts as the Attorney General determines to be necessary for carrying out this section.'' Thus, the Departments derive authority to promulgate this rule from the statute and issued this rule consistent with the statute, not in contravention of it. Moreover, the Departments have promulgated this rule in accordance with the APA's rulemaking process. *See* 5 U.S.C. 553; *see also* Sections II.C.6.2, 6.3 of this preamble.

The Departments also note that, although an agency ''must give effect to the unambiguously expressed intent of Congress,'' if Congress ''has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'' *Chevron,* 467 U.S. at 843–44; *see also Aguirre-Aguirre,* 526 U.S. at 424–25 (''It is clear that principles of *Chevron* deference are applicable to [the INA]. The INA provides that '[t]he Attorney General shall be charged with the administration and enforcement' of the statute and that the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling.' . . . In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' '' (citations omitted)). Congress has clearly spoken in the Act, *see* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A); INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B); and INA 103(g)(1), (2), 8 U.S.C. 1103(g)(1), (2), and the Departments properly engaged in this rulemaking, consistent with 5 U.S.C. 553, to effectuate that statutory scheme. To the extent that comments disagree with provisions of the INA, such comments are properly directed to Congress, not the Departments.

6.6. Congress Should Act

Comment: Some commenters stated that Congress, not the Departments, must make the sorts of changes to the asylum procedures set out in the proposed rule. Commenters cited a variety of reasons why these changes are most appropriately the providence of Congress, including commenters' belief that the rule would effectively end or eliminate asylum availability and limit how many asylum seekers would receive relief annually, the breadth of the changes in the proposed rule, and alleged inconsistencies between the Act and the rule. Commenters expressed a belief that changes as significant as those proposed should be undertaken only by Congress. Other commenters suggested that Congress should separately enact other legislation to protect asylum seekers.

Response: As stated above, the Departments issued the proposed rule, and in turn are issuing this final rule, pursuant to the authorities provided by

Congress through the HSA and the Act. INA. *See, e.g.,* INA 103(a)(1) and (3), (g)(2), 208, 8 U.S.C. 1101(a)(1) and (3), (g)(2), 1158.[81] Despite commenters' statements, the provisions of the rule are consistent with these authorities and the Act, as discussed above. *See, e.g.,* Sections II.C.2, II.C.3, II.C.4, and II.C.6.1 of this preamble.

Should Congress enact legislation that amends the provisions of the Act that are interpreted and affected by this rule, the Departments will engage in future rulemaking as needed. Commenters' discussion of specific possible legislative proposals or initiatives, however, is outside of the scope of this rule.

6.7. Violates Constitutional Rights

Comment: One organization contended that the application of the ''interpersonal'' and ''private'' categories to domestic and gender-based violence would violate the Equal Protection Clause. The organization claimed the presumption created by these categories would have a disproportionate effect on women, who are much more likely than men to experience violence by an intimate partner.

Another organization alleged that the rule would essentially prevent women, children, LGBTQ individuals, people of color, survivors of violence, and torture escapees from obtaining asylum protection, claiming this violates the ''spirit and letter'' of both the Fifth Amendment and the Refugee Act of 1980. According to the organization, the rule is designed to ''eliminate due process'' and create ''impossible new legal standards'' to prevent refugees from obtaining asylum. One organization emphasized generally that asylum seekers should not be treated like criminals but should instead be shown dignity and respect; the organization noted that these individuals should also be given judicial due process.

Response: The rule makes no classifications prohibited by the Equal Protection Clause; thus, the commenter's allegation that the rule will disproportionately affect various groups—women, children, LGBTQ individuals, people of color, and survivors of violence and torture—is unfounded. The Departments do not track the factual bases for each asylum application, and each application is adjudicated on a case-by-case basis in accordance with the evidence and applicable law. Moreover, the changes alleged by commenters to have a disparate impact on discrete groups are ones rooted in existing law as noted in the NPRM, and commenters provided no evidence that existing law has caused an unconstitutional disparate impact. For allegations of disparate impact based on gender, a ''significantly discriminatory pattern'' must first be demonstrated. *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977). The Departments are unaware of such a pattern, and commenters did not provide persuasive evidence of one, relying principally on anecdotes and isolated statistics, news articles, and reports.[82] Moreover, to the extent that the NPRM may affect certain groups of aliens more than others, those effects are a by-product of the intrinsic demographic distribution of claims, and a plausible equal protection claim will not lie in such circumstances. *See Regents of Univ. of Cal.,* 140 S. Ct. at 1915–16 (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of animus, invidious discrimination, or an equal protection violation).

For allegations of disparate impact based on race, case law has ''not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact. . . . [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.'' *Washington,* 426 U.S. at 239, 242. No discriminatory motive or purpose underlies this rulemaking; it does not address race in any way; [83] and commenters have not explained—logically, legally, or otherwise—how the rule would even affect asylum claims based on persecution because of race.

In regard to allegations that the rule would discriminate against LGBTQ individuals, children, and survivors of violence or torture, the Departments reiterate that the rule applies equally to all asylum seekers. Further, as noted elsewhere, to the extent that the NPRM may affect certain groups of aliens more than others based on the innate characteristics of those who file asylum applications, those effects are a by-product of the intrinsic demographic distribution of claims, and a plausible equal protection claim will not lie in such circumstances. *See Regents of Univ. of Cal.,* 140 S. Ct. at 1915–16 (impact of a policy on a population that is intrinsically skewed demographically does not established a plausible claim of animus, invidious discrimination, or an equal protection violation).

Relatedly, this rule does not eliminate statutory withholding of removal or protection under the CAT regulations, through which the United States continues to fulfill its commitments under the 1967 Refugee Protocol, consistent with the Refugee Act of 1980 and subsequent amendments to the INA, and the CAT, consistent with FARRA. *See R–S–C,* 869 F.3d at 1188, n.11 (explaining that ''the Refugee Convention's non-refoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General's withholding-only rule''); *Cazun* v. *Att'y Gen. U.S.,* 856 F.3d 249, 257 n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado,* 786 F.3d at 1162 (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of parties, was implemented in the United States by the FARRA and its implementing regulations).

The rule does not eliminate due process. As explained previously in this rule, due process in an immigration proceeding requires notice and an opportunity to be heard. *See LaChance,* 522 U.S. at 266 (''The core of due process is the right to notice and a meaningful opportunity to be heard.''). The rule does not eliminate the notice of charges of removability against an alien, INA 239(a)(1), 8 U.S.C. 1229(a)(1), or the opportunity for the alien to make his or her case to an immigration judge, INA 240(a)(1), 8 U.S.C. 1229a(a)(1), or on appeal, 8 CFR 1003.38. Moreover, asylum is a discretionary benefit. *See* INA 208 (b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (stating that the Departments ''may'' grant asylum''); *see also Thuraissigiam,* 140 S. Ct. at 1965 n.4 (''A grant of

[81] In addition, Congress has authorized the Department to ''provide by regulation for any other conditions or limitations on the consideration of an application for asylum'' consistent with the other provisions of the Act. INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B).

[82] The Departments also note that accepting the commenters' assertion that the likelihood of women being subject to intimate-partner violence being greater than that of men necessarily demonstrates an equal protection violation would, in turn, mean that other immigration regulations regarding victims of domestic violence, *e.g.,* 8 CFR 204.2(c), are also unconstitutional because of their putative disparate impact.

[83] The NPRM did not mention race at all, except when quoting the five statutory bases for asylum—race, religion, nationality, political opinion, and membership in a particular social group.

asylum enables an alien to enter the country, but even if an applicant qualifies, an actual grant of asylum is discretionary.''). The Attorney General and the Secretary are statutorily authorized to limit and condition asylum eligibility under section 208(b)(2)(C), (d)(5)(B) of the Act, 8 U.S.C. 1158(b)(2)(C), (d)(5)(B), by regulation and consistent with the Act, and courts have found that aliens have no cognizable due process interest in the discretionary benefit of asylum. *See Yuen Jin,* 538 F.3d at 156–57; *Ticoalu,* 472 F.3d at 11 (citing *DaCosta,* 449 F.3d at 50). The Departments properly exercised that authority in this rulemaking, and that exercise does not implicate due process claims. Finally, the rule does not treat aliens ''like criminals,'' as commenters alleged. Aliens retain all due process rights to which they are entitled under law, and the rule does not change that situation.

6.8. Violates International Law

Comment: Commenters asserted that the proposed rule violates the Convention on the Rights of the Child (''CRC'') because the United States, as a signatory, is obligated to ''refrain from acts that would defeat the object and purpose of the Convention.'' Commenters averred that the CRC protects the rights of children to seek asylum; therefore, commenters argued, the United States must protect the right of children to seek asylum. Commenters also asserted that the proposed rule violates the Refugee Convention and the CRC by requiring adjudicators to presume that many child-specific forms of persecution do not warrant a grant of asylum. Commenters alleged that this will result in children being returned to danger in violation of the language and spirit of the Refugee Convention and the CRC.

One commenter cited Article 14 of the Universal Declaration of Human Rights (''UDHR''), G.A. Res. 217A (III), U.N. Doc. A/810 (1948), which states that ''[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'' That commenter asserted that the proposed revisions unnecessarily hinder access to asylum in contradiction of that right. Commenters also asserted that, under Article 34 of the Refugee Convention, the United States has an obligation to extend grants of asylum ''as far as possible'' to eligible refugees. These commenters asserted that this requires adjudicators to, at the very least, exercise a general presumption in favor of individuals who meet the definition of refugee. To do otherwise would not meet the United States' obligation to facilitate ''as far as possible'' the assimilation and naturalization of individuals who qualify as refugees.

Commenters criticized the Departments' statements that the continued viability of statutory withholding of removal, as referenced in the preamble to the NPRM, meets the United States' non-refoulement obligations. Commenters asserted that this is a misreading of the scope of both domestic and international obligations. As an initial matter, commenters averred that the Refugee Act of 1980, as implemented, was designed to give full force to the United States' obligations under the Refugee Convention, to the extent applicable by incorporation in the 1967 Protocol. Commenters argued that these obligations are not limited to one article of the Refugee Convention and are not limited to not returning an individual to a country where he or she would face persecution or other severe harm. Rather, commenters asserted, the obligations also require the United States to ensure that refugees are treated fairly and with dignity, and are guaranteed freedom of movement and rights to employment, education, and other basic needs. Commenters also cited the Refugee Convention's provision to provide a pathway to permanent status for refugees, which the commenters asserted is reflected in the asylum scheme implemented by the Refugee Act, not the statutory withholding of removal provisions. Commenters argued that narrowing the opportunity to receive asylum through the implementation of numerous regulatory obstacles makes asylum—and therefore permanent status—unattainable, which is inconsistent with the United States' obligations under U.S. and international law. Commenters also generally asserted that allowing immigration judges to pretermit applications for asylum violates the principle of non-refoulement.

Commenters generally asserted that the culmination of the proposed rule's procedural and substantive changes subvert the purpose of the Refugee Act, which was to implement the United States' commitments made through ratification of the 1967 Protocol. Further, one organizational commenter argued that the proposed rule ''re-orients the U.S. asylum process away from a principled, humanitarian approach focused on identifying individuals with international protection needs towards one that establishes a set of obstacles which must be overcome by individuals seeking international protection.'' Commenters also criticized the Departments' statements that the continued viability of statutory withholding of removal ensures continued compliance with international obligations. Specifically, commenters noted that many of the provisions of the proposed rule also affect eligibility for protection under statutory withholding of removal. Commenters argued that the proposed changes that affect statutory withholding of removal would not adequately meet the United States' obligations under the non-refoulement provisions of Article 33.

Response: This rule is consistent with the United States' obligations as a party to the 1967 Protocol, which incorporates Articles 2 through 34 of the 1951 Refugee Convention.[84] This rule is also consistent with U.S. obligations under Article 3 of the CAT, as implemented in the immigration regulations pursuant to the implementing legislation.

Regarding the CRC, as an initial point, although the United States has signed the instrument, the United States has not ratified it; thus, it cannot establish any binding obligations. *See Martinez-Lopez* v. *Gonzales,* 454 F.3d 500, 502 (5th Cir. 2006) (''The United States has not ratified the CRC, and, accordingly, the treaty cannot give rise to an individually enforceable right.''). Moreover, contrary to commenters' assertions, nothing in the rule is inconsistent with the CRC. Under the CRC, states are obligated to ''take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.'' Convention on the Rights of the Child, art. 22, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1448. Because this rule is consistent with the Refugee Act and the United States' obligations under the Refugee

[84] The Departments also note that neither of these treaties is self-executing, and that, therefore, neither is directly enforceable in the U.S. legal context except to the extent that they have been implemented by domestic legislation. *Al-Fara* v. *Gonzales,* 404 F.3d 733, 743 (3d Cir. 2005) (''The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (''CAT was not self-executing''); *see also Stevic,* 467 U.S. at 428 n.22 (''Article 34 merely called on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 was precatory and not self-executing.'').

Convention and Article 3 of the CAT, it is consistent with the CRC.

Similarly, the Departments disagree with commenters' assertions that the rule violates the CRC by creating a presumption against ''child-specific forms of persecution.'' As an initial point, nothing in the rule singles out children or ''child-specific'' claims; rather, the rule applies to all types of claims regardless of the demographic characteristics of the applicant. Moreover, although certain types of children are afforded more protections by statute than similarly-situated non-child asylum applicants, *see e.g.,* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C), this rule does not affect those protections. Further, generally applicable legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents. *See* EOIR, *Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children* 7 (Dec. 20, 2017), *https://www.justice.gov/eoir/file/oppm17-03/download.*

The UDHR is a non-binding human rights instrument, not an international agreement; thus it does not impose legal obligations on the United States. *Alvarez-Machain,* 542 U.S. at 728, 734–35 (citing John P. Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights,* in The International Protection of Human Rights 39, 50 (Evan Luard ed., 1967) (quoting Eleanor Roosevelt as stating that the UDHR is '' 'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations' and 'not a treaty or international agreement . . . impos[ing] legal obligations.' '')). Moreover, although article 14(1) of the UDHR proclaims the right of ''everyone'' to ''seek and to enjoy'' asylum, it does not purport to state specific standards for establishing asylum eligibility, and it certainly cannot be read to impose an obligation on the United States to grant asylum to ''everyone,'' *see id.,* or to prevent the Attorney General and Secretary from exercising the discretion granted by the INA, consistent with U.S. obligations under international law, *see* UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* 3 (Jan. 26, 2007), *https://www.unhcr.org/4d9486929.pdf* (''The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.'').

Similarly, the Departments disagree with commenters' unsupported assertions that the United States' obligation to ''as far as possible facilitate the assimilation and naturalization of refugees'' requires a general presumption in favor of granting asylum to all individuals who apply. Rather, as the Supreme Court has noted, Article 34 ''is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.'' *Cardoza-Fonseca,* 480 U.S. at 441.

Moreover, the United States implemented the non-refoulement provision of Article 33(1) of the Refugee Convention through the withholding of removal provision at section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), and the non-refoulement provision of Article 3 of the CAT through the CAT regulations, rather than through the asylum provisions at section 208 of the Act, 8 U.S.C. 1158. *See Cardoza-Fonseca,* 480 U.S. at 429, 440–41 & n.25; *Matter of O–F–A–S–,* 27 I&N Dec. at 712; FARRA; 8 CFR 208.16(b), (c), 208.17 through 208.18; 1208.16(b), (c); 1208.17 through 1208.18. This rule's limitations on asylum, including the ability of immigration judges to pretermit applications, do not violate the United States' non-refoulement obligations.

At the same time, the changes to statutory withholding of removal and CAT protection do not misalign the rule with the non-refoulement provisions of the 1951 Refugee Convention, the 1967 Protocol, and the CAT. As explained above, the Departments have properly asserted additional standards and clarification for immigration judges to follow when evaluating claims for statutory withholding of removal and protection under the CAT.

6.9. Executive Order 12866 and Costs and Benefits of the Rule; Regulatory Flexibility Act

Comment: At least one commenter alleged that the rule creates ''serious inconsistencies'' with sections 208(a) and 240(b) of the Act, 8 U.S.C. 1158(a), 1229a(b), and the Constitution; as a result, commenters stated, the rule constitutes a ''significant regulatory action'' under Executive Order 12866 and the Departments must comply with the order's analysis requirements, specifically sections 6(a)(3)(B) and (C).

Multiple organizations claimed that the costs and benefits section of the rule fails to address the cost to the ''reputation'' of the United States, as well as the cost of losing the ''talent, diversity, and innovation'' brought by asylees.

Another organization emphasized that it is difficult to evaluate whether the Departments' ''multiple overlapping proposals to amend the same asylum provisions'' comply with Executive Order 12866's mandate that ''[e]ach agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.'' Citing *CSX Transportation, Inc.* v. *Surface Transportation Board,* 754 F.3d 1056, 1065–66 (D.C. Cir. 2014), the organization claimed it would be ''arbitrary and capricious'' for the Departments to account for costs and benefits in favor of this proposal that are identical to the costs and benefits ''already priced into the other revisions of the same provision.'' [85] The organization contended that there is no indication in the rule that the Departments have attempted to identify such overlap.

Commenters disagreed with the Department's assertion, pursuant to the Regulatory Flexibility Act (''RFA'') requirements, that the rule would ''not have a significant economic impact on a substantial number of small entities'' and that the rule only regulates individuals and not small entities. 85 FR at 36288–89. For example, commenters argued that the combined effect of the rule's provisions would, inter alia, affect how practitioners accept cases, manage dockets, or assess fees. Commenters asserted that these effects would, in turn, impact the overall ability of practitioners to provide services and affect aliens' access to representation. In addition, commenters stated that these changes demonstrate the rule would in fact regulate small entities, namely the law firms or other organizations who appear before the Departments.

Response: The Departments agree with commenters that the rule is a ''significant regulatory action.'' As stated in the proposed rule at section V.D, the rule was considered a ''significant regulatory action.'' 85 FR at 36289. As a result, the rule was submitted to the Office of Management and Budget for review, and the Departments included the required analysis of the rule's costs and benefits. *Id.* at 36289–90.

Regarding commenters' concerns that the analysis failed to consider intangible costs like alleged costs to the United States' reputation or the lost ''talent, diversity, and innovation'' from asylees,

[85] The Departments note that reliance on *CSX Transportation* is misplaced because that case involved the agency's consideration of costs to determine a maximum relief penalty amount and was not related to the consideration of costs in the context of an agency's required cost-benefit analysis.

the Departments note that such alleged costs are, in fact, the nonquantifiable opinions of the commenters. The Departments are not required to analyze opinions. Even if commenters' opinions about intangible concepts without clear definitions could be translated into measurable or qualitatively discrete considerations the Departments are unaware of any standard or metric to evaluate the cost of concepts such a country's reputation or ''innovation.'' Moreover, the fact-specific nature of asylum applications and the lack of granular data on the facts of every asylum application prevent the Departments from quantifying particular costs. Further, although Executive Order 12866 observes that nonquantifiable costs are important to consider, the order requires their consideration only to the extent that they can be usefully estimated, and the Departments properly assessed the rules using appropriate qualitative considerations. *See* 85 FR at 36289–90.

As stated above in Section II.C.6.9 of this preamble, each of the Departments' regulations stands on its own. This regulation is not ''inconsistent, incompatible, or duplicative'' with other proposed or final rules published by the Departments, and the Departments disagree with the implication that all rules that would affect one underlying area of the Act, such as asylum eligibility, must be issued in one single rulemaking to comply with Executive Order 12866. *Cf. Ctr. for Biological Diversity* v. *EPA,* 722 F.3d 401, 410 (D.C. Cir. 2013) (agencies have discretion to address an issue through different rulemakings over time).

As noted in the NPRM, the Departments believe that the rule will provide a significant net benefit by allowing for the expeditious and efficient resolution of asylum cases by reducing the number of meritless claims before the immigration courts, thereby providing the Departments with ''the ability to more promptly grant relief or protection to qualifying aliens.'' 85 FR at 36290. These benefits will ensure that the Departments' case volumes do not increase to an insurmountable degree, which in turn will leave additional resources available for a greater number of asylum seekers. Contrary to commenters' claims, the rule will not prevent aliens from submitting asylum applications or receiving relief or protection in appropriate cases. Moreover, the rule is not imposing any new costs on asylum seekers. Additionally, any costs imposed on attorneys or representatives for asylum seekers will be minimal and limited to the time it will take to become familiar with the rule. Immigration practitioners are already subject to professional responsibility rules regarding workload management, 8 CFR 1003.102(q)(1), and are already accustomed to changes in asylum law based on the issuance of new precedential decisions from the BIA or the courts of appeals.

Also, although becoming familiar with such a decision or with this rule may require a certain, albeit small, amount of time, any time spent on this process will likely be offset by the future benefits of the rule. Indeed, one purpose of the rule is to encourage clearer and more efficient adjudications, *see e.g.,* 85 FR at 36290, thus reducing the need for practitioners to become familiar with the inefficient, case-by-case approach that is currently employed for adjudicating issues such as firm resettlement. In addition, the Departments note that the prospective application of the rule will further diminish the effect of the rule on practitioners, as no practitioners will be required to reevaluate any cases or arguments that they are currently pursuing.

The Departments also reject the assertion that the rule would have a significant impact on small entities. The rule applies to asylum applicants, who are individuals, not entities. *See* 5 U.S.C. 601(6). The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Indeed, nothing in the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Departments are unaware of cases in which the RFA's requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C. 603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of ''small entities'' to which the rule ''will apply''). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327, 342–43 (D.C. Cir. 1985) (''[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter.''); *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (''Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that is, those to which the regulation 'will apply.'. . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' (citing *Mid-Tex,* 773 F.2d 327 at 343)); *see also White Eagle Co-op Ass'n* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009) (''The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.'').

Further, DOJ reached a similar conclusion in 1997 involving a broader rulemaking regarding asylum adjudications. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it ''affects only Federal government operations'' by revising the procedures for the ''examination, detention, and removal of aliens''). That conclusion was reiterated in the interim rule, 62 FR 10312, 10328 (Mar. 6, 1997), which was adopted with no noted challenge or dispute. This final rule is similar, in that it, too, affects only the operations of the Federal government by amending a subset of the procedures the government uses to process certain aliens. The Departments thus believe that the experience of implementing the prior rule supports their conclusion that there is no evidence that the current rule will have a significant impact on small entities as contemplated by the RFA or an applicable executive order.

6.10. Trafficking Victims Protection Reauthorization Act

Comment: Commenters argued that the proposed rule violates the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (''TVPRA''), Public Law 110–457, 122 Stat. 5044, by failing to consider its impact on applications for relief submitted by UAC. Specifically, commenters cited the TVPRA's instruction that ''[a]pplications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.'' 8 U.S.C. 1232(d)(8). Commenters averred that the rule fails to consider how UAC are subjected to and affected by persecution and other harm as well as the particular vulnerabilities of UAC.

Moreover, commenters argued that the proposed rule violates both the text and the spirit of the TVPRA by creating additional hurdles that increase the risk that UAC will be unable to meaningfully participate in the adjudication of their claims for relief. Specifically, commenters averred that it was unlikely that Congress would have provided protections to UAC from the bars to asylum related to the one-year filing deadline and the safe third country, only to then allow immigration judges to pretermit applications for asylum without a hearing.

One organizational commenter criticized the proposed rule's lack of ''meaningful discussion'' regarding how the new procedures would interact with USCIS's initial jurisdiction over applications for asylum from UAC. Commenters also stated that the proposed rule may result in confusion if an immigration judge exercises jurisdiction over a UAC's application that is pending before USCIS. If this were to occur, commenters alleged, the UAC may be required to submit two applications for asylum and also be required to demonstrate an exception to the one-year filing deadline that would not have been applicable to the application before USCIS.

Commenters also asserted that the new discretionary factor regarding accrual of one year or more of unlawful presence would act as a bar to asylum in direct contradiction of Congress's recognition of the need to exempt UACs from the one-year filing deadline. Although commenters acknowledged that this is a discretionary factor and not an outright bar, commenters asserted that even including this as a discretionary factor is contrary to Congress's intent.

Commenters stated that, based on the proposed regulatory language and accompanying preamble language, it is unclear whether asylum officers would be permitted to render a determination that an asylum application is frivolous for UAC who file defensive applications before USCIS in the first instance. By permitting the asylum officer to focus on matters that may be frivolous if the asylum officer identifies indicators of frivolousness, commenters asserted, the interview would become adversarial, in contradiction of Congress's purpose of granting UAC the non-adversarial, child-appropriate setting of an asylum interview for initial review of the asylum application.

Response: As recognized in the proposed rule, UAC[86] are not subjected to expedited removal. *See* 8 U.S.C. 1232(a)(5)(D)(i). Regarding the remainder of the rule, the rule does not violate the TVPRA. The TVPRA enacted multiple procedures and protections specific to UAC that do not apply to other similarly-situated asylum applicants. Although UAC are not subject to either the safe third country exception or the requirement to file an application within one year following the alien's arrival in the United States, INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E), Congress did not exempt UAC from all bars to asylum eligibility. As a result, UAC, like all asylum seekers, (1) may not apply for asylum if they previously applied for asylum and their application was denied, INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C), and (2) are ineligible for asylum if they are subject to any of the mandatory bars at section 208(b)(2)(A)(i)–(vi) of the Act, 8 U.S.C. 1158(b)(2)(A)(i)–(vi), or if they are subject to any additional bars implemented pursuant to the Attorney General's and Secretary's authority to establish additional limitations on asylum eligibility by regulation, *see* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). That Congress did not exempt UAC from all bars indicates congressional intent to hold UAC to the same standards to establish eligibility for asylum as other similarly situated applicants unless specifically exempted.

Contrary to commenters' suggestion, this rule does not alter asylum officers' jurisdiction over asylum applications from UAC. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C). If UAC are placed in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, and raise asylum claims, immigration judges will continue to refer the claims to asylum officers pursuant to the TVPRA, consistent with the asylum statute and procedures in place prior to the promulgation of this rule. *See* INA 208(b)(3)(C), 8 U.S.C 1158(b)(3)(C). Those asylum officers will determine whether the UAC are eligible for asylum on the basis of this rule. This rule does not affect any other procedure or protection implemented by the TVPRA.

The Departments disagree that the rule undermines the spirit of the TVPRA by adding accrual of unlawful presence for one year or more as a negative discretionary factor. Although the NPRM may have been unclear on the point, its citation to INA 212(a)(9)(B) and (C), 8 U.S.C. 1182(a)(9)(B) and (C), 85 FR at 36284, indicated that its intent was for the phrase ''unlawful presence'' to have the same meaning as in INA 212(a)(9)(B)(ii) and (iii), 8 U.S.C. 1182(a)(9)(B)(ii) and (iii). Under INA 212(a)(9)(B)(iii)(I), 8 U.S.C. 1182(a)(9)(B)(iii)(I), aliens under the age of 18, such as UAC, do not accrue unlawful presence. Thus, commenters' concerns are unfounded, and the Departments are clarifying that point in the final rule.

Further, the Departments have concluded that the safeguards in place for allowing asylum officers to make a finding that an asylum application is frivolous are sufficient to protect UAC in the application process.[87] Even if an asylum officer finds an application is frivolous, the application is referred to an immigration judge, who provides review of the determination. The asylum officer's determination does not render the applicant permanently ineligible for immigration benefits unless the immigration judge or the BIA also makes a finding of frivolousness. 8 CFR 208.20(b), 1208.20(b). Further, asylum officers continue to conduct child appropriate interviews by taking into account age, stage of language development, background, and level of sophistication. *See* USCIS, Interviewing Procedures for Minor Applicants (Aug. 6, 2020), *https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves.*

Finally, the Departments note that, for UAC who are not eligible for asylum

[86] UAC are children who (1) have no lawful immigration status in the United States, (2) are under the age of 18, and (3) do not have a parent or legal guardian in the United States or, if in the United States, available to provide care and physical custody. 6 U.S.C. 279(g)(2).

[87] As a practical matter, the Departments note that the statutory mens rea requirement that a frivolous asylum application be ''knowingly'' filed will likely preclude a frivolousness finding against very young UAC.

under this rule but who may still be eligible for withholding of removal under section 241 of the Act, 8 U.S.C. 1231, or protection under the CAT regulations, DOJ is cognizant of the ''special circumstances'' often presented by juvenile respondents in immigration proceedings. DOJ's immigration judges may make certain modifications to ordinary courtroom proceedings to account for juvenile respondents that would not be made for adult respondents. *See* EOIR, Operating Policies and Procedures Memorandum 17–03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children 4–6 (Dec. 20, 2017), *https://www.justice.gov/eoir/file/oppm17-03/download; see also id. at 7 (directing immigration judges to take* ''*special care*'' *in cases involving UAC by, for example, expediting the consideration of requests for voluntary departure).*

In short, the Departments have fully considered whether the rule will have any particular impacts on UAC that are not already accounted for in existing law or are not addressed in the rule itself. The Departments have also fully considered commenters' concerns. Thus, for the reasons given above, the Departments believe that the rule does not have an unlawful impact on minors in general or on UAC in particular.

7. Retroactive Applicability

Comment: One organization stated generally that nearly all of the NPRM's provisions are illegally retroactive in effect. Multiple commenters noted that, although the NPRM seeks to make its frivolous definition prospective only in application, *see* 85 FR at 36304, it is silent as to whether its other provisions would apply retroactively. As a result, one organization claimed, the inference is that the Departments intend each of the NPRM's remaining provisions to apply to applications that are pending at the time the rule becomes effective. The organization alleged that this would violate the presumption against retroactivity, noting that a regulation cannot be applied retroactively unless Congress has provided a clear statement that the agencies may promulgate regulations with that effect. *See INS* v. *St. Cyr,* 533 U.S. 289, 316–17 (2001). The organization also claimed there is no statute authorizing the Departments to promulgate regulatory changes to asylum that have retroactive effect, contending the provisions of the NPRM would either impair rights concerning, or place new disabilities on, asylum applications already filed. The organization alleged that the proposed changes in the NPRM would harm asylum seekers.

At least one organization claimed that the NPRM's substantive standards would have an impermissible retroactive effect on pending applications. One organization alleged that each standard, including the list of bars to the favorable exercise of discretion, would overrule BIA precedent, attempt to overrule Federal appellate court precedent, shift burdens of proof, or otherwise change settled law. Another organization noted that there are currently more than 300,000 asylum cases pending before the asylum office and almost 1.2 million cases pending before the U.S. immigration courts, many of which include asylum applications. The organization argued that, if the rule is finalized, the Departments ''must clarify'' that its provisions will not be applied retroactively.

One commenter claimed that if the rule is enacted with the retroactive provisions intact, it will immediately be enjoined.

At least one commenter expressed concern that, if the NPRM is applied retroactively, there will be ''mass denials which violate due process,'' and the Departments will be ''tied up in Federal court for the next decade.'' At least one commenter contended that Congress will cease to fund the Departments because it will recognize that the money will be used to fund the attorney fees of litigants pursuant to the Equal Access to Justice Act ''after countless litigants prevail in their suits against [the Departments].''

At least one commenter claimed that, because the Supreme Court is currently attempting to ''reign in the administrative state'' and Congress is ''fed up'' with agency waste, the Departments are ''signing their own death warrants'' by seeking to enact the proposed rule. At least one commenter suggested the Departments' goal is to ''[s]hut down legal immigration by convincing Congress to defund the only agencies capable of adjudicating immigration petitions,'' suggesting this is ''treasonous'' and claiming that those who want to end legal immigration are in the extreme minority. At least one commenter emphasized that legal immigration is beneficial to the national economy but suggested this does not matter if those who care ''are not in a position to stop the train before it drives off a cliff.''

At least one organization claimed that the hundreds of thousands of pending asylum applications implicate a reliance interest in ''the state of the law as it stands.'' At least one organization alleged that this reliance interest is ''further prejudiced'' by the 30-day comment period allowed by the Departments, contending that ''in one swoop, previously eligible applicants may find themselves ineligible without any warning.''

Another organization expressed particular concern for LGBTQ applicants, claiming that applying the rule's standards to over 800,000 pending applications violates Fifth Amendment due process rights that apply ''equally to all people in the United States.'' One organization emphasized that the rule would apply to individuals, many of whom have U.S.-born children, who have already applied for asylum and are waiting on a hearing or interview.

Response: Although the Departments believe that substantial portions of the rule are most appropriately classified as a clarification of existing law rather than an alteration of prior substantive law, *see Levy* v. *Sterling Holding Co., LLC,* 544 F.3d 493, 506 (3d Cir. 2008) (''Thus, where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does *not* have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.'' (emphasis in original)), they nevertheless recognize that the potential retroactivity of the rule was not clear in the NPRM. Accordingly, to the extent that the rule changes any existing law, the Departments are electing to make the rule prospective to apply to all asylum applications—including applications for statutory withholding of removal and protection under the CAT regulations—filed on or after its effective date and, for purposes of the changes to the credible fear and related screening procedures, and reasonable fear review procedures, to all aliens apprehended or otherwise encountered by DHS on or after the effective date.[88] Nevertheless, to the extent that the rule merely codifies existing law or authority, nothing in the rule precludes adjudicators from

[88] In addition to serving as a bar to refugee admission and the granting of asylum, the concept of firm resettlement also operates as a bar to the adjustment of status of an asylee. INA 209(b)(4), 8 U.S.C. 1159(b)(4); 8 CFR 209.2(a)(1)(iv) and 1209.2(a)(1)(iv). Consistent with the prospective nature of the rule, the Departments will apply the new regulatory definitions of ''firm resettlement'' in 8 CFR 208.15 and 1208.15 for purposes of INA 209(b)(4), 8 U.S.C. 1159(b)(4), only to aliens who apply for asylum, are granted asylum, and then subsequently apply for adjustment of status, where all of these events occur on or after the effective date of this rule.

applying that existing authority to pending cases independently of the prospective application of the rule.[89]

The Departments decline to respond to commenters' assertions about potential implications that the rule's application to pending cases may have, such as ''mass denials'' of asylum applications and impact on future appropriations, as such comments are both unmoored from a reasonable basis in fact and wholly speculative due to the case-by-case and fact-intensive nature of many asylum-application adjudications. Further, as noted, the Departments are applying the rule prospectively, so the underlying factual premise of the commenters' concern is erroneous.

8. Miscellaneous/Other Points

8.1. Likelihood of Litigation

Comment: Commenters opposed the rule because it would ''create a flurry of litigation'' causing ''fundamental aspects of immigration law [to] remain uncertain for many years.''

Response: The Departments recognize that litigation, including the potential for an initial nationwide injunction, has become almost inevitable regarding any immigration policy or regulation that does not provide a perceived benefit to aliens, and they are aware that litigation will likely follow this rule, just as it has others of similar scope. *Cf. DHS* v. *New York,* 140 S. Ct. 599, 599 (2020) (Gorsuch, J. concurring in the grant of a stay) (''On October 10, 2018, the Department of Homeland Security began a rulemaking process to define the term 'public charge,' as it is used in the Nation's immigration laws. Approximately 10 months and 266,000 comments later, the agency issued a final rule. Litigation swiftly followed, with a number of States, organizations, and individual plaintiffs variously alleging that the new definition violates the Constitution, the Administrative Procedure Act, and the immigration laws themselves. These plaintiffs have urged courts to enjoin the rule's enforcement not only as it applies to them, or even to some definable group having something to do with their claimed injury, but as it applies to *anyone.*''). The Departments are also aware of the pernicious effects of nationwide injunctions. *See, e.g., Trump* v. *Hawaii,* 138 S. Ct. 2392, 2424–25 (2018) (Thomas, J. concurring) (''Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called 'universal' or 'nationwide' injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the Federal court system—preventing legal questions from percolating through the Federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.'' (footnote omitted)). The Departments do not believe, however, that the inevitability of litigation over contested issues is a sufficient basis to stop them from exercising statutory and regulatory prerogatives in furtherance of the law and the policies of the Executive Branch. Accordingly, the Departments decline the invitation to withdraw the rule due to the threat of litigation.

8.2. DHS Officials

Comment: Commenters also argued that the proposed rule is procedurally invalid due to concerns with the authority of multiple DHS officials. Commenters stated that the rule is invalid because of the service of Ken Cuccinelli at USCIS. For example, commenters cited *L.M.–M.* v. *Cuccinelli,* 442 F. Supp. 3d 1 (D.D.C. 2020), in support of the argument that ''Mr. Cuccinelli's unlawful appointment invalidates any regulations that might be put into effect, implemented, or adopted during his tenure at USCIS.'' Commenters further noted that Mr. Cuccinelli began serving as the head of USCIS over one year ago, on June 10, 2019, despite the 210-day limitation for temporary appointments to senate-confirmed positions implemented by the Federal Vacancies Reform Act of 1998 (''FVRA''), Public Law 105–277, sec. 151, 112 Stat. 2681, 2681–612 through 2618–13 (codified at 5 U.S.C. 3346).

Similarly, commenters stated that Acting Secretary Chad Wolf and Chad Mizelle, the Senior Official Performing the Duties of the General Counsel, both are serving in violation of the FVRA and, accordingly, both lack signature authority that has force or effect. *See* 5 U.S.C. 3348(d)(1).

Response: Neither the NPRM nor this final rule was signed by Mr. Cuccinelli. Thus, the status of Mr. Cuccinelli's service within the Department is immaterial to the lawfulness of this rule. The NPRM and this final rule were signed by Chad Mizelle, the Senior Official Performing the Duties of the General Counsel for DHS, and not by Ken Cuccinelli. As indicated in the proposed rule at Section V.H, Chad Wolf, the Acting Secretary of Homeland Security, reviewed and approved the proposed rule and delegated the signature authority to Mr. Mizelle.

Secretary Wolf is validly acting as Secretary of Homeland Security. On April 9, 2019, then-Secretary Nielsen, who was Senate confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security. This change to the order of succession applied to any vacancy. This exercise of the authority to establish an order of succession for DHS pursuant to 6 U.S.C. 113(g)(2) superseded the FVRA and the order of succession found in Executive Order 13753, 81 FR 90667 (Dec. 9, 2016). As a result of this change, and pursuant to 6 U.S.C. 113(g)(2), Kevin K. McAleenan, who was Senate-confirmed as the Commissioner of CBP, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan subsequently amended the Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession, below the positions of the Deputy Secretary and Under Secretary for Management. Because the Deputy Secretary and Under Secretary for Management positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

Further, because he has been serving as the Acting Secretary pursuant to an order of succession established under 6 U.S.C. 113(g)(2), the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and Mr. Wolf remains the Acting

[89] For example, the rule states that the Secretary or Attorney General, subject to an exception, will not favorably exercise discretion in adjudicating an asylum application for an alien who has failed to satisfy certain tax obligations. 8 CFR 208.13(d)(2)(i)(E) and 1208.13(d)(2)(i)(E). That provision applies only to asylum applications filed on or after the effective date of the rule. However, the rule does not preclude the consideration of unfulfilled tax obligations as a discretionary consideration in adjudicating a pending asylum application based on established case law that may be applied to pending applications. *See, e.g., Matter of A–H–,* 23 I&N Dec. at 782–83 (''Moreover, certain additional factors weigh against asylum for respondent: Specifically, respondent testified that he received money from overseas for his political work, yet he never filed income tax returns in the United States and his children nevertheless received financial assistance from the Commonwealth of Virginia. Respondent's apparent tax violations and his abuse of a system designed to provide relief to the needy exhibit both a disrespect for the rule of law and a willingness to gain advantage at the expense of those who are more deserving.'' (footnote omitted)). In short, existing law will continue to apply to asylum applications filed prior to the effective date of this rule, regardless of whether that law is altered or incorporated into the rule.

Secretary notwithstanding President Trump's September 10 transmission to the Senate of Mr. Wolf's nomination to serve as DHS Secretary. *Compare* 6 U.S.C. 113(a)(1)(A) (cross-referencing the FVRA without the ''notwithstanding'' caveat), *with id.* 113(g)(1)–(2) (noting the FVRA provisions and specifying, in contrast, that section 113(g) provides for acting secretary service ''notwithstanding'' those provisions); *see also* 5 U.S.C. 3345(b)(1)(B) (restricting acting officer service under section 3345(a), in particular, by an official whose nomination has been submitted to the Senate for permanent service in that position).

That said, there have been recent challenges to whether Mr. Wolf's service is invalid, resting on the erroneous contentions that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. The Departments believe those challenges are not based on an accurate view of the law. But even if those contentions are legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan issued a valid order of succession under 6 U.S.C. 113(g)(2)—then the FVRA would have applied, and Executive Order 13753 would have governed the order of succession for the Secretary of Homeland Security from the date of Nielsen's resignation.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, Mr. Wolf would have been ineligible to serve as the Acting Secretary of DHS after his nomination was submitted to the Senate, *see* 5 U.S.C. 3345(b)(1)(B), and Peter Gaynor, the Administrator of the Federal Emergency Management Agency (''FEMA''), would have—by operation of Executive Order 13753—become eligible to exercise the functions and duties of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President's succession order for DHS when the FVRA applies. Mr. Gaynor would have been the most senior official eligible to exercise the functions and duties of the Secretary under that succession order, and thus would have become the official eligible to act as Secretary once Mr. Wolf's nomination was submitted to the Senate. *See* 5 U.S.C. 3346(a)(2). Then, in this alternate scenario in which, as assumed above, there was no valid succession order under 6 U.S.C. 113(g)(2), the submission of Mr. Wolf's nomination to the Senate would have restarted the FVRA's time limits. *See* 5 U.S.C. 3346(a)(2).

Out of an abundance of caution, and to minimize any disruption to DHS and to the Administration's goal of maintaining homeland security, on November 14, 2020, with Mr. Wolf's nomination still pending in the Senate, Mr. Gaynor exercised the authority of Acting Secretary that he would have had (in the absence of any governing succession order under 6 U.S.C. 113(g)(2)) to designate a new order of succession under 6 U.S.C. 113(g)(2) (the ''Gaynor Order'').[90] In particular, Mr. Gaynor issued an order of succession with the same ordering of positions listed in former Acting Secretary McAleenan's November 2019 order. The Gaynor Order thus placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed Mr. Wolf's authority to continue to serve as the Acting Secretary. Hence, regardless of whether Mr. Wolf already possessed authority pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan (as the Departments have previously concluded), the Gaynor Order provides an alternative basis for concluding that Mr. Wolf currently serves as the Acting Secretary.[91]

On November 16, 2020, Acting Secretary Wolf ratified any and all actions involving delegable duties that he took between November 13, 2019, through November 16 2020, including the NPRM that is the subject of this rulemaking.

Under section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1), the Secretary is charged with the administration and enforcement of the INA and all other immigration laws (except for the powers, functions, and duties of the President, the Attorney General, and certain consular, diplomatic, and Department of State officials). The Secretary is also authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary. *See* INA 103, 8 U.S.C. 1103, and 6 U.S.C. 113(g)(2). The HSA further provides that every officer of the Department ''shall perform the functions specified by law for the official's office or prescribed by the Secretary.'' 6 U.S.C. 113(f). Thus, the designation of the signature authority from Acting Secretary Wolf to Mr. Mizelle is validly within the Acting Secretary's authority.

8.3. Article I Immigration Courts

Comment: At least one commenter, the former union representing immigration judges, expressed a belief that the immigration courts and the BIA should be moved from within DOJ in the Executive Branch into an independent article I court system.[92] The commenter indicated that such a move would address ''political influence'' and ensure ''neutral decision making.''

Response: Immigration judges are required to adjudicate cases in an ''impartial manner,'' 8 CFR 1003.10(b); they exercise ''independent judgment and discretion,'' *id.;* and they ''should not be swayed by partisan interests or public clamor,'' EOIR, *Ethics and Professionalism Guide for Immigration*

[90] Mr. Gaynor signed an order that established an identical order of succession on September 10, 2020, the day Mr. Wolf's nomination was submitted, but it appears he signed that order before the nomination was received by the Senate. To resolve any concern that his September 10 order was ineffective, Mr. Gaynor signed a new order on November 14, 2020. Prior to Mr. Gaynor's new order, the U.S. District Court for the District of New York issued an opinion concluding that Mr. Gaynor did not have authority to act as Secretary, relying in part on the fact that DHS did not notify Congress of Administrator Gaynor's service, as required under 5 U.S.C. 3349(a). *See Batalla Vidal* v. *Wolf,* No. 16CV4756NGGVMS, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020). The Departments disagree that the FVRA's notice requirement affects the validity of an acting officer's service; nowhere does section 3349 indicate that agency reporting obligations are tied to an acting officer's ability to serve.

[91] On October 9, 2020, the U.S. District Court for the District of Columbia issued an opinion indicating that it is likely that section 113(g)(2) orders can be issued by only Senate-confirmed secretaries of DHS and, thus, that Mr. Gaynor likely had no authority to issue a section 113(g)(2) succession order. *See Nw. Immigrant Rights Project* v. *United States Citizenship & Immigration Servs.,* No. CV 19–3283 (RDM), 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020). This decision is incorrect because the authority in section 113(g)(2) allows ''the Secretary'' to designate an order of succession, *see* 6 U.S.C. 113(g)(2), and an ''acting officer is vested with the same authority that could be exercised by the officer for whom he acts.'' *In re Grand Jury Investigation,* 916 F.3d 1047, 1055 (D.C. Cir. 2019). The Acting Secretary of DHS is accordingly empowered to exercise the authority of ''the Secretary'' of DHS to ''designate [an] order of succession.'' 6 U.S.C. 113(g)(2). In addition, this is the only district court opinion to have reached such a conclusion about the authority of the Acting Secretary, and the Departments are contesting that determination.

[92] On November 2, 2020, the Federal Labor Relations Authority ruled that immigration judges are management officials for purposes of 5 U.S.C. 7103(a)(11), and, thus, excluded from a bargaining unit pursuant to 5 U.S.C. 7112(b)(1). *U.S. Dept. of Justice, Exec. Office for Immigration Review and National Association of Immigration Judges, Int'l Fed. of Prof. and Tech. Engineers Judicial Council 2,* 71 FLRA No. 207 (2020). That decision effectively decertified the union that previously represented a bargaining unit of non-supervisory immigration judges.

Judges, sec. VIII (Jan. 26, 2011), *https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.* To the extent that a union which represented immigration judges suggests that the members of its former bargaining unit do not engage in ''neutral decision making'' or are currently swayed by partisan influence in derogation of their ethical obligations, the Departments respectfully disagree, and note that the issue is one to be resolved between the former union and the members of its former bargaining unit, rather than through a rulemaking. The Departments are also unaware of any complaints filed by the former union regarding any specific immigration judges who have failed to engage in neutral decision making. In short, the commenter's premise is unfounded in either fact or law.

Otherwise, the recommendation is both beyond the scope of this rulemaking and the Departments' authority. Congress has the sole authority to create an article I court. *E.g.* 26 U.S.C. 7441 (''There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court.''). Despite this authority, Congress has provided for a system of administrative hearings for immigration cases, *see, e.g.,* INA 240, 8 U.S.C. 1229a (laying out administrative procedures for removal proceedings), which the Departments believe should be maintained. *Cf. Strengthening and Reforming America's Immigration Court System: Hearing before the Subcomm. on Border Sec. & Immigration of the S. Comm. on the Judiciary,* 115th Cong. (2018) (written response to Questions for the Record of James McHenry, Director, EOIR) (''The financial costs and logistical hurdles to implementing an Article I immigration court system would be monumental and would likely delay pending cases even further.'').

9. Severability

Comment: Some commenters disagreed with the Departments' inclusion of severability provisions in the rule. *See* 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). For example, at least one commenter stated that the severability provisions conflict with the premise that all the provisions in the rule are related. Another commenter disagreed with the severability provisions, stating that the rule should instead be struck in its entirety.

Response: The changes made by the rule function sensibly independent of the other provisions. As a result, the Departments included severability language for each affected part of title 8 CFR. 8 CFR 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c). In other words, the Departments included these severability provisions to clearly illustrate the Departments' belief that the severance of any affected sections ''will not impair the function of the statute as a whole'' and that the Departments would have enacted the remaining regulatory provisions even without any others. *See K Mart Corp.* v. *Cartier, Inc.,* 486 U.S. 281, 294 (1988) (discussing whether an agency's regulatory provision is severable). The Departments disagree that this severability analysis is impacted by the interrelatedness of either the provisions of this rule or the affected parts more generally. Indeed, it is reasonable for agencies, when practical, to make multiple related changes in a single rulemaking in order to best inform the public and facilitate notice and comment.

III. Regulatory Requirements

A. Administrative Procedure Act

This final rule is being published with a 30-day effective date as required by the Administrative Procedure Act. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Departments have reviewed this regulation in accordance with the Regulatory Flexibility Act, *see* 5 U.S.C. 601 *et seq.,* and, as explained more fully above, have determined that this rule will not have a significant economic impact on a substantial number of small entities, *see* 5 U.S.C. 605(b). This regulation affects only individual aliens and the Federal government. Individuals do not constitute small entities under the Regulatory Flexibility Act. *See* 5 U.S.C. 601(6).

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule as defined by section 804 of the Congressional Review Act. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. *See* 5 U.S.C. 804(2).

E. Executive Orders 12866, 13563, and 13771

This final rule is considered by the Departments to be a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Accordingly, the regulation has been submitted to the Office of Management and Budget (''OMB'') for review.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits; reducing costs; harmonizing rules; and promoting flexibility.

The final rule would change or provide additional clarity for adjudicators across many issues commonly raised by asylum applications and would potentially streamline the overall adjudicatory process for asylum applications. Although the regulation will improve the clarity of asylum law and help streamline the credible fear review process, the regulation does not change the nature of the role of an immigration judge or an asylum officer during proceedings for consideration of credible fear claims or asylum applications. Notably, immigration judges will retain their existing authority to review de novo the determinations made by asylum officers in a credible fear proceeding, and will continue to control immigration court proceedings. In credible fear proceedings, asylum officers will continue to evaluate the merits of claims for asylum, withholding of removal, and CAT protection for possible referral to an immigration judge. Although this rule expands the bases on which an asylum officer may determine that a claim does not merit referral (and, as a consequence, make a negative fear determination), the alien will still be able to seek review of that negative fear

determination before the immigration judge.

Immigration judges and asylum officers are already trained to consider all relevant legal issues in assessing a credible fear claim or asylum application, and the final rule does not implement any changes that would make adjudications more challenging than those that are already conducted. For example, immigration judges already consider issues of persecution, nexus, particular social group, frivolousness, firm resettlement, and discretion in assessing the merit of an asylum application, and the provision of clearer standards for considering those issues in this rule does not add any operational burden or increase the level of operational analysis required for adjudication. Accordingly, the Departments do not expect the changes to increase the adjudication time for immigration court proceedings involving asylum applications or for reviews of negative fear determinations.

Depending on the manner in which DHS exercises its prosecutorial discretion for aliens potentially subject to expedited removal, the facts and circumstances of each individual alien's situation, DHS's interpretation or the relevant regulations, and application of those regulations by individual adjudicators, the changes may decrease the number of cases of aliens subject to expedited removal that result in a full hearing on an application for asylum. In all cases, however, an alien will retain the opportunity to request immigration judge review of DHS's initial fear determination.

The Departments are implementing changes that may affect any alien subject to expedited removal who makes a fear claim and any alien who applies for asylum, statutory withholding of removal, or protection under the CAT regulations. The Departments note that these changes are likely to result in fewer asylum grants annually due to clarifications regarding the significance of discretionary considerations and changes to the definition of ''firm resettlement.'' However, because asylum applications are inherently fact-specific, and because there may be multiple bases for denying an asylum application, neither DOJ nor DHS can quantify precisely the expected decrease. As of September 30, 2020, EOIR had 589,276 cases pending with an asylum application. EOIR, *Workload and Adjudication Statistics: Total Asylum Applications* (Oct. 13, 2020), *https://www.justice.gov/eoir/page/file/1106366/download.* In FY 2019, at the immigration court level, EOIR granted 18,816 asylum applications and denied 45,285 asylum applications. *See* 85 FR at 36289. An additional 27,112 asylum applications were abandoned, withdrawn, or otherwise not adjudicated. *Id.* As of January 1, 2020, USCIS had 338,931 applications for asylum and for withholding of removal pending. *Id.* at 36289 & n.44. In FY 2019, USCIS received 96,861 asylum applications, and approved 19,945 such applications. *Id.* at 36289 & n.45.

The Departments expect that the aliens most likely to be impacted by this rule's provisions are those who are already unlikely to receive a grant of asylum under existing law. Assuming DHS places those aliens into expedited removal proceedings, the Departments have concluded that it will be more likely that they would receive a more prompt adjudication of their claims for asylum or withholding of removal than they would under the existing regulations. Depending on the individual circumstances of each case, this rule would mean that such aliens would likely not remain in the United States—for years, potentially—pending resolution of their claims.

An alien who is ineligible for asylum may still be eligible to apply for the protection of withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding of removal under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of the CAT. *See* INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 208.17 through 208.18, 1208.16, and 1208.17 through 1208.18. For those aliens barred from asylum under this rule who would otherwise be positively adjudicated for asylum, it is possible they would qualify for withholding (provided a bar to withholding did not apply separate and apart from this rule). To the extent there are any direct impacts of this rule, they would almost exclusively fall on that population. Further, the full extent of the impacts on this population is unclear and would depend on the specific circumstances and personal characteristics of each alien, and neither DHS nor DOJ collects such data at such a level of granularity.

Overall, the Departments assess that operational efficiencies will likely result from these changes, which could, inter alia, reduce the number of meritless claims before the immigration courts, provide the Departments with the ability to more promptly grant relief or protection to qualifying aliens, and ensure that those who do not qualify for relief or protection are removed more efficiently than they are under current rules.

F. Executive Order 12988: Criminal Justice Reform

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C 3501–3512, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. The changes made in this final rule required DHS to revise USCIS Form I–589, Application for Asylum and for Withholding of Removal, OMB Control Number 1615–0067. DOJ and DHS invited public comments on the impact to the proposed collection of information for 60 days. *See* 85 FR at 36290.

DOJ and DHS received multiple comments on the information collection impacts of the proposed rule. Commenters expressed concern that the proposed revisions significantly increase the time and cost burdens for aliens seeking protection from persecution and torture, as well as adding to the burden of immigration lawyers, asylum officers, advocacy organizations, and immigration judges. DHS and DOJ have summarized all of the comments related to information collection and have provided responses in a document titled ''Form I–589 Public Comments and Response Matrix,'' which is posted in the rulemaking docket EOIR–2020–0003 at *https://www.regulations.gov/.* As a result of the public comments, DHS has increased the burden estimate for the Form I–589 and has updated the supporting statement submitted to OMB accordingly. The supporting statement can be found at *https://www.reginfo.gov/.* The updated abstract is as follows:

USCIS Form I–589

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Form I–589 is necessary to determine whether an alien applying for asylum or withholding of removal in the United States is classified as a refugee and is eligible to remain in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–589 is approximately 114,000, and the estimated hourly burden per response is 18.5 [93] hours. The estimated number of respondents providing biometrics is 110,000, and the estimated hourly burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual burden associated with this collection of information in hours is 2,237,700.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $70,406,400.[94]

H. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1244

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 208 and 235 are amended as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

■ 2. Amend § 208.1 by adding paragraphs (c) through (g) to read as follows:

§ 208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a State or a unit thereof. The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related

[93] This estimate is higher than the estimate provided in the NPRM because USCIS reevaluated its projections and determined that the hourly burden per response was likely to be higher than USCIS had initially estimated, which also increased the total estimated public burden (in hours).

[94] This estimate is higher than the estimate provided in the NPRM because USCIS reevaluated its projections in response to public comments suggesting that the monetary cost was likely to be higher than USCIS had initially estimated.

to efforts by the State to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the State or a legal sub-unit of the State. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of screening or adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats, except that particularized threats of severe harm of an immediate and menacing nature made by an identified entity may constitute persecution; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application or withholding of removal under section 241(b)(3) of the Act, the Secretary, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(1) Interpersonal animus or retribution;

(2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a State or expressive behavior that is antithetical to the State or a legal unit of the State;

(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(6) Criminal activity;

(7) Perceived, past or present, gang affiliation; or,

(8) Gender.

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application, provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

■ 3. Amend § 208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with §§ 208.30, 1003.42, or 1208.30.

* * * * *

■ 4. Amend § 208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear or reasonable fear determination under 8 CFR 208.30 or 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. * * *

* * * * *

■ 5. Amend § 208.6 by revising paragraphs (a) and (b) and adding paragraphs (d) and (e) to read as follows:

§ 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Secretary.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or

protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws,

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees and officers of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States Government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

■ 6. Amend § 208.13 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) and (d) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(C) Such country or all such countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Secretary, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) Such country was, at the time of the transit, not a party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and received a final judgment denying the alien protection in that country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) All such countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to § 208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence, unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

(E) At the time the asylum application is filed with DHS has:

(*1*) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(*2*) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

(*3*) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(*1*) Exceptional circumstances prevented the alien from attending the interview; or

(*2*) The interview notice was not mailed to the last address provided by the alien or his or her representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of those changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Secretary, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial or referral (which may result in the denial by an immigration judge) of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i). Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i), a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

■ 7. Revise § 208.15 to read as follows:

§ 208.15 Definition of ''firm resettlement.''

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution or torture, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or

(ii) The alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless the alien establishes that he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist) from the alien's parent.

■ 8. Amend § 208.16 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) to read as follows:

§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b)(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under the totality of the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the

persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including but not limited to persecutors who are gang members, public officials who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

■ 9. Amend § 208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

■ 10. Revise § 208.20 to read as follows:

§ 208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, and before January 11, 2021, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

(2) Paragraphs (b) through (f) of this section shall only apply to applications filed on or after January 11, 2021.

(b) For applications filed on or after January 11, 2021, an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For any application referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph 1208.20(c).

(c) For applications filed on or after January 11, 2021, an asylum application is frivolous if it:

(1) Contains a fabricated material element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may also be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien knowingly filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

■ 11. Add § 208.25 to read as follows:

§ 208.25 Severability.

The provisions of part 208 are separate and severable from one another. In the event that any provision in part 208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 12. Amend § 208.30 by:

■ a. Revising the section heading; and

■ b. Revising paragraphs (a), (b), (c), (d) introductory text, (d)(1) and (2), (d)(5) and (6), (e) introductory text, (e)(1) through (5), (e)(6) introductory text, (e)(6)(ii), (e)(6)(iii) introductory text,

(e)(6)(iv), the first sentence of paragraph (e)(7) introductory text, and paragraphs (e)(7)(ii), (f), and (g).

The revisions read as follows:

§ 208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, DHS has exclusive jurisdiction to make the determinations described in this subpart B. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Process and Authority.* If an alien subject to section 235(a)(2) or 235(b)(1) of the Act indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with this section. An asylum officer shall then screen the alien for a credible fear of persecution, and as necessary, a reasonable possibility of persecution and reasonable possibility of torture. An asylum officer, as defined in section 235(b)(1)(E) of the Act, has the authorities described in 8 CFR 208.9(c) and must conduct an evaluation and make a determination consistent with this section.

(c) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

(1) Arrived in the United States concurrently with the principal alien; and

(2) Desires to be included in the principal alien's determination. However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

(d) *Interview.* The asylum officer will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. The asylum officer shall conduct the interview as follows:

(1) If the officer conducting the interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.

(2) At the time of the interview, the asylum officer shall verify that the alien has received in writing the relevant information regarding the fear determination process. The officer shall also determine that the alien has an understanding of the fear determination process.

* * * * *

(5) If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language the alien speaks and understands, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter must be at least 18 years of age and may not be the alien's attorney or representative of record, a witness testifying on the alien's behalf, a representative or employee of the alien's country of nationality, or, if the alien is stateless, the alien's country of last habitual residence.

(6) The asylum officer shall create a summary of the material facts as stated by the alien. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct any errors therein.

(e) Procedures for determining credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture.

(1) An alien establishes a credible fear of persecution if there is a significant possibility the alien can establish eligibility for asylum under section 208 of the Act. ''Significant possibility'' means a substantial and realistic possibility of succeeding. When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by the alien in support of the alien's claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid any future harm by relocating to another part of his or her country, if under all the circumstances it would be reasonable to expect the alien to do so; and

(iii) The applicability of any bars to being able to apply for asylum or to eligibility for asylum set forth at section 208(a)(2)(B)–(C) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act.

(2) An alien establishes a reasonable possibility of persecution if there is a reasonable possibility that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal. When making such determination, the officer will take into account:

(i) The credibility of the statements made by the alien in support of the alien's claim;

(ii) Such other facts as are known to the officer, including whether the alien could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all circumstances, it would be reasonable to expect the applicant to do so; and

(iii) The applicability of any bars at section 241(b)(3)(B) of the Act.

(3) An alien establishes a reasonable possibility of torture if there is a reasonable possibility that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 208.16(c), 8 CFR 208.17, and 8 CFR 208.18. The alien must demonstrate a reasonable possibility that he or she will suffer severe pain or suffering in the country of removal, and that the feared harm would comport with the other requirements of 8 CFR 208.18(a)(1) through (8). When making such a determination, the asylum officer shall take into account:

(i) The credibility of the statements made by alien in support of the alien's claim, and

(ii) Such other facts as are known to the officer, including whether the alien could relocate to a part of the country of removal where he or she is not likely to be tortured.

(4) In all cases, the asylum officer will create a written record of his or her determination, including a summary of the material facts as stated by the alien, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture. In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a reasonable possibility of persecution or torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

(5)(i)(A) Except as provided in paragraph (e)(5)(ii) or (iii) or paragraph (e)(6) or (7) of this section, if an alien would be able to establish a credible fear of persecution but for the fact that the alien is subject to one or more of the mandatory bars to applying for asylum or being eligible for asylum contained in section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, then the asylum officer will enter a negative credible fear of persecution determination with respect to the alien's eligibility for asylum.

(B) If an alien described in paragraph (e)(5)(i)(A) of this section is able to establish either a reasonable possibility of persecution (including by establishing that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, then the asylum officer will enter a positive reasonable possibility of persecution or torture determination, as applicable. The Department of Homeland Security shall place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture.

(C) If an alien described in paragraph (e)(5)(i)(A) of this section fails to establish either a reasonable possibility of persecution (including by failing to establish that he or she is not subject to one or more of the mandatory bars to eligibility for withholding of removal contained in section 241(b)(3)(B) of the Act) or a reasonable possibility of torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(ii) If the alien is found to be an alien described in 8 CFR 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture, if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(iii) If the alien is found to be an alien described in 8 CFR 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1) for full consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act or withholding of deferral of removal under the regulations issued pursuant to the implementing legislation for the Convention Against Torture if the alien establishes, respectively, a reasonable possibility of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable possibility of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear standard described in paragraph (g) of this section and in 8 CFR 1208.30(g).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (''Agreement''). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph (e)(6). The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

* * * * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and:

* * * * *

(iv) As used in paragraphs (e)(6)(iii)(B), (C), and (D) of this section only, ''legal guardian'' means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in

paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with that provision, prior to any determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country (''receiving country'') that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. * * *

* * * * *

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the applicable agreement, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in the receiving country, the asylum officer shall make a written notation to that effect, and may then proceed to determine whether any other agreement is applicable to the alien under the procedures set forth in this paragraph (e)(7). If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of each of the applicable agreements, or would more likely than not be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or tortured, in each of the prospective receiving countries, the asylum officer shall make a written notation to that effect, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture, under paragraph (d) of this section.

* * * * *

(f) *Procedures for a positive fear determination.* If, pursuant to paragraph (e) of this section, an alien stowaway or an alien subject to expedited removal establishes either a credible fear of persecution, reasonable possibility of persecution, or a reasonable possibility of torture:

(1) DHS shall issue a Notice of Referral to Immigration Judge for asylum-and-withholding-only proceedings under 8 CFR 208.2(c)(1).

(2) Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and 8 CFR 212.5 of this chapter.

(g) *Procedures for a negative fear determination.* (1) If, pursuant to paragraphs (e) and (f) of this section, an alien stowaway or an alien subject to expedited removal does not establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, DHS shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative determination, in accordance with section 235(b)(1)(B)(iii)(III) of the Act and this § 208.30. The alien must indicate whether he or she desires such review on a Record of Negative Fear Finding and Request for Review by Immigration Judge. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(i) If the alien requests such review, DHS shall arrange for detention of the alien and serve him or her with a Notice of Referral to Immigration Judge, for review of the negative fear determination in accordance with paragraph (g)(2) of this section.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, DHS shall order the alien removed with a Notice and Order of Expedited Removal, after review by a supervisory officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, DHS shall complete removal proceedings in accordance with section 235(a)(2) of the Act. (2) Review by immigration judge of a negative fear determination.

(i) Immigration judges shall review negative fear determinations as provided in 8 CFR 1208.30(g). DHS, however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.

(ii) DHS shall provide the record of any negative fear determinations being reviewed, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based, to the immigration judge with the negative fear determination.

■ 13. Amend § 208.31 by revising paragraphs (f) and (g) to read as follows:

§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by immigration judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to Immigration Judge. The record of determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be

withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 14. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); Public Law 112–54.

■ 15. Amend § 235.6 by revising paragraphs (a)(1)(ii) and (a)(2)(i) and (iii) and adding paragraph (c) to read as follows:

§ 235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv) of chapter I, an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and the DHS initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

(i) If an asylum officer determines that the alien does not have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, and the alien requests a review of that determination by an immigration judge; or

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of 8 CFR 208.30 or 8 CFR 208.31.

* * * * *

(c) The provisions of part 235 are separate and severable from one another. In the event that any provision in part 235 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, 8 CFR parts 1003, 1208, 1212, 1235, and 1244 are amended as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Public Law 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Public Law 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Public Law 106–554, 114 Stat. 2763A–326 to–328.

■ 17. Amend § 1003.1 by revising paragraph (b)(9) to read as follows:

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

* * * * *

(b) * * *

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 1208.2(b) and (c) of this chapter.

* * * * *

■ 18. Amend § 1003.42 by revising the section heading and paragraphs (a), (b), (d) through (g), (h)(1), and the last sentence in paragraph (h)(3) and adding paragraph (i) to read as follows:

§ 1003.42 Review of credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations.

(a) *Referral.* Jurisdiction for an immigration judge to review a negative fear determination by an asylum officer pursuant to section 235(b)(1)(B) of the Act shall commence with the filing by DHS of the Notice of Referral to Immigration Judge. DHS shall also file with the notice of referral a copy of the written record of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of a negative fear determination. This record shall not be merged with any later proceeding involving the same alien.

* * * * *

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to applying for asylum or being eligible for asylum under section 208(a)(2)(B)–(D) and (b)(2) of the Act, including any bars established by regulation under section 208(b)(2)(C) of the Act, and such other facts as are known to the immigration judge, that the alien could establish his or her ability to apply for or be granted asylum under section 208 of the Act. The immigration judge shall make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim, whether the alien is subject to any mandatory bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act, and such other facts as are known to the immigration judge, that the alien would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion in the country of removal, consistent with the criteria in 8 CFR 1208.16(b). The immigration judge shall also make a de novo determination as to whether there is a reasonable possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien would be tortured in the country of removal, consistent with the criteria in 8 CFR 1208.16(c), 8 CFR 1208.17, and 8 CFR 1208.18.

(2) If the alien is determined to be an alien described in 8 CFR208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the Immigration Judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) prior to any further review of the asylum officer's negative fear determination.

(3) If the alien is determined to be an alien described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(iii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) prior to any further review of the asylum officer's negative fear determination.

(e) *Timing.* The immigration judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's

negative credible fear determination issued on the Record of Negative Credible Fear Finding and Request for Review.

(f) *Decision.* (1) The decision of the immigration judge shall be rendered in accordance with the provisions of 8 CFR 1208.30(g)(2). In reviewing the negative fear determination by DHS, the immigration judge shall apply relevant precedent issued by the Board of Immigration Appeals, the Attorney General, the Federal circuit court of appeals having jurisdiction over the immigration court where the Request for Review is filed, and the Supreme Court.

(2) No appeal shall lie from a review of a negative fear determination made by an Immigration Judge, but the Attorney General, in the Attorney General's sole and unreviewable discretion, may direct that the Immigration Judge refer a case for the Attorney General's review following the Immigration Judge's review of a negative fear determination.

(3) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board for transmittal and service as provided in 8 CFR 1003.1(f). Such decision by the Attorney General may be designated as precedent as provided in 8 CFR 1003.1(g).

(g) *Custody.* An immigration judge shall have no authority to review an alien's custody status in the course of a review of a negative fear determination made by DHS.

(h) * * *

(1) *Arriving alien.* An immigration judge has no jurisdiction to review a determination by an asylum officer that an arriving alien is not eligible to apply for asylum pursuant to the 2002 U.S.-Canada Agreement formed under section 208(a)(2)(A) of the Act and should be returned to Canada to pursue his or her claims for asylum or other protection under the laws of Canada. *See* 8 CFR 208.30(e)(6). However, in any case where an asylum officer has found that an arriving alien qualifies for an exception to that Agreement, an immigration judge does have jurisdiction to review a negative fear finding made thereafter by the asylum officer as provided in this section.

* * * * *

(3) * * * However, if the asylum officer has determined that the alien may not or should not be removed to a third country under section 208(a)(2)(A) of the Act and subsequently makes a negative fear determination, an immigration judge has jurisdiction to review the negative fear finding as provided in this section.

* * * * *

(i) *Severability.* The provisions of part 1003 are separate and severable from one another. In the event that any provision in part 1003 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 19. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229.

■ 20. Amend § 1208.1 by adding paragraphs (c) through (g) to read as follows:

§ 1208.1 General.

* * * * *

(c) *Particular social group.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the claim. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or, status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person first articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group was both not a strategic choice and constituted egregious conduct.

(d) *Political opinion.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a political opinion is one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a State or a unit thereof. The Attorney General, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the State to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the State or a legal sub-unit of the State. A person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for

such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

(e) *Persecution.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, persecution requires an intent to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization that the government was unable or unwilling to control. For purposes of evaluating the severity of the level of harm, persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional. It does not include intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats, except that particularized threats of a severe harm of immediate and menacing nature made by an identified entity may constitute persecution; or, non-severe economic harm or property damage, though this list is nonexhaustive. The existence of government laws or policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

(f) *Nexus.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, the Attorney General, in general, will not favorably adjudicate the claims of aliens who claim persecution based on the following list of nonexhaustive circumstances:

(1) Interpersonal animus or retribution;

(2) Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;

(3) Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a State or expressive behavior that is antithetical to the State or a legal unit of the State;

(4) Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist or other non-state organizations;

(5) The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;

(6) Criminal activity;

(7) Perceived, past or present, gang affiliation; or,

(8) Gender.

(g) *Evidence based on stereotypes.* For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, evidence offered in support of such an application which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender, shall not be admissible in adjudicating that application, provided that nothing in this paragraph shall be construed as prohibiting the submission of evidence that an alleged persecutor holds stereotypical views of the applicant.

■ 21. Amend § 1208.2 by adding paragraph (c)(1)(ix) to read as follows:

§ 1208.2 Jurisdiction.

* * * * *

(c) * * *

(1) * * *

(ix) An alien found to have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture in accordance with § 208.30, § 1003.42, or § 1208.30.

* * * * *

■ 22. Amend § 1208.5 by revising the first sentence of paragraph (a) to read as follows:

§ 1208.5 Special duties toward aliens in custody of DHS.

(a) *General.* When an alien in the custody of DHS requests asylum or withholding of removal, or expresses a fear of persecution or harm upon return to his or her country of origin or to agents thereof, DHS shall make available the appropriate application forms and shall provide the applicant with the information required by section 208(d)(4) of the Act, including in the case of an alien who is in custody with a positive credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31, and except in the case of an alien who is in custody pending a credible fear determination under 8 CFR 208.30 or a reasonable fear determination pursuant to 8 CFR 208.31. * * *

* * * * *

■ 23. Amend § 1208.6 by revising paragraphs (a) and (b) and adding paragraphs (d) and (e) to read as follows:

§ 1208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any application for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by DHS and the Executive Office for Immigration Review that indicate that a specific alien has applied for refugee admission, asylum, withholding of removal under section 241(b)(3) of the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, or has received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure, except as permitted in this section. DHS will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

* * * * *

(d)(1) Any information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3) the Act, or protection under regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, any information regarding an alien who has filed such an application, and any relevant and applicable information regarding an alien who has been the subject of a reasonable fear or credible fear determination may be disclosed:

(i) As part of an investigation or adjudication of the merits of that application or of any other application under the immigration laws;

(ii) As part of any State or Federal criminal investigation, proceeding, or prosecution;

(iii) Pursuant to any State or Federal mandatory reporting requirement;

(iv) To deter, prevent, or ameliorate the effects of child abuse;

(v) As part of any proceeding arising under the immigration laws, including proceedings arising under the Act; and

(vi) As part of the Government's defense of any legal action relating to the alien's immigration or custody status, including petitions for review filed in accordance with 8 U.S.C. 1252.

(2) If information may be disclosed under paragraph (d)(1) of this section, the disclosure provisions in paragraphs (a), (b), and (c) of this section shall not apply.

(e) Nothing in this section shall be construed as prohibiting the disclosure of information contained in an application for refugee admission, asylum, withholding of removal under section 241(b)(3)(B) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation, any relevant and applicable information supporting that application, information regarding an alien who has filed such an application, or information regarding an alien who has been the subject of a reasonable fear or credible fear determination:

(1) Among employees of the Department of Justice, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, the Department of Labor, or a U.S. national security agency having a need to examine the information for an official purpose; or

(2) Where a United States government employee or contractor has a good faith and reasonable belief that disclosure is necessary to prevent the commission of a crime, the furtherance of an ongoing crime, or to ameliorate the effects of a crime.

■ 24. Section 1208.13 is amended by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv), (d), and (e) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, numerosity, and reach of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the Department of Homeland Security establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

(d) *Discretion.* Factors that fall short of grounds of mandatory denial of an asylum application may constitute discretionary considerations.

(1) The following are significant adverse discretionary factors that a decision-maker shall consider, if applicable, in determining whether an alien merits a grant of asylum in the exercise of discretion:

(i) An alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution in a contiguous country or unless such entry or attempted entry was made by an alien under the age of 18 at the time the entry or attempted entry was made;

(ii) The failure of an alien to apply for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited before entering the United States unless:

(A) The alien received a final judgment denying the alien protection in such country;

(B) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(C) Such country or countries were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

(iii) An alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

(2)(i) The Attorney General, except as provided in paragraph (d)(2)(ii) of this section, will not favorably exercise discretion under section 208 of the Act for an alien who:

(A) Immediately prior to his arrival in the United States or en route to the United States from the alien's country of citizenship, nationality, or last lawful habitual residence, spent more than 14 days in any one country unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) Such country was, at the time of the transit, not a party to the 1951 Convention relating to the Status of Refugees the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(B) Transits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States unless:

(*1*) The alien demonstrates that he or she applied for protection from persecution or torture in at least one such country and the alien received a final judgment denying the alien protection in such country;

(*2*) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(*3*) All such countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, or the Convention against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment;

(C) Would otherwise be subject to § 1208.13(c) but for the reversal, vacatur, expungement, or modification of a conviction or sentence unless the alien was found not guilty;

(D) Accrued more than one year of unlawful presence in the United States, as defined in sections 212(a)(9)(B)(ii) and (iii) of the Act, prior to filing an application for asylum;

(E) At the time the asylum application is filed with the immigration court or is referred from DHS has:

(*1*) Failed to timely file (or timely file a request for an extension of time to file) any required Federal, State, or local income tax returns;

(*2*) Failed to satisfy any outstanding Federal, State, or local tax obligations; or

(*3*) Has income that would result in tax liability under section 1 of the Internal Revenue Code of 1986 and that was not reported to the Internal Revenue Service;

(F) Has had two or more prior asylum applications denied for any reason;

(G) Has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application;

(H) Failed to attend an interview regarding his or her asylum application with DHS, unless the alien shows by a preponderance of the evidence that:

(*1*) Exceptional circumstances prevented the alien from attending the interview; or

(*2*) The interview notice was not mailed to the last address provided by the alien or the alien's representative and neither the alien nor the alien's representative received notice of the interview; or

(I) Was subject to a final order of removal, deportation, or exclusion and did not file a motion to reopen to seek asylum based on changed country conditions within one year of the changes in country conditions.

(ii) Where one or more of the adverse discretionary factors set forth in paragraph (d)(2)(i) of this section are present, the Attorney General, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien, by clear and convincing evidence, demonstrates that the denial of the application for asylum would result in exceptional and extremely unusual hardship to the alien, may favorably exercise discretion under section 208 of the Act, notwithstanding the applicability of paragraph (d)(2)(i). Depending on the gravity of the circumstances underlying the application of paragraph (d)(2)(i), a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 208 of the Act.

(e) *Prima facie eligibility.* (1) Notwithstanding any other provision of this part, upon oral or written motion by the Department of Homeland Security, an immigration judge shall, if warranted by the record, pretermit and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law. An immigration judge need not conduct a hearing prior to pretermitting and denying an application under this paragraph (e)(1) but must consider any response to the motion before making a decision.

(2) Notwithstanding any other provision of this part, upon his or her own authority, an immigration judge shall, if warranted by the record, pretermit and deny any application for asylum, withholding of removal under section 241(b)(3) of the Act, or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation if the alien has not established a prima facie claim for relief or protection under applicable law, provided that the immigration judge shall give the parties at least 10 days' notice prior to entering such an order. An immigration judge need not conduct a hearing prior to pretermitting and denying an application under this paragraph (e)(2) but must consider any filings by the parties within the 10-day period before making a decision.

§ 1208.14 [Amended]

■ 25. Amend § 1208.14 by

■ a. Removing the words ''§ 1235.3(b) of this chapter'' in paragraphs (c)(4)(ii) introductory text and (c)(4)(ii)(A) and adding in their place the words ''§ 235.3(b) of chapter I''; and

■ b. Removing the citations ''§ 1208.30'' and ''§ 1208.30(b)'' in paragraph (c)(4)(ii)(A) and adding in their place the words ''§ 208.30 of chapter I''.

■ 26. Revise § 1208.15 to read as follows:

§ 1208.15 Definition of ''firm resettlement.''

(a) An alien is considered to be firmly resettled if, after the events giving rise to the alien's asylum claim:

(1) The alien resided in a country through which the alien transited prior to arriving in or entering the United States and—

(i) Received or was eligible for any permanent legal immigration status in that country;

(ii) Resided in such a country with any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but excluding status such as of a tourist); or

(iii) Resided in such a country and could have applied for and obtained any non-permanent but indefinitely renewable legal immigration status in that country;

(2) The alien physically resided voluntarily, and without continuing to suffer persecution in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, provided that time spent in Mexico by an alien who is not a native or citizen of Mexico solely as a direct result of being returned to Mexico pursuant to section 235(b)(2)(C) of the Act or of being subject to metering would not be counted for purposes of this paragraph; or

(3)(i) The alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, or

(ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States, and the alien renounced that citizenship after arriving in the United States.

(b) The provisions of 8 CFR 1240.8(d) shall apply when the evidence of record indicates that the firm resettlement bar may apply. In such cases, the alien shall bear the burden of proving the bar does not apply. Either DHS or the immigration judge may raise the issue of the application of the firm resettlement bar based on the evidence of record. The firm resettlement of an alien's parent(s) shall be imputed to the alien if the resettlement occurred before the alien turned 18 and the alien resided with the alien's parents at the time of the firm resettlement unless he or she could not have derived any permanent legal immigration status or any non-permanent but indefinitely renewable legal immigration status (including asylee, refugee, or similar status but

excluding status such as of a tourist) from the alien's parent.

■ 27. Amend § 1208.16 by revising paragraphs (b)(3) introductory text and (b)(3)(ii) and adding paragraphs (b)(3)(iii) and (iv) to read as follows:

§ 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(b) * * *

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

* * * * *

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including persecutors who are gang members, public official who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

* * * * *

■ 28. Amend § 1208.18 by revising paragraphs (a)(1) and (7) to read as follows:

§ 1208.18 Implementation of the Convention Against Torture.

(a) * * *

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

* * * * *

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

* * * * *

■ 29. Revise § 1208.20 to read as follows:

§ 1208.20 Determining if an asylum application is frivolous.

(a) For applications filed on or after April 1, 1997, and before January 11, 2021, an applicant is subject to the provisions of section 208(d)(6) of the Act only if the alien received the notice required by section 208(d)(4)(A) of the Act and a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. An application is frivolous if:

(1) Any of the material elements in the asylum application is deliberately fabricated, and the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

(2) Paragraphs (b) through (f) shall only apply to applications filed on or after January 11, 2021.

(b) For applications filed on or after January 11, 2021, an asylum officer may determine that the applicant knowingly filed a frivolous asylum application and may refer the applicant to an immigration judge on that basis, so long as the applicant has received the notice required by section 208(d)(4)(A) of the Act. For applications referred to an immigration judge, an asylum officer's determination that an application is frivolous will not render an applicant permanently ineligible for immigration benefits unless an immigration judge or the Board makes a finding of frivolousness as described in paragraph (c) of this section.

(c) For applications filed on or after January 11, 2021, an asylum application is frivolous if it:

(1) Contains a fabricated material element;

(2) Is premised upon false or fabricated evidence unless the application would have been granted without the false or fabricated evidence;

(3) Is filed without regard to the merits of the claim; or

(4) Is clearly foreclosed by applicable law.

(d) If the alien has been provided the warning required by section 208(d)(4)(A) of the Act, he or she need not be given any additional or further opportunity to account for any issues with his or her claim prior to the entry of a frivolousness finding.

(e) An asylum application may be found frivolous even if it was untimely filed.

(f) A withdrawn asylum application may be found frivolous unless:

(1) The alien wholly disclaims the application and withdraws it with prejudice;

(2) The alien is eligible for and agrees to accept voluntary departure for a period of no more than 30 days pursuant to section 240B(a) of the Act;

(3) The alien withdraws any and all other applications for relief or protection with prejudice; and

(4) The alien waives his right to appeal and any rights to file, for any reason, a motion to reopen or reconsider.

(g) For purposes of this section, a finding that an alien filed a knowingly frivolous asylum application shall not preclude the alien from seeking withholding of removal under section 241(b)(3) of the Act or protection under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

■ 30. Add § 1208.25 to read as follows:

§ 1208.25 Severability.

The provisions of part 1208 are separate and severable from one another. In the event that any provision in part 1208 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

■ 31. Amend § 1208.30 by revising the section heading and paragraphs (a), (b) introductory text, (b)(2), (e), and (g) to read as follows:

§ 1208.30 Credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

(a) *Jurisdiction.* The provisions of this subpart B apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) and 8 CFR 208.30, DHS has exclusive jurisdiction to make fear determinations, and the immigration judges have exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart B, paragraphs (b) through (g) of this section and 8 CFR 208.30 are the exclusive procedures applicable to stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act and who receive fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act and 8 CFR 208.30. Prior to January 1, 2030, an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands is ineligible to apply for asylum and may only establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act or withholding or deferral of removal under the regulations issued pursuant to the Convention Against Torture's implementing legislation.

(b) *Treatment of dependents.* A spouse or child of an alien may be included in that alien's fear evaluation and determination, if such spouse or child:

* * * * *

(2) *Desires to be included in the principal alien's determination.* However, any alien may have his or her evaluation and determination made separately, if he or she expresses such a desire.

* * * * *

(e) *Determination.* For the standards and procedures for asylum officers in conducting credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture interviews and in making positive and negative fear determinations, see 8 CFR 208.30. The immigration judges will review such determinations as provided in paragraph (g) of this section and 8 CFR 1003.42.

* * * * *

(g) *Procedures for negative fear determinations*—(1) *Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3) and is determined to lack a credible fear of persecution or a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(ii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3). If the immigration judge finds that the alien is not described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described in 8 CFR 208.13(c)(3) or 8 CFR 1208.13(c)(3), the immigration judge will then review the asylum officer's negative determinations regarding credible fear and regarding reasonable possibility made under 8 CFR 208.30(e)(5)(iv) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear (''significant possibility'') standard described in paragraph (g)(2).

(ii) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4) and is determined to lack a reasonable possibility of persecution or torture under 8 CFR 208.30(e)(5)(v), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4). If the immigration judge finds that the alien is not described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4), then the immigration judge shall vacate the determination of the asylum officer, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1). If the immigration judge concurs with the determination that the alien is an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 8 CFR 1208.13(c)(4), the immigration judge will then review the asylum officer's negative decision regarding reasonable possibility made under 8 CFR 208.30(e)(5)(v) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the fear of persecution or torture findings under the reasonable possibility standard instead of the credible fear of persecution standard described in paragraph (g)(2).

(2) *Review by immigration judge of a negative fear finding.* (i) The asylum officer's negative decision regarding a credible fear of persecution, reasonable possibility of persecution, and reasonable possibility of torture shall be subject to review by an immigration judge upon the applicant's request, in accordance with section 235(b)(1)(B)(iii)(III) of the Act. If the alien refuses to make an indication, DHS will consider such a response as a decision to decline review.

(ii) The record of the negative fear determination, including copies of the Notice of Referral to Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative fear determination.

(iii) A fear hearing will be closed to the public unless the alien states for the record or submits a written statement that the alien is waiving that requirement; in that event the hearing shall be open to the public, subject to

the immigration judge's discretion as provided in 8 CFR 1003.27.

(iv) Upon review of the asylum officer's negative fear determinations:

(A) If the immigration judge concurs with the determination of the asylum officer that the alien has not established a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the case shall be returned to DHS for removal of the alien. The immigration judge's decision is final and may not be appealed.

(B) If the immigration judge finds that the alien, other than an alien stowaway, establishes a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, the immigration judge shall vacate the Notice and Order of Expedited Removal, and DHS may commence asylum-and-withholding-only proceedings under 8 CFR 1208.2(c)(1), during which time the alien may file an application for asylum and for withholding of removal in accordance with 8 CFR 1208.4(b)(3)(i). Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(C) If the immigration judge finds that an alien stowaway establishes a credible fear of persecution, reasonable possibility of torture, or reasonable possibility of torture, the alien shall be allowed to file an application for asylum and for withholding of removal before the immigration judge in accordance with 8 CFR 1208.4(b)(3)(iii). The immigration judge shall decide the application as provided in that section. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph. Such decision on that application may be appealed by either the stowaway or DHS to the Board of Immigration Appeals. If a denial of the application for asylum and for withholding of removal becomes final, and deferral of removal has not otherwise been granted pursuant to 8 CFR 1208.17(a), the alien shall be removed from the United States in accordance with section 235(a)(2) of the Act. If an approval of the application for asylum, withholding of removal, or, as pertinent, deferral of removal becomes final, DHS shall terminate removal proceedings under section 235(a)(2) of the Act.

■ 32. Amend § 1208.31 by revising paragraphs (f) and (g) to read as follows:

§ 1208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

* * * * *

(f) *Removal of aliens with no reasonable fear of persecution or torture.* If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using the Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien must indicate whether he or she desires such review. If the alien refuses to make an indication, DHS shall consider such a response as a decision to decline review.

(g) *Review by Immigration Judge.* The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Notice of Referral to the Immigration Judge. The record of determination, including copies of the Notice of Referral to the Immigration Judge, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be conducted by the immigration judge within 10 days of the filing of the Notice of Referral to the Immigration Judge with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to DHS for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit an Application for Asylum and for Withholding of Removal. Such application shall be considered de novo in all respects by an immigration judge regardless of any determination made under this paragraph.

(i) The immigration judge shall consider only the alien's application for withholding of removal under 8 CFR 1208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies with the Board of Immigration Appeals. If the alien or DHS appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under 8 CFR 1208.16.

PART 1212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 33. The authority citation for part 1212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458); Title VII of Public Law 110–229.

■ 34. Add § 1212.13 to read as follows:

§ 1212.13 Severability.

The provisions of part 1212 are separate and severable from one another. In the event that any provision in part 1212 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

§ 1212.14 [Amended]

■ 35. Amend § 1212.14 in paragraph (a)(1)(vii) by removing the words ''§ 1235.3 of this chapter'' and adding in their place the words ''§ 235.3 of chapter I''.

PART 1235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 36. The authority citation for part 1235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2003 Comp., p. 278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Public Law 108–458).

§§ 1235.1, 1235.2, 1235.3, and 1235.5 [Removed and Reserved]

■ 37. Remove and reserve §§ 1235.1, 1235.2, 1235.3, and 1235.5.

■ 38. Amend § 1235.6 by:

■ a. Removing paragraphs (a)(1)(ii) and (iii);

■ b. Redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(ii) and revising it;

■ c. Revising paragraphs (a)(2)(ii) and (iii); and

■ d. Adding paragraph (c).

The revisions and addition read as follows:

§ 1235.6 Referral to immigration judge.

(a) * * *

(1) * * *

(ii) If an immigration officer verifies that an alien subject to expedited removal under section 235(b)(1) of the Act has been admitted as a lawful permanent resident or refugee, or granted asylum, or, upon review pursuant to § 235.3(b)(5)(iv) of chapter I, an immigration judge determines that the alien was once so admitted or granted asylum, provided that such status has not been terminated by final administrative action, and DHS initiates removal proceedings against the alien under section 240 of the Act.

* * * * *

(2) * * *

(i) If an asylum officer determines that an alien does not have a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture, and the alien requests a review of that determination by an immigration judge; or

* * * * *

(iii) If an immigration officer refers an applicant in accordance with the provisions of § 208.30 or § 208.31.

* * * * *

(c) The provisions of part 1235 are separate and severable from one another. In the event that any provision in part 1235 is stayed, enjoined, not implemented, or otherwise held invalid, the remaining provisions shall nevertheless be implemented as an independent rule and continue in effect.

PART 1244—TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

■ 39. The authority citation for part 1244 continues to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1254a note, 8 CFR part 2.

■ 40. Amend § 1244.4 by revising paragraph (b) to read as follows:

§ 1244.4 Ineligible aliens.

* * * * *

(b) Is an alien described in section 208(b)(2)(A) of the Act.

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.

Dated: December 2, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–26875 Filed 12–10–20; 8:45 am]

BILLING CODE 4410–30–P; 9111–97–P

FEDERAL REGISTER

Vol. 85 Friday,
No. 239 December 11, 2020

Part IV

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Parts 3, 5 and 7
Licensing Amendments; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 3, 5, 7

[Docket ID OCC–2019–0024]

RIN 1557–AE71

Licensing Amendments

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

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is amending its rules relating to policies and procedures for corporate activities and transactions involving national banks and Federal savings associations to update and clarify the policies and procedures, eliminate unnecessary requirements consistent with safety and soundness, and make other technical and conforming changes.

DATES: The final rule is effective on January 11, 2021, except for instruction 15g which is effective on December 11, 2020.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Christopher Crawford, Counsel, Valerie Song, Assistant Director, Heidi M. Thomas, Special Counsel, or Rima Kundnani, Senior Attorney, Chief Counsel's Office, (202) 649–5490; or Karen Marcotte, Director for Licensing Activities, (202) 649–7297, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. For persons who are deaf or hearing impaired, TTY, (202) 649–5597.

SUPPLEMENTARY INFORMATION:

I. Background

Twelve CFR part 5 sets forth the OCC's requirements for national banks and Federal savings associations that seek to engage in certain corporate transactions or activities. It addresses the range of an institution's existence from chartering to dissolution and includes, among other things, business combinations, branching matters, operating subsidiaries, and dividend payments. In some cases, a national bank or Federal savings association is required to apply to engage in a certain transaction or activity while in other situations the bank or savings association must submit a notice to the OCC either for informational purposes or as a means for providing the OCC with the opportunity to object to the transaction or activity. On March 5, 2020, the OCC issued a notice of proposed rulemaking (proposal) to revise part 5.[1] This proposal is part of the OCC's continual review of its regulations to eliminate outdated or otherwise unnecessary provisions and to clarify or revise requirements imposed on national banks and Federal savings associations where possible and when not inconsistent with safety and soundness.[2]

The OCC received six substantive written comments on this proposal. These comments and the OCC's response are discussed in the next section of this *Supplementary Information.*

II. Description of the Final Rule

Rules of General Applicability (Part 5, Subpart A)

Twelve CFR part 5, subpart A, sets forth the OCC's generally applicable rules and procedures for corporate activities and transactions of national banks and Federal savings associations. The OCC proposed substantive and technical changes to subpart A as explained below.

Rules of General Applicability (§ 5.2) Section 5.2(b) provides that the OCC may adopt materially different procedures for a particular filing or class of filings in exceptional circumstances or for unusual transactions after providing notice to the applicant and any other party that the OCC determines should receive notice. The proposal would increase the OCC's flexibility to address unusual situations by providing that the OCC may adopt materially different procedures as it deems necessary and then using the term ''exceptional circumstances or unusual transactions'' as examples, but not limitations, as to when the OCC may deem it necessary to adopt materially different procedures. One commenter expressed concern that the phrase ''as it deems necessary'' seemed vague and suggested the OCC note specific instances where flexibility is needed to eliminate vagueness.

The OCC disagrees with this commenter. The final rule includes examples—for exceptional circumstances or unusual transactions—that are intended to explain when the OCC may act while not limiting its ability in unforeseen cases where additional flexibility may be needed. Therefore, the OCC adopts this change as proposed.

Definitions (§ 5.3) Section 5.3 defines terms that are used throughout part 5. The OCC proposed several new definitions to this section. First, the OCC proposed definitions for ''nonconforming assets'' and ''nonconforming activities.'' The OCC uses, but does not define, these terms in §§ 5.23 and 5.24 (conversions to a Federal savings association or national bank, respectively) and § 5.33 (business combinations). The OCC proposed these definitions to mean assets or activities that are impermissible for a national bank or a Federal savings association, as applicable, to hold or conduct, or if permissible, are nonetheless held or conducted in a manner that exceeds limits applicable to national banks or Federal savings associations. Under this proposed definition, the term ''assets'' includes a national bank's or Federal savings association's investments in subsidiaries or other entities. The OCC did not receive any comments on these definitions and adopts them as proposed.

Second, the OCC proposed to define the term ''previously approved activity'' to mean, in the case of a national bank, an activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank; and in the case of a Federal savings association, an activity approved in published OCC or Office of Thrift Supervision (OTS) precedent for a Federal savings association, an operating subsidiary of a Federal savings association, or a pass-through investment of a Federal savings association.[3] The OCC proposed this definition to provide more clarity given the repeated use of this standard in §§ 5.34, 5.36, 5.38, and 5.58. One commenter discussed this definition. This commenter requested that the OCC clarify that this definition includes a previous OCC approval for any bank, not only the bank in question. The intention of this definition is to apply to

[1] The proposed rule was published in the **Federal Register** on April 2, 2020. 85 FR 18728.

[2] These periodic reviews are in addition to the OCC's decennial review of its regulations as required by the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA). Public Law 104–208 (1996), codified at 12 U.S.C. 3311(b). Section 2222 of EGRPRA requires that, at least once every 10 years, the OCC along with the other Federal banking agencies and the Federal Financial Institutions Examination Council (FFIEC) conduct a review of their regulations to identify outdated or otherwise unnecessary regulatory requirements imposed on insured depository institutions. Specifically, EGRPRA requires the agencies to categorize and publish their regulations for comment, eliminate unnecessary regulations to the extent that such action is appropriate, and submit a report to Congress summarizing their review. The agencies completed their second EGRPRA review on March 30, 2017 and published their report in the **Federal Register**. 82 FR 15900 (March 30, 2017).

[3] The OCC notes that this definition would not apply to an activity that a statute, regulation, or court decision has subsequently made impermissible.

all previously approved activities. To clarify this, the OCC has changed ''an activity'' to ''any activity'' in this definition in the final rule.

The preamble to the proposed rule also noted that for references to previously approved activities, national banks and Federal savings associations may consult the OCC's publications *Comparison of the Powers of National Banks and Federal Savings Associations* and *Activities Permissible for National Banks and Federal Savings Associations, Cumulative.*[4] In response to the commenter, the OCC clarifies that these documents are not exclusive examples of where to find published OCC precedent. The OCC also publishes interpretive letters and corporate decisions that may be used as precedent in its monthly Interpretations and Actions.[5] This commenter also suggested that the OCC publish its unpublished interpretive letters regarding permissible activities. The OCC notes that it endeavors to publish all pertinent interpretive letters.

Third, the OCC defines the term ''well capitalized'' differently in various sections of part 5 by cross-referencing to other OCC rules. The OCC proposed to add a definition of ''well capitalized'' to § 5.3 that incorporates these cross-references so that the individual cross-references in other sections are no longer needed. The OCC received no comments on this change and adopts it in the final rule as proposed, with one technical change to make a cross-reference citation more specific. As noted in the preamble to the proposed rule, this new definition does not make any substantive changes.

Fourth, the OCC proposed to add the term ''well managed'' to § 5.3. Currently, part 5 contains two different definitions of ''well managed.'' Consistent with section 5136A of the Revised Statutes (12 U.S.C. 24a), § 5.39 generally defines ''well managed'' for purposes of financial subsidiaries as a 1 or 2 composite rating under the Uniform Financial Institutions Rating System and at least a rating of 2 for management. By contrast, §§ 5.34 and 5.38, governing national bank and Federal savings association operating subsidiaries, respectively, generally define ''well managed'' as a 1 or 2 composite rating without reference to the management rating. Sections 5.35 (bank service company investments), 5.36 (other equity investments by a national bank), and 5.58 (Federal savings association pass-through investments) cross-reference to the §§ 5.34 or 5.38 definition. Additionally, § 5.59(h)(2)(ii)(A) requires a Federal savings association to be well managed to be eligible for expedited review when acquiring or establishing a service corporation.

The OCC proposed a single definition of ''well managed'' applicable throughout part 5 to eliminate confusion between the two definitions and to further the OCC's supervisory objectives.[6] The financial subsidiary statute, 12 U.S.C. 24a, defines ''well managed'' to include the management rating, and the OCC proposed to use this definition for national banks and Federal savings associations. The proposal also defined ''well managed'' for Federal branches and agencies of foreign banks as meaning the composite ROCA supervisory rating (which rates risk management, operational controls, compliance and assets quality) of 1 or 2, and at least a rating of 2 for risk management.

The OCC received one comment on this proposed definition. This commenter opposed the inclusion of management rating in a definition of ''well managed,'' except as required by statute. It stated that the financial subsidiary statutory definition of ''well managed'' was intended for new non-traditional activities, not core banking activities, and that using the new ''well managed'' definition could cause some banks to conduct activities in the bank rather than the subsidiary. The commenter noted that this could create safety and soundness issues because the bank would no longer benefit from having the activities conducted in a separate entity. In addition, this commenter stated that, in any event, the CAMELS management rating is in need of change.

The OCC disagrees with this commenter. As the OCC explained in the preamble to the proposed rule, the OCC believes that a single definition of ''well managed'' would enhance bank safety and soundness and provide a clearer and more consistent standard for national banks and Federal savings associations. In addition, the OCC finds that the components reflected in an entity's management rating, such as bank controls, are relevant to the establishment of operating subsidiaries, investments in bank service companies, other equity investments of a national bank and pass-through investments of a Federal savings association, and Federal savings association investments in service corporations. As explained in the preamble to the proposed rule, a national bank, Federal savings association, or Federal branch or agency with a 2 composite rating but a 3 management, or risk management, rating warrants additional scrutiny. Further, the OCC notes that the definition of ''well managed'' in Regulation K (international banking) and Regulation Y (bank holding companies) of the Board of Governors of the Federal Reserve System (Federal Reserve Board) also includes both composite and management ratings.[7]

This commenter also requested that if the OCC adopts the proposed ''well managed'' definition, the definition should include reasonable exceptions to the associated filing requirements. However, the proposed definition provides that it applies unless the OCC otherwise determines in writing. This provision allows the OCC to make exceptions in certain cases as warranted.

Finally, this commenter requested a transition period in event a bank receives a new rating, noting that without such a transition period a bank might be required to file an application where it already has begun negotiating or entering into an agreement to, for example, make a non-controlling investment, or otherwise relied on the fact that only an after-the-fact notice would be required. Specifically, the commenter recommended that the required ''compliance date'' of a new rating, particularly if it creates new requirements for the bank, should be several months after it is assigned or there should be an exception for any agreement already entered into at the

[4] These references are available at *https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-comparison-powers-national-banks-fed-sav-assoc.pdf* and *https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-activities-permissible-for-nat-banks-fed-saving.pdf.*

[5] *See https://occ.gov/topics/charters-and-licensing/interpretations-and-actions/index-interpretations-and-actions.html.*

[6] There is one instance of the term ''well managed'' in current part 5 that does not follow this definition. Specifically, 12 CFR 5.59(e)(7)(i) requires that each Federal savings association ''be well managed and operate safely and soundly.'' This provision is not directly applicable to any filing procedures but is rather a general statement of appropriate management and safety and soundness standards. For example, pursuant to § 5.59(e)(7)(ii) the OCC may limit a Federal savings association's investment in a service corporation, or limit or refuse to permit any activity of a service corporation, for supervisory, legal, or safety or soundness reasons.

[7] *See* 12 CFR 211.2(z); 12 CFR 225.2(s). Additionally, the OCC notes that the definition of ''well managed'' in Regulation Y applies to both expedited processing, *see, e.g.,* 12 CFR 225.14(c)(2), and for an entity qualifying to be a financial holding company, *see, e.g.,* 12 CFR 225.82. These are analogous, for example, to the revised usage of ''well managed'' for processing procedures to establish an operating subsidiary in § 5.34 and for a national bank qualifying to invest in a financial subsidiary in § 5.39, respectively.

time the rating is assigned. The OCC disagrees. For safety and soundness reasons, a national bank's or Federal savings association's rating should apply to all its activities as of the date the OCC issues the rating. Furthermore, a national bank or Federal savings association may mitigate any rating changes by including appropriate regulatory approval clauses in agreements with third parties.

For the reasons discussed above, the OCC adopts the definition of ''well managed'' as proposed.

The proposed rule also noted that the OCC was considering an amendment to the definition of ''short-distance relocation.'' Currently, moving the premises of a branch or main office of a national bank or a branch or home office of a Federal savings association is a short-distance relocation if the move is within: (1) A one-thousand foot-radius of the site if the branch, main office, or home office is located within a principal city of a metropolitan statistical area (MSA); (2) a one-mile radius of the site if the branch, main office, or home office is not located within a principal city but is located within an MSA; or (3) a two-mile radius of the site if the branch, main office, or home office is not located within an MSA. Under the branch relocation provisions in § 5.30 (national banks) and § 5.31 (Federal savings associations) and the main office and home office relocation provisions in § 5.40, short-distance relocations have a shorter public comment and OCC approval period than other relocations. Additionally, the OCC finds the short-distance relocation provision to be equivalent to a ''relocation'' for the purposes of branch closings under section 42 of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831r–1).

The preamble to the proposed rule noted that the OCC was considering doubling the distances for short-distance relocations to allow greater flexibility and to reduce regulatory burden for office relocations. The preamble noted that any amended definition would not apply to a branch that would be relocated from a low- or moderate-income (LMI) area to a non-LMI area.

The OCC received three comments on this possible amendment. One commenter supported the change and agreed that it would promote flexibility and reduce regulatory burden without depriving customers of appropriate notice. However, the commenter expressed concerns about having a separate standard for LMI areas because it could affect statistics on bank closures by more heavily weighing branch relocations in LMI areas relative to relocation in non-LMI areas. Another commenter stated that the expanded definitions for ''short distance relocations'' should not apply when the branch is relocated from an LMI tract to another LMI tract in addition to the suggested exclusion for branches relocated from an LMI tract to a non-LMI tract. The third commenter stated that the suggested definition may disproportionately adversely impact LMI persons and that the OCC should exempt branches in LMI areas or that largely service LMI customers from the definition change. Further, this commenter advocated no change to the definition, noting that it is not only LMI customers who would be inconvenienced.

The OCC has decided not to expand the distances in the definition of ''short-distance relocation'' in the final rule. In light of these public comments and after further reviewing this suggestion, the OCC believes that a bifurcated definition would increase burden on national banks without providing a compensating benefit. In addition, the exception may cause confusion for banks if a census tract LMI status changes. However, any increase in distance without excluding LMI tracts would negatively affect LMI communities. Therefore, the current definition of ''short distance relocation'' remains unchanged.

Finally, the OCC proposed technical changes to § 5.3. The OCC received no comments on these technical changes and adopts them as proposed. First, current § 5.3 defines ''applicant'' as a ''person or entity that submits a notice or application to the OCC under'' part 5. However, this usage of the term ''applicant'' is confusing because it covers persons who submit an application or a notice. Accordingly, the final rule changes the term ''applicant'' to ''filer'' to more clearly cover both a person who files an application or a notice. The final rule makes conforming changes throughout part 5.

Second, the final rule adds a new definition for ''Appropriate Federal banking agency'' that cross-references the definition contained in section 3(q) of the FDI Act, 12 U.S.C. 1813(q).

Third, the final rule adds a new definition clarifying that ''MSA'' means metropolitan statistical area as defined by the Director of the Office of Management and Budget (OMB).[8]

Fourth, part 5 currently defines ''notice'' to mean a submission notifying the OCC that a national bank or Federal savings association intends to engage in or has commenced certain activities or transactions. The definition notes that the specific meaning depends on context and ''may require the filer to obtain prior OCC approval before engaging in the activity or transaction.'' As described later in this *Supplementary Information,* the final rule generally changes the term ''notice'' to ''application'' for activities or transactions that require prior OCC approval. Therefore, the final rule removes the quoted language from the definition.

Fifth, the final rule adds abbreviations for the former OTS, the Federal Deposit Insurance Corporation (FDIC), and generally accepted accounting principles as used in the United States (GAAP) to make their use consistent throughout part 5.

Finally, to reflect the more current regulatory drafting style, the final rule removes the paragraph designations in § 5.3 and makes conforming changes to cross-references in § 5.3 and other OCC rules.

The final rule also makes additional technical corrections by removing the phrase ''as defined in § 5.3'' and related language throughout part 5. The definitions in § 5.3 apply to all of part 5 so these cross-references are not necessary.

Filing required (§ 5.4) Section 5.4 requires a depository institution to file an application or notice with the OCC to engage in certain corporate activities and transactions and provides general information on this filing requirement. Section 5.4(f) currently encourages a potential filer to contact the appropriate OCC licensing office to determine the need for a prefiling meeting, and it specifically provides that the OCC decides whether to require a prefiling meeting on a case-by-case basis. The proposal included more general guidance on when a filer should seek a prefiling meeting with the OCC. Specifically, the OCC proposed to include a new sentence advising potential filers with novel, complex, or unique proposals to contact the appropriate OCC licensing office early in the development of the proposal to help identify and consider relevant policy issues. The OCC received no comments on this change and adopts it as proposed.

[8] According to the OMB,''[t]he general concept of a metropolitan statistical area is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus.'' 75 FR 37246 (June 28, 2010). These standards are then applied to census data to delineate the metropolitan statistical areas.

Additionally, the OCC proposed to move the certification requirement in current § 5.13(h) to new § 5.4(g). Current § 5.13(h) requires filers to certify that material submitted to the OCC contains no material misrepresentations or omissions. The OCC also may review and verify any information filed in connection with a notice or an application. Section 5.13(h) further provides that material misrepresentations or omissions may be subject to enforcement actions and other penalties, including criminal penalties under 18 U.S.C. 1001. As discussed below, the OCC proposed to revise § 5.13(h) to clarify the procedures regarding nullification of decisions. The certification requirement in § 5.13(h) does not fit well in the revised provision so the OCC proposed to move it to § 5.4 with other provisions relating to the form of the filing, as new paragraph (g).

The OCC received one comment on new § 5.4(g). This commenter stated that because proposed § 5.4(g) makes no mention of a legal standard for culpability, it is unclear whether a filer would be subject to criminal penalties even if a material misrepresentation or omission were not made knowingly and willfully. The commenter suggested that in order to provide clarity regarding the applicable legal standard to which criminal penalties may apply when signing a certification, the OCC should amend proposed § 5.4(g) to qualify that filers who ''knowingly and willfully'' make material misrepresentations or omissions in a filing may be subject to enforcement and criminal penalty under 18 U.S.C. 1001. The commenter also suggested that the OCC update its standard forms accordingly. However, the OCC is not the appropriate agency to make representations about the specific elements of a criminal statute. Further, the OCC notes that the existing phrasing of ''may be subject to enforcement action and other penalties'' in the rule text indicates that section 1001 may or may not be applicable given the circumstances of a particular case, and that every misrepresentation or omission will not necessarily lead to a violation of section 1001. Section 1001 only would be applicable if the misrepresentation or omission meets the standard for a violation set forth in section 1001. Therefore, the OCC declines to address this comment in § 5.4(g).

Filing fees (§ 5.5) Section 5.5(a) provides the procedure for submitting filing fees to the OCC. The current rule requires payment to the OCC by check, money order, cashier's check, or wire transfer. The OCC proposed updating this provision by providing that a filer can pay the fees by check payable to the OCC or by other means acceptable to the OCC. The OCC received no comments on this change and adopts it as proposed. The OCC notes that it does not currently charge filing fees for licensing filings and is not imposing any fees as part of this final rule.

Investigations (§ 5.7) Section 5.7 provides the OCC with examination and investigation authority related to a filing. As discussed in the ''Background Investigations'' booklet of the *Comptroller's Licensing Manual,* the OCC routinely engages in background investigations of filers and other individuals involved in filings for new charters, changes in bank control, and changes in directors and senior executive officers. As part of these background investigations, the OCC collects fingerprints and submits them to the Federal Bureau of Investigation for a national criminal history background check. The OCC proposed adding a new paragraph (b) to § 5.7 to codify this procedure. The OCC also proposed conforming changes to other sections in part 5 to clarify when it collects fingerprints. The OCC received one comment in support of these changes. The final rule includes these changes as proposed.

Public availability, Comments, and Hearings and other meetings (§§ 5.9, 5.10, 5.11) Section 5.9 addresses the public availability and confidential treatment of filings. Section 5.10 provides the process for public comment periods and the submission of public comments. Section 5.11 provides the process for hearings and public and private meetings. The OCC proposed changing the terms ''application'' to ''filing'' and ''applicant'' to ''filer'' in these sections to reflect the more general terminology proposed in this rule. Furthermore, each of these sections currently uses the term ''interested persons'' to refer to persons other than the filer who seek to interact with a filing or related procedure. The OCC understands the term ''interested persons'' to mean any person who is or may wish to be involved in the licensing process. Such a person may, but need not, have particular financial, pecuniary, or other interest in the transaction itself, the filer, or other party to the transaction. In the proposal, the OCC invited comment about whether the term ''interested persons'' is sufficiently clear, or whether a change in terminology would be helpful to indicate the breadth of this provision. The OCC received no comments on changing the terms ''application'' to ''filing'' and ''applicant'' to ''filer'' and adopts these changes in the final rule. Further the OCC received no comments in the term ''interested persons'' and so does not change this term in the final rule.

Decisions (§ 5.13) Section 5.13 contains the OCC's procedures for acting on a filing. Paragraph (a)(2) of this section provides the procedures for the OCC's expedited review, including extending the time frame for reviewing or removing a filing from expedited review. Specifically, the OCC may change the expedited review procedures if it concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, Community Reinvestment Act (CRA) [9] (if applicable), or compliance concern or raises a significant legal or policy issue requiring additional OCC review. Paragraph (a)(2)(ii) of § 5.13 provides that the OCC will not change the expedited procedures if it determines, among other things, that an adverse comment does not raise a significant supervisory, CRA (if applicable), or compliance concern or a significant legal or policy issue, or is frivolous or filed primarily as a means of delaying action on the filing. The OCC proposed adding non-substantive comments to this list to better align the regulation with OCC policy. The proposal stated that the OCC considers a comment to be ''non-substantive'' if it is: (1) A generalized opinion that a filing should or should not be approved; or (2) a conclusory statement, lacking factual or analytical support.

The OCC received three comments on this proposed change. One commenter supported the addition of ''non-substantive'' to the list of items that do not remove a filing from expedited processing stating that this change would provide commenters with a clear standard and reduce unfair or unnecessary delays where a comment lacks factual or analytical support.

Another commenter opposed this change stating that it would increase the risk that the OCC could arbitrarily classify comments as non-substantive. The OCC disagrees with this commenter. For example, in the analogous context of informal rulemaking under the Administrative Procedure Act (APA),[10] agencies need only ''consider and respond to significant comments'' received during the public comment period.[11] Courts have not interpreted the APA as requiring agencies to respond to

[9] 12 U.S.C. 2901 *et seq.*

[10] 5 U.S.C. 551 *et seq.*

[11] *See, e.g., Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 96 (2015).

insubstantial comments.[12] As stated by the Supreme Court, ''administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.' '' [13]

The regulation's requirement that a party seeking relief must provide sufficient and supported information to warrant review of its claim is fully consistent with established principles that wholly speculative or unsupported comments need not be addressed.[14] Further, the receipt of a large number of comments that set forth a particular view regarding a proposal does not necessarily render those comments ''significant'' or material [15] if they do not contain the requisite level of analytical or substantive content.

The situation also may be analogized with the standards applicable to setting forth minimally viable claims in litigation. A Federal plaintiff has an ''obligation to provide the 'grounds' of his 'entitle[ment] to relief' [that] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'' [16] ''Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'' [17]

The OCC believes that either of these standards, as expressed by the Supreme Court, are analogous to those proposed for a comment on a licensing filing to warrant a change to expedited procedures. The requirement that a comment not be ''non-substantive'' to be considered reflects that the OCC will not ''accept as true a legal conclusion couched as a factual allegation.'' [18] Similarly, the requirement is consistent with the APA's provisions governing formal rulemaking proceedings.[19] Thus, a comment containing merely a conclusory statement would not be sufficient to change the expedited processing procedures. It is appropriate for the OCC to require that a comment must have factual and analytical support to allow the OCC to determine that one of the concerns set forth in § 5.13(a)(1) has indeed been raised, thus warranting additional OCC review.[20]

Accordingly, the OCC believes that the criteria for being ''non-substantive'' set forth in the amendment provides a clear standard for when the OCC will consider a comment to be non-substantive and provides commenters with guidance on submitting views on a filing. Further, the OCC notes that if a commenter believes that the OCC inadequately considered a comment, they may have grounds to challenge the OCC's licensing decision under the APA.

This commenter also stated that the final rule should describe the procedure by which the OCC would notify the commenter if the OCC determines a comment to be non-substantive and the procedure for re-submission of the comment. The OCC also disagrees with this comment. The OCC does not intend to notify a commenter that it finds its comment non-substantive. As indicated above, the OCC believes the provision as proposed adequately explains the OCC's standards for non-substantive comments and that these standards should inform commenters when the OCC would find a comment to be non-substantive.

Another commenter requested the OCC to define and explain the term ''significant'' as used in the current rule to describe supervisory, CRA, and compliance concerns and to provide the criteria it would use to determine the significance of concerns. In response to this comment, the OCC intends ''significant'' as used in the current and final rule to mean a ''substantive'' comment that raises material concerns requiring a longer review period to determine the impact on the application. A ''substantive'' comment is one that includes specific, concrete statements raising an issue on the relevant subject with supporting argument and material. A comment may be ''substantive'' but not ''significant'' if it does not raise concerns for which the OCC would need a longer time period to review to determine their impact on the application (*e.g.,* they are relatively minor or can be addressed in other ways). The OCC notes that it considers all comments received.

This commenter also requested that the final rule clarify whether a ''prior filing'' means a filing from the current filer or a different bank that shares the same assessment area. This provision is referring to the current filer. As requested by the commenter, the final rule includes language to clarify this point.

Current § 5.13(a)(2)(ii) also provides that the OCC will not change the expedited procedures if the adverse comment raises a CRA concern that the OCC determines has been satisfactorily resolved. The current rule states that the OCC considers a CRA concern to be satisfactorily resolved if the OCC previously reviewed (*e.g.,* in an examination or application) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the concern would not warrant denial or imposition of a condition on approval of the application. The OCC proposed amending this provision to expand what is meant by ''previously reviewed'' to include other supervisory activity, in addition to an examination, and a prior filing, which includes notices and applications.

One commenter read this proposed amendment to mean that the OCC would not consider a comment to be substantive if it addresses an issue the OCC previously resolved during an examination or application and as such opposed this change, noting that it would increase the arbitrariness of the OCC's rulings. However, the commenter misreads the proposal. The proposal does not classify an already addressed issue as non-substantive. Instead, a CRA concern that has been satisfactorily resolved is currently, and remains in the final rule, a separate basis for not changing expedited processing under

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[12] *See Thompson* v. *Clark,* 741 F.2d 401, 408–09 (D.C. Cir. 1984); *Auto. Parts & Accessories Ass'n* v. *Boyd,* 407 F.2d 330, 338 (D.C. Cir.1968).

[13] *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.,* 435 U.S. 519, 553–54 (1978). *See also, e.g., Interstate Natural Gas Ass'n of Am.* v. *Fed. Energy Regulatory Comm'n,* 494 F.3d 1092, 1096 (D.C. Cir. 2007) (''[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern' . . . and '[t]he APA requirement of agency responsiveness to comments is subject to the common-sense rule that a response be necessary.'''(*quoting Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 294 (D.C. Cir. 1973) and *Natural Res. Def. Council, Inc.* v. *U.S. Envtl. Prot. Agency,* 859 F.2d 156, 188 (D.C. Cir. 1988) (per curiam)).

[14] *See Home Box Office, Inc.* v. *Fed'l Commc'ns Comm'n,* 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (''Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.'').

[15] *See Hillsdale Envtl. Loss Prevention, Inc.* v. *U.S. Army Corps of Eng'rs,* 702 F.3d 1156, 1181–82 (10th Cir. 2012) (Holding that ''[e]ven if 90% of the comments . . . were negative, this merely demonstrates public opposition, not a substantial dispute'' concerning the factors that the agency had to consider per the statute).

[16] *Bell Atlantic Corp.* v. *Twombly,* 550 U.S. 544, 555 (2007) (*quoting* Fed. R. Civ. P. 8(a)(2) (first alteration in original)).

[17] *Ashcroft* v. *Iqbal,* 556 U.S. 662, 678 (2009).

[18] *Papsan* v. *Allain,* 478 U.S. 265, 286 (1986).

[19] *See* 5 U.S.C. 556(d) (permitting agency officials or administrative law judges overseeing formal rulemaking proceedings to exclude ''irrelevant, immaterial, or unduly repetitious evidence'').

[20] *Cf. Twombly,* 550 U.S. at 556 (requiring that an antitrust complaint contain ''enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement'').

§ 5.13(a)(2). The only proposed change to this provision was to broaden the types of activities in which the concern had already been addressed. The commenter does not address this aspect of the proposal. Further, as stated in the ''Public Notice and Comments'' booklet of the *Comptroller's Licensing Manual,* ''[t]he OCC construes these standards [for satisfactorily resolved CRA concerns] narrowly. The OCC may consider a CRA concern to be unresolved, for example, if the agency receives new information on a matter that it reviewed previously.'' [21]

The OCC also proposed amending the introductory text to paragraph (a)(2) to reflect that some expedited review procedures in part 5 do not require the national bank or Federal savings association to be an eligible bank or eligible savings association, as defined in § 5.3. In addition, the OCC proposed clarifying paragraphs (a)(2)(i) and (ii) by revising the punctuation and sentence structure so that it is easier to read.

For these reasons, the OCC adopts these proposed amendments to § 5.13 (a)(2) with the change discussed above. Additionally, the OCC is making additional technical amendments to paragraph (a)(2)(iii) to conform with the general change in terminology from ''application'' to ''filing'' in rules of general applicability.

Paragraph (h) of § 5.13 provides that the OCC may nullify a decision on a filing if: (1) The OCC discovers a material misrepresentation or omission after the OCC has rendered a decision on the filing; (2) the decision is contrary to law, regulation, or OCC policy; or (3) the OCC granted the decision due to clerical or administrative error or a material mistake of law or fact. The OCC's decisions on filings generally contain a statement that the ''OCC may modify, suspend or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which the decision pertains.'' The OCC proposed revising paragraph (h) to clarify that the OCC may nullify a decision on a filing either prior to or after consummation of the transaction and that the OCC may nullify a decision based on a material misrepresentation or omission in any information provided to the OCC in the filing or supporting materials. Additionally, the OCC proposed adding a new paragraph (i) that would provide that the OCC may modify, suspend, or rescind a decision on a filing if a material change in the information or circumstance on which the OCC relied occurs prior to the date of the consummation of the transaction to which the decision pertains. The OCC received no comments on these amendments to § 5.13(g) and new § 5.13(i) and adopts them as proposed. As explained in the preamble to the proposed rule, these revisions are intended to clarify that nullification is based on the facts, law, and policy as they existed at the time of the OCC's decision. By contrast, modification, suspension, or rescission is based on a change in facts or circumstance from the time of the OCC's decision until consummation of the transaction to which the decision pertains.

As indicated previously in this *Supplementary Information,* the final rule moves the provisions in current § 5.13(h) regarding certification of the submitted filing and penalties for material misrepresentation and omissions in a filing to new paragraph § 5.4(g).

Organizing a National Bank or Federal Savings Association (§ 5.20)

Section 5.20 provides the procedures and requirements involved in organizing a *de novo* national bank or Federal savings association. The OCC proposed two new definitions to § 5.20(d). First, the OCC proposed defining ''principal shareholder'' as a person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of their immediate family, will own, control, or hold 10 percent or more of the stock of the proposed national bank or Federal savings association. This definition is consistent with the definition used in the ''Background Investigations'' booklet of the *Comptroller's Licensing Manual* and the instructions for the Interagency Biographical and Financial Report.[22] The OCC proposed this definition in conjunction with provisions related to background checks and fingerprint collections in § 5.20(i)(3), discussed below.

Second, the OCC proposed clarifying that the term ''organizer'' means a member of the organizing group. This definition is not clearly stated in current § 5.20.

The OCC received no comments on these new definitions and adopts them as proposed.

Paragraph (i) contains procedures for filing a charter application. The OCC proposed a new paragraph (i)(3) requiring each proposed organizer, director, executive officer, or principal shareholder to submit to the OCC the information prescribed in the Interagency Biographical and Financial Report and legible fingerprints. New paragraph (i)(3) permits the OCC to request additional information, if appropriate, and waive the requirements of that paragraph if the OCC determines it to be in the public interest. The OCC received no comments on this provision and adopts it as proposed. As discussed in the ''Charters'' booklet of the *Comptroller Licensing Manual,* the OCC generally conducts routine background checks on insiders, including proposed organizers, directors, executive officers, and controlling shareholders. This revision to § 5.20(i), which is consistent with the final rule's background investigation changes in § 5.7(b), codifies this process and authorizes the collection of fingerprints for charter applications.

The OCC also proposed a number of technical changes to § 5.20. First, in the definition of ''organizing group'' in § 5.20(d)(7), the OCC proposed to change the term ''persons'' to ''individuals'' to more accurately reflect who may make up an organizing group. One commenter stated that further clarity is needed for changing this term. The OCC proposed this change to clarify that only individuals and not entities may serve in the organizing group, as provided by 12 U.S.C. 21. Section 21 states that ''[a]ssociations for carrying on the business of banking . . . . may be formed by any number of natural persons, not less in any case than five.'' However, to be as consistent as possible with this statute, the final rule instead changes the term ''persons'' to ''natural persons.'' Although 12 U.S.C. 21 only applies to national banks, this definitional change applies to both national banks and Federal savings associations. Second, in § 5.20(g)(4)(ii), the OCC proposed to change the phrase ''withdrawal of preliminary approval'' to ''nullification or rescission of preliminary approval'' to align with the terminology in proposed §§ 5.13(h) and (i). Third, in § 5.20(i), the OCC proposed to change the term ''spokesperson'' to ''contact person'' in redesignated paragraph (i)(5) to conform to the use of this term in other paragraphs of this section. Fourth, in redesignated

[21] ''Public Notice and Comments'' booklet of the *Comptroller's Licensing Manual,* Version 1.1, Nov. 2017, p. 8. The OCC note's that one commenter requested that this language regarding new information be included in the regulatory text. However, the OCC believes that it is not necessary to include this language in the rule, and that the inclusion of this language in the *Supplementary Information* of this final rule and in the *Licensing Manual* provides adequate explanation for how OCC construes as ''previously reviewed.''

[22] The Interagency Biographical and Financial Report is available on the OCC's website at *https://www.occ.gov/static/licensing/form-ia-biographical-financial-report.pdf.*

paragraph (i)(5), the OCC proposed to change the term ''interested parties'' to ''relevant parties,'' which more accurately describes who the OCC should notify of its decision on an application. Lastly, the OCC proposed to remove the reference to 12 CFR part 197 in § 5.20(i), redesignated paragraph (i)(6)(iii), because the OCC has removed this regulation. The remaining citation, 12 CFR part 16, now applies to both national banks and Federal savings associations. The OCC received no comments on these technical changes and therefore adopts them as proposed, with an additional technical correction of cross-references in redesignated paragraph (i)(6)(i).

The final rule makes one new technical correction to § 5.20. It removes the reference to 12 CFR part 195, the Federal savings association CRA rule, in § 5.20(e)(2)(ii) as of December 11, 2020. The OCC recently amended 12 CFR part 25 to include Federal savings associations and removed 12 CFR part 195 as of October 1, 2020.[23]

Federal Mutual Savings Association Charter and Bylaws (§ 5.21)

Section 5.21 governs the procedures and requirements for charters and bylaws of Federal mutual savings associations. Pursuant to paragraph (f)(2), charter amendments are generally subject to prior approval by the OCC although, under paragraph (g), most applications for charter amendments are subject to expedited review and deemed approved as of the 30th day after filing unless the OCC notifies the filer that it has denied the amendment, or the amendment is not eligible for expedited review. An application is not eligible for expedited review if the charter amendment would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management or involves a significant issue of law or policy. Paragraph (g) further provides that a notice is required within 30 days after adoption if the filer adopts the optional charter amendments contained in paragraph (g) without change.

The OCC proposed to reorganize these provisions to clarify the procedures Federal mutual savings associations must follow in adopting charter amendments, to align the terminology in § 5.21 with general usage in part 5, and to make other clarifying changes. As indicated in the preamble to the proposed rule, the OCC does not intend these changes to be substantive. The OCC received no comments on these amendments to § 5.21 and adopts them as proposed, with technical amendments. Specifically, the final rule amends paragraphs (j)(2) to reflect the changes made by the OCC's interim final rule on Director, Shareholder, and Member Meetings.[24] These amendments do not make any substantive changes to paragraph (j)(2) as proposed.

As a result of the final rule, all of this section's procedural requirements for adopting charter amendments are located in paragraph (f)(2). These amendments clarify that charter amendments are subject to a three-part regime: Application with expedited review, standard application, or notice. As a result, revised paragraph (g) now only contains provisions relating to optional charter amendments. Additionally, the final rule adds a new paragraph (f)(3) specifying that a charter amendment is effective once it is: (1) Approved by the OCC, if approval is required under paragraph (f)(2); and (2) adopted by the association provided the association follows the requirements of its charter in adopting the amendment. The final rule also makes a clarifying amendment to paragraph (g)(2) to reflect that change of a Federal savings association's title does not require prior OCC notice under § 5.42, as is implied by the current paragraph (g)(2).[25] The OCC intends no substantive change with this amendment.

Current paragraph (j) of § 5.21 governs the bylaws for Federal mutual savings associations. Paragraph (j)(2)(viii) requires the bylaws to specify that the Federal mutual association's board of directors consist of no fewer than five nor more than fifteen members unless the OCC has authorized a higher or lower number. However, unlike the corresponding provision for Federal stock savings associations, 12 CFR 5.22(l)(2), paragraph (j)(2)(viii) does not explicitly address numbers of directors authorized by the former OTS. Accordingly, the final rule revises this paragraph to explicitly acknowledge that authorizations by the former OTS remain effective.

Current paragraph (j)(3) contains the filing requirements for changes to Federal mutual savings association bylaws. Currently, all bylaw amendments require some sort of filing with the OCC. As with the charter amendments discussed above, the OCC reorganizes these provisions in the final rule to clarify the procedures Federal mutual savings associations must follow in adopting bylaw amendments and to align the terminology with that used in part 5. The OCC also is eliminating the filing requirement for savings associations that adopt without change the OCC's model or optional bylaws, thereby reducing burden for these Federal mutual savings associations. As a result, these amendments specify that bylaw amendments are subject to a four-part regime: Application with expedited review, standard application, notice, and no filing required. As with the charter amendments, the final rule provides that a bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment. Additionally, the final rule makes two additional technical changes. First it corrects a cross reference in paragraph (j)(3)(i)(A) to correctly refer to paragraph (j)(3)(i)(B). Second, it changes the heading of proposed paragraph (j)(3)(ii) from ''Notice requirement'' to ''Corporate governance election and notice requirement'' to better reflect the subject of this paragraph.

As discussed later in this *Supplementary Information,* the OCC proposed technical changes throughout part 5, including replacing the word ''shall'' with another appropriate word or words. These technical changes, as well as other minor proposed wording changes, are included in the model charter and bylaw provisions provided

[23] *See* 85 CFR 34734 (June 5, 2020).

[24] *See* 85 FR 31943 (May 28, 2020). Because the final rule includes the changes made by the interim final rule, the OCC is not issuing a separate rulemaking to finalize the part 5 changes made by the interim final rule. Among other things, this interim final rule amended §§ 5.21 and 5.22 to permit an association's bylaws to provide for telephonic or electronic participation of members and shareholders, as applicable, at both annual and special meetings. These amendments also provide that members or shareholders participating telephonically or electronically at these meetings will be deemed present in person for purposes of the quorum requirement in §§ 5.21(j)(2)(v) or 5.22(k)(5), as applicable. In addition, this interim final rule requires Federal savings associations to have procedures in place for telephonic and electronic participation and provides associations with a choice of procedures to follow based on elected State corporate governance procedures, the Delaware General Corporation Law, or the Model Business Corporation Act. Further, this interim final rule clarifies that stock Federal savings associations may provide for telephonic or electronic participation at all board of directors meetings, as currently provided for mutual Federal savings associations. The OCC received one substantive comment letter on this interim final rule, which supported its amendments. In response to a request for comment in the preamble to this interim final rule, this commenter opposed any new risk management standards to mitigate any security risks arising from telephonic or electronic meetings, noting that new standards would be unnecessary given current safeguards and regulatory requirements. The OCC is not imposing any new risk management standards for telephonic or electronic meetings through this part 5 final rule.

[25] When provisions for Federal savings associations were added to § 5.42, the OCC did not include the prior rule's advance notice requirement. *See* 80 FR 28383 (May 15, 2015).

in revised § 5.21. As indicated in the preamble to the proposed rule, the OCC does not intend these technical changes to require any changes on the part of Federal mutual savings associations that use the current model language. Further, the OCC does not intend these technical changes to have any effect on the provisions or effectiveness of a Federal mutual savings association's current charter or bylaws.

Federal Stock Savings Association Charter and Bylaws (§ 5.22)

Section 5.22 governs the procedures and requirements for Federal stock savings association charters and bylaws. Section 5.22 generally parallels § 5.21, which applies to Federal mutual savings association charters and bylaws. The OCC proposed equivalent changes to § 5.22 as proposed for § 5.21. The OCC also proposed two additional technical amendments to § 5.22. Section 5.22 contains sample charter and bylaw provisions, and paragraph (g)(7) provides an optional ''Section 8'' for Federal stock savings association charters following mutual to stock conversions. This optional section contains a definition of ''acting in concert.'' The OCC proposed minor wording changes to this definition for consistency with the definition of this term in the OCC's change in bank control regulation, § 5.50. The OCC also proposed correcting a cross-reference to 12 CFR part 192 in paragraph (e). The OCC received no comments on the revisions to § 5.22 and adopts them as proposed, with additional technical amendments. First, as discussed above regarding § 5.21, the final rule amends paragraph (g)(1) to reflect that change of a Federal savings association's title does not require prior OCC notice under § 5.42. Second, the final rule corrects the cross-reference in paragraph (i) to the form ''Federal stock charter.'' Third, the final rule changes the heading in proposed paragraph (j)(2)(ii) from ''Notice requirement'' to ''Corporate governance election and notice requirement'' to better reflect the subject of this paragraph. Fourth, the final rule amends paragraphs (k)(1) and (l)(3) and (8) to reflect the changes made by the OCC's interim final rule on Director, Shareholder, and Member Meetings.[26] Fifth, the final rule corrects cross-references in paragraphs (k)(2) and (k)(4)(ii). Finally, the final rule amends paragraph (m)(2) to remove the sentence that provides that employment contracts shall conform with 12 CFR 163.39 because the OCC removed § 163.39 in a separate final rule.[27]

Conversion To Become a Federal Savings Association (§ 5.23) and Conversion To Become a National Bank (§ 5.24)

Sections 5.23 and 5.24 are largely parallel rules that provide the procedures and standards for OCC review and approval of an application by an institution to convert to a Federal savings association or national bank, respectively. The OCC proposed a number of amendments to these sections and did not receive any comments. Therefore, the OCC adopts these amendments as proposed.

First, § 5.23(d)(2)(ii)(A) and 5.24(e)(2)(i) each require the president or other duly authorized officer to sign the conversion application. OCC applications also require an authorized signature. However, these sections are the only provisions in part 5 that require an authorized officer to sign the application. The final rule removes §§ 5.23(d)(2)(ii)(A) and 5.24(e)(2)(i) because the OCC does not find it necessary to specify this signature requirement in a regulation.

Second, the ''Conversions to Federal Charter'' booklet of the *Comptroller's Licensing Manual* indicates that filers should include a list of directors and senior executive officers of the converting institution as well as a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the converting institution's stock. It is necessary for the OCC to have a complete list of these individuals because the OCC generally conducts routine background investigations as part of the application process. The final rule codifies these requirements in §§ 5.23(d)(2)(ii) and 5.24(e)(2). Additionally, the final rule makes a technical change to redesignated § 5.23(d)(2)(ii)(F) to correctly reference § 5.58 for Federal savings association equity investments, rather than § 5.36, which applies to national banks.

Furthermore, as proposed, the final rule adds a new paragraph to each of these rules, §§ 5.23(d)(2)(iv) and 5.24(e)(4), providing that the OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report and legible fingerprints. This amendment codifies the background investigation process set forth in the ''Conversions to Federal Charter'' booklet of the *Comptroller's Licensing Manual* and specifically authorizes the collection of fingerprints for conversion applications, consistent with the background investigation changes proposed to other sections in this final rule.

Sections 5.23(d)(4) and 5.24(h) provide for expedited review for conversion from an eligible national bank to a Federal savings association, and vice versa. Currently, this conversion application is deemed approved as of the 60th day after the OCC receives the filing. As noted in the preamble to the proposed rule, the OCC believes that it can review and decide these conversion applications in a shorter period because it already supervises an entity eligible to use the expedited review process. Accordingly, the final rule decreases the time period for the expedited review to 45 days. The final rule also makes a technical change to § 5.23(d)(4) to remove the modifier ''national'' before bank as the defined term in § 5.3 is ''eligible bank.'' This deletion does not change the scope of institutions eligible for expedited review as only a national bank, and not a State bank, may be an eligible bank under the definition in § 5.3.

Fiduciary Powers of National Banks and Federal Savings Associations (§ 5.26)

Section 5.26 contains the application requirements and processes for a national bank or Federal savings association to engage in the exercise of fiduciary powers. Paragraph (e)(2)(i)(C) requires a national bank or Federal savings association to submit sufficient biographical information on proposed trust management personnel as part of an application for fiduciary powers. The OCC proposed two changes to this paragraph and did not receive any comments. Therefore, the OCC adopts them as proposed. Because the scope of the term ''trust management personnel'' in paragraph (e)(2)(i)(C) is unclear, the final rule clarifies that the biographical information is required for proposed senior trust management personnel, as identified by the OCC. The final rule also provides that the application required in paragraph (e)(2)(i)(C) include, if requested by the OCC, the Interagency Biographical and Financial Report and legible fingerprints for these individuals, consistent with the background investigation changes made to other sections of part 5 by this final rule.

Section 5.26(e)(6) requires a national bank or Federal savings association to submit a written notice to the OCC no later than 10 days after it begins

[26] *See* 85 FR 31943 (May 28, 2020).

[27] *See* 85 FR 42630 (July 14, 2020).

previously approved fiduciary activities in additional States. The OCC proposed to reorganize this paragraph with no substantive changes. No commenters discussed this reorganization and the OCC adopts it as proposed. Under the final rule, paragraph (e)(6)(i) generally requires a written notice after the national bank or Federal savings association begins any of the activities specified in 12 CFR 9.7(d) in a new State. Paragraph (e)(6)(ii) requires the notice to include the new States, the fiduciary activities to be conducted, and the extent to which the activities differ materially from the fiduciary activities currently conducted. Paragraph (e)(6)(iii) provides that no notice is required if the information required by paragraph (e)(6)(ii) is provided by other means, such as in a merger application. Finally, the final rule redesignates current paragraph (iii), which provides that no notice is required if the national bank or Federal savings association is conducting only activities ancillary to its fiduciary business through a trust representative office or otherwise, as paragraph (iv).

One commenter discussed § 5.26(e)(5), which the OCC did not propose to amend. This provision requires a national bank or Federal savings association that has ceased to conduct previously approved fiduciary powers for 18 consecutive months to provide the OCC with a new notice as set forth by this section 60 days prior to commencing any fiduciary activity. The commenter requested that the OCC change this 18 month time period to five years. The commenter noted that five years would be consistent with 12 U.S.C. 92a(k), which allows the OCC to revoke the authority to engage in fiduciary activities if the national bank has not exercised it for five consecutive years. The OCC disagrees with this commenter's recommendation and continues to believe, as discussed when the OCC originally adopted this requirement in 2015, that an 18-month time period is appropriate to ensure that the management and condition of a national bank or Federal savings association has not changed since the OCC's original approval of the fiduciary activities.[28] Further, this 18-month notification period enables the OCC to allocate supervisory resources to evaluate the institution when it resumes fiduciary activities. Lastly, § 5.26(e)(5) requires notice to the OCC, and not OCC approval. Therefore, the OCC does not find this requirement to be overly burdensome.

Establishment, Acquisition, and Relocation of a Branch of a National Bank (§ 5.30)

Section 5.30 describes the application procedures to establish and relocate a national bank branch. Paragraph (d) provides definitions applicable to § 5.30. The OCC proposed two amendments to paragraph (d). First, paragraph (d)(1)(i) lists certain types of facilities that are considered branches. The OCC proposed to reorder this list so that the reference to 12 U.S.C. 36(c) applies only to seasonal agencies and not to the other types of facilities. Second, paragraph (d)(1)(iii) specifies that remote service units (RSUs) and certain types of offices are not within the definition of ''branch.'' The OCC proposed to clarify this provision by adding both a cross-reference to the description of RSUs contained in 12 CFR 7.4003 [29] and a reference to automated teller machines (ATMs), including interactive ATMs, codifying OCC Interpretive Letter No. 1165 (August 2019).[30] As discussed in this interpretive letter, a national bank establishment of an interactive ATM does not constitute establishing a branch if the machine meets the definition of an ATM used for purposes of 12 U.S.C. 36 consistent with OCC interpretations, and the nature of the interactions between the customer and remote bank personnel are delimited as would be the case with an RSU. The OCC received no comments on these amendments and adopts them as proposed.

One commenter requested that the OCC amend the definition of ''mobile branch'' in § 5.30(d)(5) to clarify that a mobile branch may be located at one location for up to four months without requiring an application for a temporary branch. Currently, paragraph (d)(5) defines ''mobile branch'' as a branch of a national bank, other than a messenger service branch, that does not have a single, permanent site, and includes a vehicle that travels to various public locations to enable customers to conduct their banking business. Pursuant to this definition, a mobile branch may provide services at various regularly scheduled locations or it may be open at irregular times and locations such as at county fairs, sporting events, or school registration periods. The OCC agrees that the rule does not clearly indicate how long a mobile branch may serve one location before losing its status as a mobile branch and that clarity and uniformity on this point would be helpful. Further, the OCC finds that locating a mobile branch at one location for a limited period of time without having to continuously move it back and forth to this location to prevent it from losing its status as a mobile branch would be useful in certain circumstances, especially during emergency situations such as weather-related emergencies or during the current COVID–19 pandemic. Therefore, the OCC is clarifying in the final rule that a mobile branch may be stationed continuously at a single location within the geographic area it is approved to serve for a period of up to four months. The OCC views this new language as interpretive. The OCC notes that a mobile branch is only permitted in States where a State bank is permitted to establish a mobile branch. Because State statutes restricting mobile branch locations are applicable to national banks, if a State statute restricts how long a mobile branch could serve a given location, that restriction is applicable to national bank mobile branches in that State.

In the preamble to the proposed rule, the OCC noted that it is considering one additional change to the definition of ''branch'' in paragraph (d). Paragraph (d)(1)(ii)(B) provides that a facility is not a branch if it is located at the site, or is an extension, of an approved main office or branch office of the national bank. The rule further provides that the OCC determines whether a facility is an extension of an existing main office or branch office on a case-by-case basis. However, the rule deems a drive-in or pedestrian facility located within 500 feet of a public entrance to an existing main office or branch office to be an extension of the existing main office or branch office, provided the functions performed at the drive-in or pedestrian facility are limited to functions that are ordinarily performed at a teller window, without the OCC's case-by case analysis. The OCC requested comment on expanding this 500 foot distance to 1,500 feet. One commenter supported this increase. However, after further review, the OCC has concluded that 500 feet is a more appropriate limit for a facility to have the benefit of automatic treatment as an extension of the main office or branch.[31] Furthermore, a

[28] *See* 80 FR 28345, at 28365 (May 18, 2015).

[29] The OCC notes that it has proposed to renumber 12 CFR 7.4003 to 12 CFR 7.1027 in a separate rulemaking. *See* 85 FR 40794 (July 7, 2020). The OCC will update this cross-reference in § 5.30 if it finalizes this renumbering.

[30] OCC Interpretive Letter No. 1165, Legal Requirements for the Establishment of Interactive Automated Teller Machines (August 2019), available at *https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2019/int1165.pdf.*

[31] The OCC also stated that it was considering the same change for a drive-in or pedestrian office of

facility at a distance greater than 500 feet may still be considered an extension of the main office or branch based on the OCC's case-by-case analysis. The OCC believes this current rule provides adequate flexibility without the need to increase the regulatory distance threshold.

Finally, the OCC proposed a technical change to paragraph (f), which provides the procedures for establishing a national bank branch. Paragraph (f)(1) requires each national bank that proposes to establish a branch to submit an application to the OCC, except in the case of messenger services as specified in paragraph (f)(2). However, paragraph (f)(3) provides that if a national bank proposes to establish a branch jointly with one or more national banks or other depository institutions, only one of the national banks must submit a branch application and this bank may act as agent for the other institutions. Even if a single application is submitted for a joint branch, the OCC still considers the relevant factors for each national bank. The OCC proposed including paragraph (f)(3) as an additional exception to the application requirement in paragraph (f)(1), thereby conforming these two paragraphs. The OCC received no comments on this change and adopts it as proposed.

Establishment, Acquisition, and Relocation of a Branch and Establishment of an Agency Office of a Federal Savings Association (§ 5.31)

Section 5.31 describes application and notice procedures for the establishment, acquisition, or relocation of a Federal savings association branch. Paragraph (j), implementing section 5(m) of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1464(m)), requires a Federal or State savings association to obtain prior OCC approval to establish or move a branch or move its principal office in the District of Columbia. The OCC proposed to add a new paragraph (j)(3) to clarify that a branch in the District of Columbia includes any location at which accounts are opened, payments are received, or withdrawals made, including ATMs that perform one or more of these functions. This amendment implements court opinions finding that ATMs that accept deposits or disburse funds against a customer's account constitute a branch.[32] Although Congress amended 12 U.S.C. 36(j) to remove ATMs and RSUs from the definition of a national bank ''branch,'' Congress has not similarly amended section 5(m) of the HOLA. Therefore, the OCC and OTS have long taken the position that an ATM established by a savings association in the District of Columbia constitutes a branch requiring approval. The OCC did not receive any comments on this proposed amendment and adopts it as proposed. Because new paragraph (j)(3) codifies the OCC's existing legal interpretation, the OCC believes that this amendment does not add any regulatory burden to savings associations.

Business Combinations Involving a National Bank or Federal Savings Association (§ 5.33)

Section 5.33 provides the application requirements and procedures for business combinations involving national banks and Federal savings associations, such as mergers, consolidations, and certain purchase and assumption transactions. The OCC proposed several changes to this section.

Paragraph (e) of § 5.33 sets forth policies the OCC considers when evaluating business combinations. Paragraph (e)(1)(ii)(F) provides that the OCC will not approve a transaction that would violate the deposit concentration limit in 12 U.S.C. 1828(c)(13). Only interstate merger transactions as defined 12 U.S.C. 1828(c)(13)(C)(i) are subject to this deposit concentration limit. The OCC proposed adding a reference to 12 U.S.C. 1828(c)(13)(C)(i) in paragraph (e)(1)(ii)(F) for clarity. The OCC did not receive any comments on this change and adopts it as proposed.

Paragraph (e)(1)(iii) provides the OCC's policy for evaluating business combinations under the CRA. Under 12 U.S.C. 2903(a)(2), the OCC must evaluate an insured national bank's or Federal savings association's CRA record when evaluating its application for a business combination. The OCC proposed three changes to paragraph (e)(1)(iii). First, the OCC proposed a new paragraph (e)(1)(iii)(A) to better describe the OCC's review of a business combination and to more closely track the statutory language under which the OCC is required to assess the track record of the applicant. This paragraph specifies that the OCC takes into account the filer's CRA record of performance in considering an application for a business combination. It also states that the OCC's conclusion of whether the CRA performance is or is not consistent with approval of an application is considered in conjunction with the other factors in § 5.33, codifying the OCC's practice of evaluating all policy factors in light of the whole application as set forth in the OCC's Policies and Procedures Manual (PPM–6300–2).

One commenter supported the clarification that the OCC will consider the institution's CRA's performance in conjunction with the other factors in § 5.33, stating that this change is consistent with statutory requirements and codifies existing OCC practice. Another commenter said that it would break with precedent to remove the provision providing that the OCC will take into account the CRA record of the target institution. This commenter also stated that this change would impair the public's ability to comment and render the OCC unable to fully consider the public benefit of the proposed merger as required by the CRA statute. The commenter stated that only a review of the CRA performance of both the target and the acquiring bank provides a full understanding of likely future CRA performance and the resultant bank's ability to meet the convenience and needs of the communities it serves.

The OCC disagrees with this commenter. The OCC's review of an institution's CRA performance is retrospective, while the OCC's review of a business combination application is prospective. As noted in the preamble to the proposed rule, OCC practice is to consider and evaluate a filer's record of performance under the CRA and, more broadly, the filer's plans and ability to enable the combined organization to serve the convenience and needs of its communities. Thus, the target's CRA record will inform the convenience and needs analysis but is not in of itself a factor in the OCC's review of the application. Additionally, the OCC notes that public benefit is not a statutory factor the OCC must consider despite the comment's reference to it as such. [33] The OCC therefore adopts this new paragraph (e)(1)(iii)(A) as proposed.

Second, the OCC proposed a new paragraph (e)(1)(iii)(B) to recognize the expanded community reinvestment compliance review required by 12 U.S.C. 1831u(b)(3) when the filing national bank would have a branch or bank affiliate immediately following the transaction in any State in which the filer had no branch or bank affiliate immediately before the transaction. Specifically, this new paragraph provides that the OCC considers the CRA record of performance of the filer and its resulting bank affiliates and the filer's record of compliance with

a Federal savings association, in 12 CFR 5.31. To maintain consistency between national bank and Federal association rules, the OCC also declines to move forward with expanding the 500 foot distance rule to 1,500 feet in § 5.31.

[32] *See Independent Bankers Ass'n of New York State, Inc.* v. *Marine Midland Bank, N.A.,* 757 F.2d 453, 458 (2d Cir. 1985) (collecting cases).

[33] *See* 12 U.S.C. 1828(c)(5).

applicable State community reinvestment laws when required by 12 U.S.C. 1831(b)(3). The OCC received no comments on this new paragraph and adopts it as proposed.

Third, the OCC proposed a new paragraph (e)(1)(iii)(C) requiring the filer to disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2, in accordance with 12 CFR 35.6 and 35.7. These regulations implement the CRA sunshine requirements of section 48 of the FDI Act, 12 U.S.C. 1831y. Requiring disclosure of any covered agreements will better permit the OCC to review the filer's CRA record and any CRA-related comments on the filing. One commenter supported the disclosure of these covered agreements. Therefore, the OCC adopts this new paragraph as proposed. The final rule also includes a technical amendment that changes the heading of paragraph (e) from ''*Policy*'' *to* ''*Policy and related filing requirements*'' to better reflect the contents of this paragraph.

This commenter also stated that the regulators should work with community groups and banks on the development of a process for recognizing these agreements during the merger application process and for their implementation to become a factor on CRA performance evaluations. The OCC agrees that these agreements may provide the OCC with context on the credit needs of the community served during the application process. However, the OCC and the other Federal banking regulators have long held the position that these agreements are private agreements between depository institutions and private parties. Therefore, the Federal banking regulators do not monitor compliance with, nor enforce, these agreements.[34] Because they are private agreements, a bank's compliance with these agreements should not be a factor in the OCC's decision on an application.

The OCC noted in the preamble to the proposed rule that it is considering whether to require a filer to memorialize and publish any discussion between the filer and any third party with respect to the development of any community reinvestment plan, community benefit plan, or similar plan in connection with a business combination. Two commenters opposed this idea. One commenter stated that the requirement to memorialize discussions would be burdensome, frivolous, and extraneous because all relevant information is included in the final plan. This commenter also stated that such a requirement may cause disagreements about what is covered and what constitutes an acceptable level of memorialization. In addition, this commenter noted that this requirement would discourage community participation in discussions for these agreements. The second commenter stated that this requirement could have a chilling effect on discussions between filers and third parties causing them to be less candid during these discussions, reducing the likelihood of reaching an agreement. This commenter also stated that the filer and third party may disagree in the way in which the discussion has been memorialized. Lastly this commenter noted that this requirement would duplicate the CRA sunshine requirements in 12 CFR part 35, which provides the circumstances under which these discussions should be made public.

The OCC disagrees with these comments and is adding a new paragraph in the final rule requiring that the national bank or Federal savings association submitting a business combination filing must provide summaries of, or documents relating to, all substantive discussions with respect to the development of the content of a covered agreement submitted pursuant to new paragraph (e)(1)(iii)(C)(*1*). This summary must include the names of participants, dates, and synopsis of these discussions. The OCC believes that memorializing and disclosing discussions between a national bank or Federal savings association and a community group during the development of an agreement promotes transparency and results in a fairer and more robust agreement for both the financial institution and the community served by the institution, furthering the intent of the CRA Sunshine statute as well as providing the OCC with additional context during the application process on the credit needs of the community served. The OCC does not expect minor or trivial communications to be memorialized; for example, discussions regarding scheduling or staffing need not be documented. However, national banks and Federal savings associations will need to memorialize and disclose substantive discussions pertaining to the content of a plan. This documentation may consist of summaries or transcripts of the discussions, or work product produced to further the negotiations, such as summaries of suggested terms of the plan. Further, to avoid conflicts between the institution and the community group, the institution may share the documentation with the community group prior to disclosure. Because national banks and Federal savings associations already should be documenting these discussions in the course of normal business operations, and because many of the documents are already produced as part of the negotiating process, the OCC believes that any additional burden placed on banks and savings associations will be minimal and will be outweighed by the benefit of ensuring transparency in the development of these plans in connection with a business combination.

The OCC also proposed a new paragraph (e)(1)(iv) to state that the OCC considers the standards and requirements contained in 12 U.S.C. 1831u for interstate merger transactions between insured banks, when applicable. Current paragraph (h) describes the application of 12 U.S.C. 1831u to combinations between insured banks with different home states. As part of the reorganization of paragraphs (g) and (h), discussed below, the OCC proposed instead to include its review of the 12 U.S.C. 1831u factors in paragraph (e)(1) for clarity. The OCC received no comments on this change and adopts it as proposed.

Paragraph (e)(8)(ii) requires a national bank or Federal savings association with one or more classes of securities subject to registration under sections 12(b) or (g) of the Securities Exchange Act of 1934 to file preliminary proxy material or information statements with the Director, Securities and Corporate Practices Division (SCP) of the OCC. As a result of an internal reorganization, the OCC proposed replacing the reference to SCP in paragraph (e)(8)(ii) with the OCC Chief Counsel's Office. The OCC received no comments on this change and adopts it as proposed.

Paragraph (g) provides procedures for different types of consolidations and mergers. Paragraph (o) provides general procedures for approval of Federal savings association business combinations. These paragraphs provide detailed procedures for national banks and Federal savings associations engaging in several different types of business combinations. Some of these requirements are imposed by statute. Specifically, 12 U.S.C. 215 and 215a provide procedures for consolidations and mergers, respectively, between national banks and State or national banks located in the same State resulting in a national bank. Similarly, 12 U.S.C. 214 through 214d provide procedures for consolidations and

[34] *See* the Interagency Questions and Answers Regarding Community Reinvestment, Q&A § __ .29(b)—2, 81 FR 48506 (July 25, 2016).

mergers between national banks and State banks located in the same State resulting in a State bank. Other consolidation and merger transactions described in § 5.33 do not have any statutory procedures, including interstate consolidations and mergers involving a national bank under 12 U.S.C. 215a–1; consolidations and mergers of national banks and Federal savings associations under 12 U.S.C. 215c and 1467a(s); consolidations and mergers of Federal savings associations and State banks, State savings associations, State trust companies, or credit unions under 12 U.S.C. 1464(d)(3)(A) and 1467a(s); and mergers of national banks with their non-bank affiliates under 12 U.S.C. 215a–3.

In order to increase flexibility and reduce regulatory burden for national banks and Federal savings associations involved in business combinations for which procedural requirements are not specified by statute, the OCC proposed a number of changes to these procedural provisions. First, the OCC proposed that a national bank may follow the procedures for mergers and consolidations under sections 2 and 3 of the National Bank Consolidation and Merger Act (NBCMA) currently provided in paragraph (g) for the specific transaction.

Second, the OCC proposed that a national bank or Federal savings association may elect to follow the procedures applicable to a State bank or State savings association, respectively, chartered by the State in which the national bank's main office or the Federal savings association's home office is located. In connection with this election, the OCC proposed rules of construction so that the State procedures function logically for national banks and Federal savings associations. Specifically, any references to a State agency in the applicable State procedures would be read as referring to the OCC. Additionally, unless otherwise specified in Federal law, all filings required by the applicable State procedures would be made to the OCC. Requiring filings prescribed by State law to be made with the OCC, rather than a State agency, is consistent with past OCC practice for certain transactions under State corporate governance procedures adopted pursuant to 12 CFR 7.2000.[35]

Third, the OCC proposed that the national bank or Federal savings association that is the acquiring institution in a transaction may follow a *de minimis* procedure that does not require a shareholder vote pursuant to proposed § 5.33(p) if certain criteria are met. Proposed § 5.33(p) is similar to the *de minimis* exception to general shareholder voting requirements for Federal stock savings associations in current § 5.33(o)(3)(ii), which applies if the transaction does not involve an interim savings association; the Federal savings association charter does not change; each share of stock outstanding will be identical to an outstanding share or treasury share after the effective date of the transaction; and either no stock or securities convertible into stock will be issued or delivered under the plan of combination, or the authorized unissued shares or treasury shares of the resulting Federal savings association to be issued or delivered, plus those initially issuable upon conversion of any securities to be issued or delivered, do not exceed 15 percent of the total shares of voting stock outstanding immediately prior to the effective date of the consolidation or merger.

The OCC proposed making this *de minimis* exception available to a national bank engaging in transactions not subject to statutory procedural requirements as well as a Federal stock savings association in new paragraph (p) with two revisions. First, the OCC proposed permitting certain combinations involving an interim bank or savings association. Specifically, a national bank or Federal stock savings association engaging in a transaction involving an interim bank or interim saving association would potentially be able to use the procedures in paragraph (p) if the existing shareholders of the national bank or Federal stock savings association would directly hold the shares of the resulting national bank or Federal stock savings association. In promulgating an amendment to the predecessor to current § 5.33(o)(3)(ii), the Federal Home Loan Bank Board, the predecessor to OTS, stated that ''[a]lthough the ownership interests of shareholders of a reorganizing association generally do not undergo substantive change upon a reorganization into holding company form, the Board believes that shareholders should, nevertheless, be given an opportunity to approve or disapprove a plan of reorganization.'' [36] The OCC believes that in a transaction involving reorganization into a holding company structure, shareholders of the national bank or Federal stock savings association should have the opportunity to vote. However, the OCC believes that a national bank or Federal stock savings association may engage in transactions involving interim banks or savings association that do not involve holding company reorganizations where shareholder votes are not necessary, if the rest of the requirements of proposed paragraph (p) are met.

Second, to provide additional flexibility, the OCC also proposed increasing the maximum issuance of shares eligible under this procedure for both national banks and Federal savings associations from 15 percent of total outstanding shares to 20 percent. This change mirrors the 20 percent threshold in similar procedures under Delaware law.[37]

The new procedural options described above would apply to: (1) Consolidations and mergers of national banks and Federal savings associations under 12 U.S.C. 215c and 1467a(s), resulting in either a national bank or Federal savings association; (2) consolidations and mergers of Federal savings associations and State banks, State savings associations, State trust companies, or credit unions under 12 U.S.C. 1464(d)(3)(A) and 1467a(s), resulting in either a Federal savings association or another entity; and (3) mergers of national banks with their non-bank affiliates under 12 U.S.C. 215a–3, resulting in either a national bank or a non-bank affiliate.

The new procedural options also would apply to interstate consolidations and mergers involving a national bank under 12 U.S.C. 215a–1 based on a revised analysis of the NBCMA. As indicated in the preamble to the proposed rule, the OCC formerly opined in licensing decisions that 12 U.S.C. 215a–1 incorporates the provisions of 12 U.S.C. 215 for consolidations and 12 U.S.C. 215a for mergers.[38] Twelve U.S.C. 215a–1 is the codification of section 4 of the NBCMA, which was enacted by section 102(b)(4)(D) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.[39] Twelve U.S.C. 215 and 215a are codifications of sections 2 and 3 of the NBCMA, respectively. Section 4 of the NBCMA states that ''a national bank may engage in a consolidation or merger *under this Act* with an out-of-State bank if the consolidation or merger is approved'' (emphasis added) [40] under 12 U.S.C. 1831u, which sets out requirements for interstate mergers of insured banks. In prior licensing decisions, the OCC interpreted ''under this Act'' to mean that an interstate

[35] *See, e.g.,* OCC Conditional Approval No. 859 (July 2008).

[36] 47 FR 17797 at 17799 (Apr. 26, 1982).

[37] *See* Del. Code Ann. tit. 8, § 251(f).

[38] *See, e.g.,* OCC CRA Decision No. 94 (June 1999).

[39] Public Law 103–328, 108 Stat. 2338, 2351.

[40] 12 U.S.C. 215a–1(a).

consolidation or merger authorized under section 4 of the NBCMA is a consolidation or merger under section 2 or 3 of the NBCMA, respectively, and thus subject to the procedural provisions of those sections with respect to shareholder vote, dissenter's rights, and other matters as well as the substantive provisions addressing corporate succession, transfer of assets, liabilities, property, rights and interests including fiduciary appointments, and the status of the resulting bank (collectively ''corporate succession provisions''). In other words, section 4 extended sections 2 and 3, which cover consolidations and mergers between banks located in the same state, to also cover consolidations and mergers between banks with different home states. The OCC therefore implemented the NBCMA in § 5.33(h) by applying these provisions of sections 2 and 3 of the NBCMA to transactions authorized under section 4 of the NBCMA.

However, after further analysis, the OCC believes that the proper reading of section 4 of the NBCMA is that it does not directly incorporate any provisions of sections 2 or 3 of the NBCMA. As noted above, the OCC previously focused on the phrase ''under this Act'' as imposing the requirements of sections 2 and 3 on a merger conducted under section 4. However, the statutory language is ambiguous and does not require the OCC to incorporate any of the provisions in sections 2 or 3 of the NBCMA. Upon further consideration, the OCC believes the text taken in its entirety may be read as merely specifying the source of the authority and imposing the requirement that the consolidation or merger be approved under section 1831u, but not imposing additional requirements or conditions with which the bank must comply. As there are no other sections of the NBCMA under which an interstate merger between banks with different home States could be conducted in cases in which the acquiring bank does not have branches in the same State as the target bank, [41] ''under this Act'' can be read to refer only to section 4 itself. Since section 4 of the NBCMA, 12 U.S.C. 215a–1, does not contain any substantive or procedural provisions, there are no statutory procedures for interstate bank mergers under 12 U.S.C. 215a–1 resulting in a national bank. Therefore, the new proposed procedures described above apply to these section 4 transactions.

In addition to new paragraph (p), the OCC proposed implementing the changes discussed above through revisions to paragraphs (g), (h), and (o). Specifically, the OCC proposed redesignating current paragraphs (g)(2), (g)(3), (g)(6), and (g)(7) as paragraphs (g)(3), (g)(6), (g)(7), and (g)(9), respectively. The proposal included new paragraph (g)(2) that provides procedures for interstate consolidations and mergers under 12 U.S.C. 215a–1 resulting in a national bank and paragraph (g)(8) providing procedures for interstate mergers between an insured national bank and an insured State bank resulting in a State bank. Procedures for these transactions are currently contained in paragraph (h). New paragraphs (g)(2) and (g)(8) include an option to follow the procedures for intrastate mergers resulting in a national bank or State bank in paragraphs (g)(1) and redesignated paragraph (g)(7), respectively. The proposal also included in new and redesignated paragraphs (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), and (g)(8) a reference to a national bank making an election under paragraph (h). Revised paragraph (h) would permit a national bank to elect to follow the procedures of the laws of the State which the national bank association has elected to follow pursuant to 12 CFR 7.2000(b) or to use the *de minimis* procedure in new paragraph (p) if applicable. Further, the proposal included a new corporate succession provision in new paragraph (g)(2)(iv) for interstate mergers resulting in a national bank to ensure that the resulting bank succeeds to the rights, franchises, and interests, including the fiduciary appointments, of the consolidating or merging banks. The proposal also included coordinating revisions to cross-references to paragraph (g).

For Federal savings associations, the OCC proposed reorganizing paragraph (o) to contain the election procedures. Revised paragraph (o)(1)(i) permits a Federal savings association to follow the procedures applicable to a State savings association chartered by the State where the Federal savings association's home office is located or to follow the standard procedures in revised paragraph (o)(2). As discussed above for national banks, revised paragraph (o)(1)(ii) would direct Federal savings associations to read references to State agencies as the OCC and to make filings generally with the OCC.

Revised paragraph (o)(2) would contain the procedures in current paragraphs (o)(1) and (o)(3) governing board and shareholder votes, respectively. The proposal changed the *de minimis* exception to the shareholder voting requirement in current paragraph (o)(3)(ii), redesignated by the proposal as paragraph (o)(2)(ii)(B), to a cross-reference to new paragraph (p) and redesignated current paragraph (o)(2) regarding the Federal savings association's change in name or home office as paragraph (o)(3). Finally, the OCC proposed a technical amendment to revised paragraph (o)(2)(ii)(A), replacing the citation to 12 CFR 152.4 with the current citation, 12 CFR 5.22.

The OCC received one comment on these proposed procedures, which focused on national bank business combinations conducted under section 4 of the NBCMA. This commenter stated that the proposal contradicts prior OCC public precedent. The OCC acknowledges this is a reversal of the OCC's prior interpretation of section 4. However, an agency is permitted to change its position on an interpretation of law.[42] As noted above, the statutory language is ambiguous. The OCC's change of position is based on the OCC's belief, after further review, that reading the language in section 4 of the NBCMA in its entirety as authorizing a consolidation or merger with an out-of-State bank under the NBCMA if it is approved pursuant 12 U.S.C. 1831u, but not importing the substantive or procedural requirements of sections 2 and 3 into section 4 through oblique terminology is more in accordance with the statutory language. Moreover, the OCC notes that this commenter did not identify any reliance concerns implicated by the change in position, nor did the OCC receive any such comments from OCC-regulated entities

[41] An acquiring bank that has branches in the same State as the target bank but has a different home State than the target bank is also ''located'' in the same State as the target bank for purposes of sections 2 or 3. In this case, while the banks have different home states, the transaction can be conducted either under section 4 or under sections 2 or 3. *See Ghiglieri* v. *NationsBank of Texas, N.A.,* 1998 U.S. Dist. LEXIS 6637 (N.D. Texas, May 6, 1998); OCC Corporate Decision No. 98–19 (April 2, 1998).

[42] *See, e.g., Perez* v. *Mortgage Bankers Association,* 575 U.S. 92 (2015); *Federal Communications Commission* v. *Fox Television Stations,* 556 U.S. 502 (2009) (an agency must provide a reasonable explanation for the change in position. The depth of explanation depends on the degree of the change. The agency also should take into account the reliance interests of parties who have relied on the agency's prior interpretation.) *See also National Cable & Telecommunications Association* v. *Brand X internet Services.,* 545 U.S. 967, 981–82 (2005) (agency reconsiderations of prior interpretations entitled to judicial deference so long as the agency adequately explains the reasons for the change); *Motor Vehicle Manufacturers Association of the U.S., Inc.* v. *State Farm Mutual Automobile Insurance Company,* 463 U.S. 29, 43 (1983) (''agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made' '').

that could conceivably have such an interest.

This commenter also stated that the proposal contradicts prior OCC licensing decisions and has contradictory results, arguing that if sections 2 and 3 of the NBCMA cannot now be used to authorize a combination of a national bank with an out-of-State bank, then the OCC would need to reverse its prior interpretation set forth in previous business combination approvals that a bank is located in a State for purposes of sections 2 and 3 by virtue of having a branch in that State. The OCC disagrees with this point. As noted above, sections 2 and 3 authorize consolidations and mergers between insured banks that are located in the same State. Section 4 authorizes mergers between insured banks with different home States if the merger is approved under 12 U.S.C. 1831u. It stands on its own and is not tied to sections 2 and 3. However, the OCC is not changing its interpretation of sections 2 and 3 that was involved in the prior business combination approvals to which the commenter refers, namely, that an acquiring bank that has a different home State than the target bank but that has a branch in the target bank's State is located in the target bank's State for purposes of section 2 and 3.[43] The OCC continues to believe such banks could engage in the transaction under the authority of section 2 or 3 or, alternatively, could engage in the transaction under section 4. Neither the revised interpretation of section 4 nor the prior interpretation affects the applicability of sections 2 or 3 to such transactions. An interstate merger that must be conducted under section 4 because the acquiring bank is not located in the same State as the target bank would be conducted under the procedures that apply for transactions under section 4 at the time of the application (whether the procedures of section 2 or 3 of the NBCMA as under the current rule or the procedures available under the proposed rule). Thus, the commenter failed to distinguish between a transaction conducted under section 4 and following the procedures of sections 2 or 3, as in the OCC's prior interpretation of section 4, and a transaction conducted under sections 2 or 3.

In addition, this commenter argues that the proposed change may raise issues with respect to the Tenth Amendment, citing *Hopkins Federal Savings & Loan Association* v. *Cleary,*[44] noting that section 4 does not contain a ''not in contravention of State law'' provision. Sections 2 and 3 contain such a provision, and under the OCC's prior interpretation of section 4, that provision would have been incorporated into section 4. Under the OCC's new interpretation, this provision is not incorporated, and the commenter claims that raises an issue. The OCC does not agree that such language is needed in Section 4. Sections 2 and 3 include State banks within their scope, authorizing them to consolidate or merge with a national bank, but by virtue of a non-contravention provision in those sections, a State bank may not engage in a business combination pursuant to sections 2 and 3 with a national bank if it would contravene State law. However, section 4 (interpreted as a stand-alone provision, not incorporating sections 2 and 3) is directed only at national banks; it does not refer to State banks. Therefore, the OCC's proposal with respect to transactions authorized under section 4 does not affect State banks. A State bank can engage in an interstate merger with a national bank if the State bank has authority to do so under State law.

The commenter similarly suggests that failure to include a ''not in contravention of State law'' provision with respect to corporate succession in mergers conducted under section 4 raises issues under *Hopkins.* However, as noted, an interstate merger of a national bank and a State bank under section 4, resulting in a national bank, would occur only if the State bank had authority to engage in the merger under State law. Moreover, a Federal law providing for corporate succession and the transfer of property, fiduciary appointments, and other relationships in a merger with a resulting national bank does not raise the same concerns as a Federal law purporting to authorize a State bank to convert into a Federal institution, as in *Hopkins.*

Lastly, this commenter stated that the OCC did not adequately explain the proposed change regarding interim transactions appropriate for *de minimis* transactions. Per proposed § 5.33(g) and (o), a national bank or Federal savings association that is the acquiring institution in a transaction may elect not to have a shareholder vote if a vote is not required by statute and certain criteria are met, including the *de minimis* nature of the transaction. The proposed *de minimis* procedures in § 5.33(p) are similar to existing Federal savings association *de minimis* procedures except for two changes. First, they permit the use of the procedures for transactions that use interim charters that are not holding company reorganizations provided that the existing shareholders of the national bank or Federal savings association will directly hold the shares of the resulting national bank or Federal savings association and the national bank's articles or Federal savings association's charter is not changed. Second, they increase the maximum issuance of shares under this procedure from 15% total outstanding shares to 20%. The current Federal savings association regulation for *de minimis* transactions excludes those involving an interim because such transactions were commonly used in a reorganization to form a holding company and the OCC believes that shareholders in these transactions should have a vote. However, it is possible to have a transaction that involves an interim in which the existing institution and its shareholders continue as the surviving institution after the transaction in a manner that meets the requirements set out in the rule that the existing shareholders of the national bank or Federal savings association directly hold the shares of the resulting national bank or Federal savings association and the national bank's articles or Federal savings association's charter is not changed. In this case, there is no reason not to allow the acquiring institution to use the procedures in proposed paragraph (p).

For the reasons stated above, the OCC adopts the proposed procedures that a national bank or Federal savings association may elect for business combinations for which there are no statutory procedural requirements.

Current paragraph (k) of § 5.33 requires a national bank or Federal savings association engaging in a consolidation or merger in which it is not the filer and the resulting institution to file a notice with the OCC advising of its intention. This requirement currently applies even when the surviving institution is another national bank or Federal savings association. Because the OCC already supervises the surviving institution and has acted on the application for consolidation or merger, the OCC proposed removing

[43] *See Ghiglieri* v. *NationsBank of Texas, N.A.,* 1998 U.S. Dist. LEXIS 6637 (N.D. Texas, May 6, 1998); OCC Corporate Decision No. 98–19 (April 2, 1998). The prior OCC decisions referred to by the commenter, Corporate Decision No. 2001–29 (September 28, 2001); Conditional Approval No. 687 (April 25, 2005); Conditional Approval No. 1105 (Aug. 11, 2014), were instances of such transactions and were conducted under the authority of section 3, not under section 4.

[44] 296 U.S. 315, 337 (1935) (ruling that a statute allowing State-chartered institutions to convert to Federal charters without regard to State law violated the Tenth Amendment).

this requirement for the disappearing national bank or Federal savings association in this type of transaction and making a conforming revisions to paragraph (g). In such a case, the OCC already has the information that it needs to process termination and ensure that the disappearing national bank or Federal savings association has met all applicable requirements. The OCC received one comment on this provision, which supported the change. The OCC therefore adopts this change as proposed. The final rule also makes technical amendments to cross-references in paragraph (k)(4).

Current paragraph (n) provides authority for, and limits on, certain business combinations for Federal savings associations. In addition to consolidations, mergers, and other specified forms of business combinations, this paragraph addresses ''other combinations,'' the definition of which in § 5.33(d)(10) includes the transfer of any deposit liabilities to another insured depository institution, credit union, or other institution. Paragraph (n)(2)(iii) provides special requirements for mutual savings associations. Specifically, if any combining savings association is a mutual savings association, the resulting institution must be a mutually held depository institution insured by the FDIC, unless the transaction is approved under 12 CFR part 192 governing mutual to stock conversions or the transaction involves a mutual holding company organization under 12 U.S.C. 1467a(o) or a similar transaction under State law. Under the definition of ''other combination,'' § 5.33(n)(2)(iii) applies to any transfer of deposit liabilities, such as the sale of a branch, even if the mutual savings association still exists as an ongoing institution after the transaction. Accordingly, a branch sale would not be permissible unless the sale is to an insured mutual institution or either the mutual to stock or mutual holding company reorganization exception applied. The OCC proposed revising paragraph (n)(2)(iii) to state that a consolidation or merger involving a mutual savings association or the transfer of all or substantially all of the deposits of a mutual savings association must result in a mutually held depository institution insured by the FDIC unless one of the exceptions applies.

As noted in the preamble to the proposed rule, the OCC did not intend paragraph (n)(2)(iii) to apply to this type of transfer of deposit liabilities when it last amended this provision in 2015 (2015 Final Rule).[45] In fact, § 5.33(n)(4), which requires mutual savings associations to provide notice to accountholders of a proposed account transfer and to give them the option of retaining the account in the transferring Federal savings association if the account liabilities are transferred to an uninsured institution, contemplates just such an account transfer. In addition, the anomalous reading of § 5.33(n)(2)(iii) was not present in the pre-integration version of the Federal savings association combination rules.[46] Former 12 CFR 146.2(a)(4) contained a similar restriction on the resulting institution being a mutually held savings association with similar exceptions. However, § 146.2(a) applied to combinations, which was defined in 12 CFR 152.13(b)(1) as a merger or consolidation with another depository institution, or an acquisition of all or substantially all of the assets or assumption of all or substantially all of the liabilities of a depository institution by another depository institution. Accordingly, a branch purchase or other transfer of less than substantially all deposits was not a combination and thus not subject to the restrictions in § 146.2(a)(4). Furthermore, in the preamble to the 2015 Final Rule, the OCC did not describe paragraph (n)(2)(iii) as applying to transfers of less than substantially all deposits.[47]

The OCC did not receive any comments on this change to paragraph (n)(2)(iii) and adopts it as proposed.

The OCC also proposed adding an additional exception to paragraph (n)(2)(iii), as new paragraph (n)(2)(iii)(C). The OCC and OTS have permitted transactions where a mutual savings association transferred all of its deposits to a non-mutual savings association institution followed by the voluntarily liquidation of the mutual savings association. These transactions are subject to approvals or non-objections by the OCC. However, the literal reading of § 5.33(n)(2)(iii) may not permit such transactions. Accordingly, the OCC proposed adding a new exception to the requirement that the resulting institution be an insured mutual institution when the transaction is part of a voluntary liquidation for which the OCC has provided non-objection under § 5.48. The OCC received no comments on this change and adopts it as proposed.

Finally, the OCC proposed technical amendments to paragraph (l) to correct a typographical error and to revise paragraph (o)(2)(ii)(A) to replace the citation to 12 CFR 152.4 with the current citation, 12 CFR 5.22. The OCC received no comments on these technical amendments and adopts them as proposed. The final rule makes additional technical amendments to paragraphs (o)(2)(ii)(A) and (o)(2)(ii)(C) to correct cross-references, paragraphs (f)(3) and (g)(6) to properly reflect the reorganization of paragraph (g), and paragraph (g) to conform headings to the plural form.

Two commenters suggested changes to § 5.33 that were not included in the proposed rule. One of these commenters suggested that prefiling discussions between the OCC and national banks filing to engage in a business combination be memorialized and made public after the bank submits its application. The OCC notes that § 5.33 does not contain a requirement for prefiling meetings but that these meetings may occur. This commenter asserts that publication of these discussions would promote fairness and transparency and deter the OCC from giving unfair advantage to certain banks. The OCC disagrees with this commenter. Prefiling discussions generally concern confidential business and often supervisory information, which may not be disclosed. The OCC therefore is not including this suggestion in its final rule.

The other commenter suggested a change to § 5.33(e)(1)(ii), which lists the policies that the OCC considers when evaluating a business combination under the Bank Merger Act. Specifically, this commenter requested a change to paragraph (e)(1)(ii)(D), which states that the OCC considers the effectiveness of any insured depository institution involved in the business combination in combating money laundering activities, including in overseas branches. This commenter requested that the OCC change this provision to provide that, as the OCC proposed with respect to CRA, the OCC's conclusion of whether the filer's effectiveness in combatting money laundering activities is consistent with approval of an application be considered in conjunction with the other factors in § 5.33. The OCC disagrees with the commenter. CRA is a separate statute and is not included in the Bank Merger Act. However, 12 U.S.C. 1828(c)(11) requires the OCC to consider, among other factors, the effectiveness of insured depository

[45] 80 FR 28346 (May 18, 2015).

[46] The 2015 Final Rule integrated many licensing rules that apply to national banks and Federal savings associations.

[47] The OCC stated, ''in a merger or consolidation with a mutual Federal savings association, a mutual savings association must be the resulting institution.'' 80 FR 28346 at 28374 (May 18, 2015).

institutions' efforts in combating money laundering when evaluating proposals subject to the Bank Merger Act. The current regulatory text repeats this statutory requirement. In addition, banks with significant Bank Secrecy Act deficiencies may not have the capability to put in place sufficient controls to mitigate additional money laundering or terrorist financing risks associated with significant corporate activities.

Operating Subsidiaries of a National Bank (§ 5.34)

Section 5.34 provides the licensing requirements for a national bank's acquisition or establishment of an operating subsidiary or commencement of a new activity in an existing operating subsidiary. Paragraph (e)(2)(i) specifies what entities may qualify as an operating subsidiary. Paragraph (e)(2)(i)(A) requires that the national bank must have the ability to control the management and operations of the subsidiary and no other person or entity exercises effective operating control over the subsidiary or has the ability to influence the subsidiary's operations to an extent equal to or greater than that of the bank. The OCC proposed to clarify this provision by requiring that no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the bank or an operating subsidiary thereof. The OCC also proposed conforming amendments to current § 5.34(e)(5)(A)(3)(*i*), redesignated by the proposed rule as § 5.34(f)(2)(i)(C)(*l*), which contains a parallel requirement for operating subsidiary filings. Redesignated § 5.34(f)(2)(i)(C)(*l*) provides additional requirements for how the national bank must effectively control the operating subsidiary to be eligible to submit a notice to the OCC instead of an application to establish or engage in an activity in an operating subsidiary. The OCC received no comments on these changes and adopts them as proposed.

Section 5.34(e)(2)(ii) identifies certain subsidiaries that are not operating subsidiaries for purposes of § 5.34. The OCC proposed to replace the word ''subsidiaries'' with ''entities'' to further clarify the exclusion. The OCC received no comments on this change and adopts it as proposed.

The OCC also proposed a new paragraph (e)(2)(ii)(C) to specify that a trust formed for purposes of securitizing assets held by the bank as part of its banking business would not be considered an operating subsidiary. This proposal would codify the OCC's position that securitization trusts generally do not qualify as operating subsidiaries because of the bank's limited control over the trust and because beneficial interests in trusts lack many of the indicia of traditional equity. The OCC received two comments on this new paragraph. One commenter supported removing securitization trusts from the definition of operating subsidiary, but also proposed excluding trusts formed for the purpose of holding securities, off-lease property, real estate, and other assets held in satisfaction of debt previously contracted (DPC assets) from this definition. The OCC does not agree with this suggested change. The parent bank likely will have actual control and management of trusts holding securities, off-lease property, real estate, and other DPC assets. Therefore, the reasons for excluding securitization trusts from the definition of operating subsidiary are unlikely to be present for these trusts identified by the commenter.

A second commenter disagreed with the proposed change asserting that the OCC has not indicated any authority for the proposition that securitization trusts are not operating subsidiaries or non-controlling investments. The commenter also stated that the OCC has not adequately discussed the intent or expected impact of the proposal. As indicted above, the OCC generally has not treated the securitization trust as an operating subsidiary. The interests in securitization trusts typically are not the equivalent of ''equity'' for purposes of 12 CFR 5.34, 5.36, 5.38, and 5.58, and do not provide indicia of ''control'' for purposes of 12 CFR 5.34 and 5.38. Rather, the beneficial interest or any other interests retained in a securitization trust are more akin to economic interests than to traditional equity interests. The beneficial interests do not give rise to traditional voting power associated with equity interests in a corporation or LLC. Furthermore, securitization trusts are generally structured simply as a set of instructions for administering the securitization that are difficult to change. Given these factors, the bank does not control the trust in the traditional sense of directing its operations.

For the reasons discussed above, the OCC adopts new paragraph (e)(2)(ii)(C) as proposed.

Paragraph (e)(5) of § 5.34 provides the procedures for operating subsidiary filings. The OCC proposed to redesignate the majority of paragraph (e)(5) as paragraph (f) and to redesignate current paragraph (e)(6), addressing grandfathered operating subsidiaries, as paragraph (g). The OCC also proposed conforming revisions to cross-references. The OCC received no comments on these technical changes and adopts them as proposed.

Redesignated § 5.34(f)(2) contains the requirements for a national bank to qualify for the notice process for operating subsidiary filings. In addition to meeting additional control requirements and being well capitalized and well managed, paragraph (f)(2)(i)(A) permits a national bank to file a notice instead of an application if the activity is listed in paragraph (e)(5), redesignated by the proposal as paragraph (f)(5). The OCC proposed to expand the scope of this requirement to include any activity that is substantively the same as a previously approved activity and that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. As discussed previously in this *Supplementary Information,* the OCC proposed to define ''previously approved activity'' in § 5.3 to mean, for national banks, any activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank.[48] The OCC noted in the preamble to the proposed rule that the expansion of the notice requirement to activities that are substantively the same as previously approved activities does not relieve the national bank from the requirement to ensure that the operating subsidiary is only conducting permissible activities and would not affect the OCC's ability to take action if the OCC finds that the activities are not permissible or are conducted in an unsafe or unsound manner.

The proposal also raised as an alternative removing all filing requirements for national bank operating subsidiaries noting that a filing would not be required if the activity was conducted in the bank. Under this alternative, a national bank would be able to acquire or establish an operating subsidiary or commence a new activity in an existing operating subsidiary without filing a notice or application if the activity to be engaged in by the operating subsidiary is a permissible bank activity, provided the operating subsidiary meets the ownership and structural aspects currently required for notice and the national bank is well capitalized and well managed.

One commenter supported this alternative noting that no filing would be required if the activity were performed in the bank and contending

[48] As discussed, the final rule changes ''an activity approved'' to ''any activity approved.''

that there are safety and soundness reasons to reduce regulatory obstacles to conducting an activity in an operating subsidiary.[49] However, upon further consideration, the OCC has determined not to pursue this alternative at this time. The OCC would like experience with the new notice provision for an activity that is substantively the same as a previously approved activity before making a decision on removing all filings for operating subsidiaries. Therefore, the OCC is not including this change in the final rule.

This commenter also argued that the OCC should extend the proposal to fiduciary powers, stating that operating subsidiaries should be able to rely on the fiduciary powers of the parent national bank or Federal savings association without notifying or seeking approval from the OCC, so long as the parent national bank or Federal savings association was not required to notify or seek approval from the OCC prior to engaging in permissible bank activities. The commenter argued that this change would also obviate the need for many national banks and Federal savings associations to register an operating subsidiary as an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) when the subsidiary is exercising its investment discretion on behalf of its customers or providing investment advice for a fee under 12 CFR part 9 and therefore would substantially reduce regulatory burden.

The OCC disagrees with this comment. Regardless of the OCC's decision regarding the alternative proposal, the provision regarding fiduciary powers and investment advice activity is special and distinct. Current § 5.34(e)(5)(vii)(B) does not require an investment advisory subsidiary to be registered. Rather, the provision provides that if the subsidiary is registered, the national bank or Federal savings association need not have fiduciary powers, but if the subsidiary is not registered, then the national bank or Federal savings association must have fiduciary powers. This requirement is necessary to ensure that there will be some applicable law that will govern the conduct of the subsidiary, whether it is the Advisers Act or 12 CFR part 9.

The commenter further recommended that if the OCC does not eliminate filings for operating subsidiary fiduciary activities, the OCC should add the exercise of fiduciary powers to the list of activities for which no advance filing is required under 12 CFR 5.34(e)(5)(vi). The OCC disagrees with this recommendation because the proposal to expand the activities eligible for notice under § 5.34(e)(5)(v) to include all previously approved activities would already include most national bank subsidiary fiduciary activities.

The commenter also argues that subsidiaries engaging in the activities listed in § 5.34(e)(5)(v) are an example of why a bank's ability to establish an operating subsidiary should not be tied to the bank's management rating, as required by the proposed definition of ''well managed.'' The commenter contends that if a bank is well capitalized and has a satisfactory composite rating, it should be able to establish, without a separate regulatory approval, a subsidiary to engage in activities listed in § 5.34(e)(5)(v), such as the management and disposition of DPC assets. The commenter requests that the OCC retain the existing definition of ''well managed'' for this section, instead of the proposed definition which includes the management rating. The OCC disagrees with this comment. If a bank is not ''well managed'' it may lack sufficient internal controls and processes to properly manage an operating subsidiary, such as one managing DPC assets. As such, an application should be required. If the bank is well managed and well capitalized, it need only file a notice once, as it can rely on the provision in current § 5.34(e)(5)(vi) to form additional subsidiaries engaging in the same activity without any additional filing.

The commenter also suggests that, in the event that the OCC decides to retain some filing requirements, the OCC use a notice rather than an application when a national bank intends to acquire as an operating subsidiary an entity that engages in *de minimis* activities not permissible for a national bank. The OCC does not agree with this comment. Although *de minimis*-type provisions did exist in the past, all were removed after the passage of the Gramm-Leach-Bliley Act, Public Law 105–102. In addition, a financial subsidiary provides an alternative existing mechanism if a national bank wishes to use a subsidiary to conduct limited activities not permissible for a national bank.

For the reasons discussed above, the OCC adopts redesignated § 5.34(f) as proposed, with two technical amendments. First, the final rule removes unnecessary cross-references to § 5.3 for the definitions of ''well capitalized,'' ''well managed, '' and ''previously approved activity.'' As indicated above, the definitions in § 5.3 apply to all of part 5 so these cross-references are unnecessary. Additionally, the final rule corrects a cross-reference to redesignated § 5.34(f) in § 5.34(c) regarding ownership requirements applying to a foreign bank rather than its Federal branch. The OCC inadvertently did not adjust the current cross-reference in § 5.34(c) to § 5.34(e)(5)(i)(B) when it restructured the rule in 2008.[50] The final rule restores the cross-reference to the ownership requirement to file a notice under § 5.34, as was originally promulgated in 2001.[51]

Current paragraph (e)(7) requires national banks to file an annual report with the OCC describing operating subsidiaries that do business directly with consumers. The OCC publishes this information on its website. The OCC proposed to remove this requirement to reduce burden and because it generally duplicates information contained elsewhere, such as the FFIEC's National Information Center (NIC). In addition, the majority of the operating subsidiaries reported are now subject to the jurisdiction of the Consumer Financial Protection Bureau, and not the OCC, for most consumer law issues. The OCC received one comment on this proposal. The commenter supported the proposal and agreed that the existing regulation is redundant. The final rule therefore removes the requirement as proposed.

Bank Service Company Investments by a National Bank or Federal Savings Association (§ 5.35)

Section 5.35 addresses national bank and Federal savings association investments in bank service companies as authorized by the Bank Service Company Act (BSCA) (12 U.S.C. 1861–1867). Pursuant to section 2 of the BSCA (12 U.S.C. 1862), paragraph (i) of § 5.35 provides that a national bank or Federal savings association may not invest more than 10 percent of its capital and surplus in a bank service company. In addition, paragraph (i) also provides that the national bank's or Federal savings association's total investments in all bank service companies may not exceed five percent of the national bank's or Federal savings association's total assets. However, section 2 of the BSCA also specifies that the investment

[49] This commenter also discussed having this alternative amendment apply to Federal savings associations. However, this alternative would not permissible for Federal savings associations because section 18(m) of the FDI Act (12 U.S.C. 1828(m)) requires a Federal savings associations to file a notice with the OCC when establishing, acquiring, or conducting a new activity in an operating subsidiary.

[50] *See* 73 FR 22216, 22238 (Apr. 24, 2008).

[51] *See* 12 CFR 5.34(c), (e)(5)(i)(B) (2002).

limitations in section 5(c)(4)(B) of the HOLA apply to Federal savings associations with regard to bank service company investments. This limitation is not currently included in paragraph (i). Accordingly, the OCC proposed to revise paragraph (i) to directly reference the limitations in section 2 of the BSCA. The OCC also proposed a technical correction to the title of this section that would remove the extraneous word ''investment.'' The OCC received no comments on the changes it proposed to § 5.35 and adopts them in the final rule as proposed with additional technical changes. Specifically, the final rule does not include the unnecessary cross reference to § 5.3 for the definitions of ''well capitalized'' and ''well managed'' in paragraph (f). The final rule also corrects a reference to the FDI Act in paragraph (d)(3).

Other Equity Investments by a National Bank (§ 5.36)

Section 5.36 provides the procedures for national banks to make certain types of equity investments. Paragraphs (e) and (f) provide the procedures and requirements for a national bank to make a non-controlling investment that is not prescribed by other OCC rules. The OCC proposed to clarify the types of national bank equity investments that are subject to § 5.36 by adding a new definition to paragraph (c) that would define ''non-controlling investment'' to mean an equity investment made pursuant to 12 U.S.C. 24(Seventh) that is not governed by procedures prescribed by another OCC rule. Additionally, the OCC proposed to specify in the definition that the term ''non-controlling investment'' does not include a national bank holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its banking business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions. This would codify the OCC's interpretation that these interests do not have sufficient indicia of ownership and control to qualify as an equity investment for purposes of § 5.36. The OCC also proposed a conforming change to paragraphs (e) and (f). The OCC received no comments to the new definition and conforming amendments and adopts them in the final rule as proposed.

For a national bank to make a noncontrolling investment, current § 5.36 requires a filing with the OCC that: (1) Describes the structure of the investment and the activity or activities conducted by the enterprise in which the bank is investing; (2) describes how the bank has the ability to prevent the enterprise from engaging in impermissible activities or has the ability to withdraw its investment; (3) describes how the investment is convenient and useful to the bank in carrying out its business and not a mere passive investment; (4) certifies that the bank's loss exposure is limited; and (5) certifies that the enterprise agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the FDI Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

A national bank must file an application with the OCC to make a non-controlling investment unless it qualifies for the notice procedure in § 5.36(e). A national bank may file a notice if: (1) The investment meets the above requirements; (2) the enterprise engages in activities that are listed in § 5.34(e)(5)(v) (permissible operating subsidiary activities) or an activity that is substantively the same as that contained in published OCC precedent approving a non-controlling investment by a national bank or its operating subsidiary; and (3) the bank is well managed and well capitalized. As with operating subsidiary notices, the OCC proposed to expand the activities eligible for notice for non-controlling investments to all previously approved activities, as defined in proposed § 5.3. This definition includes activities approved for national banks and their operating subsidiaries, in addition to previously approved non-controlling investments. The proposal also reorganized paragraph (e) and made conforming changes to paragraphs (e)(2) and (e)(4). Additionally, the OCC stated that it is considering an alternative amendment removing the filing requirement for non-controlling investments in enterprises engaging in bank permissible activities, as discussed above for national bank operating subsidiaries.

The OCC received one comment relating to § 5.36(e), supporting the alternative amendment. However, for the reasons noted in the discussion on § 5.34, Operating subsidiaries, the OCC declines to include this alternative in the final rule.

This commenter also recommended that if the OCC retains the notice requirements and limits the use of a notice to banks meeting the proposed definition to ''well managed'' in § 5.3, the OCC should make exceptions to these filing requirements for investments that help to meet the credit needs of the community and for investments below a specified threshold. As noted above in its discussion of comments on the definition of ''well managed'' in § 5.3, the OCC finds that the components reflected in an entity's management rating, such as bank controls, are relevant to the establishment of other equity investments of a national bank and that a national bank with a 2 composite rating but a 3 management, or risk management, rating warrants additional scrutiny. This rationale is generally applicable, regardless of the size of the investment, including for investments that help meet the credit needs of the community.

For these reasons, the OCC adopts these changes to § 5.36(e) as proposed, with technical amendments to remove unnecessary cross-references to § 5.3.

As noted, whether a national bank is filing a notice under paragraph (e) or an application under paragraph (f), the current rule requires the enterprise in which the bank will make a non-controlling investment to agree to OCC supervision and examination. The OCC proposed to amend paragraph (f), redesignated as paragraph (f)(1), to permit national banks to file an application for prior approval to invest in an enterprise that has not agreed to be subject to OCC supervision and examination. Additionally, the OCC proposed a new paragraph (f)(2) to provide for expedited review of certain applications for investments in enterprises that do not agree to OCC supervision and examination that pose minimal risk to the national bank's safety and soundness. An application under proposed paragraph (f)(2) would be deemed approved by the OCC within 10 days after the application is received if five additional requirements are met. First, the enterprise must engage in permissible bank activities as described in proposed paragraph (e) of this section. Second, the national bank must be well managed and well capitalized. These two requirements parallel the requirements for filing a notice. Third, the book value of the national bank's non-controlling investment for which the application is submitted must not be more than 1% of the bank's capital and surplus. Fourth, no more than 50% of the enterprise may be owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association. Many enterprises in which national banks make non-controlling investments are owned by a consortium of banks and savings associations and provide services to their owners and others. Given the potentially complex

interactions between these enterprises and their owners and the additional risks posed to the owners, the OCC believes that OCC supervision and examination of these enterprises is necessary for the safety and soundness of the investing national banks and Federal savings associations. Accordingly, the proposed rule did not permit investments in these entities without their commitment to OCC supervision and examination, and therefore expedited review of these investments would not be available. Finally, the OCC must not have notified the national bank that the application has been removed from expedited review, or that the expedited review process has been extended, pursuant to the standards contained in § 5.13(a)(2).

The OCC received one comment on these proposed amendments to § 5.36(f), which supported the proposed changes. The OCC therefore adopts these amendments to paragraph (f) as proposed, with one technical change in wording for clarity. As explained in the preamble to the proposed rule, the OCC believes that these amendments will give national banks greater flexibility to make permissible non-controlling investments, while giving the OCC an opportunity for an in-depth review of the proposed investment to ensure there is no inappropriate risk to the national bank's safety and soundness. Furthermore, the OCC believes that this added flexibility will in particular facilitate national bank investments in financial technology (fintech) companies, which will enhance the ability of national banks to enter into strategic partnerships and to develop innovative products, services, and processes while ensuring the OCC receives adequate information to supervise the attendant banking activities.[52]

In addition, the OCC proposed adding a new paragraph (g) to § 5.36 to permit a national bank to make a non-controlling investment without a filing to the OCC in certain circumstances. Specifically, a national bank would be permitted to make a non-controlling investment without an application or notice if the activities of the enterprise are limited to those activities previously reported by the bank in connection with making or acquiring a non-controlling investment; the activities in the enterprise continue to be legally permissible for a national bank; the bank's non-controlling investment will be made in accordance with any conditions imposed by the OCC in approving any prior non-controlling investment in an enterprise conducting these same activities; and the bank is able to make the representations and certifications specified in amended §§ 5.36(e)(3) through (e)(7). As a conforming amendment, the OCC proposed to redesignate current paragraphs (g) through (i) as paragraphs (h) through (j), respectively.

The OCC received no comments on new paragraph (g) and the conforming amendments and adopts the revisions as proposed, with two technical changes to correct a cross-reference in paragraph (h)(1) to reflect the redesignation and to remove an unnecessary cross-reference to § 5.3 in redesignated paragraph (i). As stated in the preamble to the proposed rule, the national bank would already have a non-controlling investment in an entity conducting particular activities, and the OCC finds that there would be little risk in the bank making an additional non-controlling investment in an entity conducting the same activities. Furthermore, the OCC finds that non-controlling investments pose similar risks to national banks as operating subsidiaries, and new paragraph (g) would parallel current § 5.34(e)(5)(vi), redesignated in the final rule as § 5.34(f)(6), which permits national banks to make investments in operating subsidiaries without a filing. Therefore, the OCC believes that the revisions to paragraph (g) will reduce burden without jeopardizing the national bank's safety and soundness.

Redesignated paragraph (j) provides exceptions to the rules of general applicability. The OCC proposed to remove the exception to § 5.9, public availability, because some of these investments may be of public interest. Further, the proposal would permit the OCC to determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply if it concludes that an application presents significant or novel policy, supervisory, or legal issues. This proposed paragraph (j) would parallel the equivalent provision for operating subsidiary filings in current § 5.34(e)(5)(iii). The OCC received one comment to these changes to paragraph (j). The commenter opposed making the public availability requirements of § 5.9 applicable to non-controlling investment filings on the grounds that the information included in those filings could be competitive information and the commenter contended that a bank cannot rely on the OCC deeming this information confidential. Therefore, the commenter argued that the proposed change would have a chilling effect on equity investments by banks. The commenter also stated that the public will learn about bank noncontrolling investments when the bank or firm in which the bank invested announces the investment.

The OCC has reconsidered this proposed amendment in light of this comment. A noncontrolling investment filing differs from an operating subsidiary filing. Although confidential information can be redacted in both of these types of filings when made available to the public, the fact that a national bank is making a noncontrolling investment in an entity may itself be considered confidential information until the national bank or entity announces the investment. Therefore, the OCC is not removing the exception to § 5.9, public availability, for § 5.36 filings as proposed. However, the OCC is adopting in the final rule the proposed provision that permits the OCC to determine that some or all of the provisions in §§ 5.8, 5.10, and 5.11 apply if it concludes that an application presents significant or novel policy, supervisory, or legal issues, with the addition of § 5.9 to this sentence.

Investment in National Bank or Federal Savings Association Premises (§ 5.37)

Section 5.37 describes the procedures for national bank and Federal savings association investment in bank premises. Paragraph (d)(1)(i) provides that the procedures of § 5.37 are applicable to investments in the stocks, bonds, debentures, or other obligations of any corporation holding the premises of the national bank or Federal savings association in addition to direct investments in the bank premises. Twelve CFR 7.1000 provides the authority for national bank and Federal savings association investments in bank premises.[53] In addition to the investments listed in § 5.37(d)(1)(i), § 7.1000(a)(3) provides that national banks and Federal savings associations may hold bank premises through a subsidiary organized as a corporation, partnership, or similar entity (*e.g.,* a limited liability company). The OCC proposed to revise § 5.37(d)(1)(i) to recognize the permissibility of holding bank premises through partnerships and similar entities, such as limited liability companies, so that it is consistent with § 7.1000(a)(3). In addition, the OCC proposed to remove the definition of ''capital and surplus'' in § 5.37 as it is redundant with the definition of this

[52] Notwithstanding this amendment, if the enterprise in which the national bank invests also provides services to the national bank, it may be subject to the examination and regulation under the Bank Service Company Act. *See* 12 U.S.C. 1867(c).

[53] The OCC notes that it has proposed to redesignate 12 CFR 7.1000 as 12 CFR 7.1024 in a separate rulemaking. *See* 85 FR 40794 (July 7, 2020).

term in § 5.3. The OCC also proposed adding § 5.9, public availability, to the exceptions to rules of general applicability in § 5.37(d)(5). Finally, the OCC proposed to correct a technical error in paragraph (a), replacing ''12 U.S.C. 317d'' with ''12 U.S.C. 371d.''

The OCC received no comments on these changes and adopts them as proposed, with two technical changes to remove an unnecessary cross-reference to § 5.3 in paragraph (d)(3)(i) and to conform a cross-reference in paragraph (d)(4).

Operating Subsidiaries of a Federal Savings Association (§ 5.38)

Section 5.38 provides the application requirements for a Federal savings association's acquisition or establishment of an operating subsidiary or commencement of a new activity in an existing operating subsidiary when required by section 18(m) of the FDI Act (12 U.S.C. 1828(m)). Section 5.38 is largely parallel to § 5.34 for national bank operating subsidiaries, except that where a national bank would file a notice, a Federal savings association would file an application eligible for expedited review. Accordingly, the OCC proposed coordinating revisions to § 5.38 including: (1) Revising the standard for qualifying subsidiaries in paragraph (e)(2)(i)(A); (2) excluding securitization trusts from the scope of the section in new paragraph (e)(2)(iii)(C); (3) redesignating paragraphs (e)(5), (e)(6), and (e)(7) as paragraphs (f), (g), and (h), respectively; (4) expanding the activities eligible for expedited review to include activities substantially the same as a previously approved activity (as proposed to be defined in § 5.3) and conducted in accordance with the same terms and conditions applicable to the previously approved activity, in redesignated paragraph (f)(2)(ii)(B); (5) expanding the entities eligible for expedited review to include certain trusts where the Federal savings association or its operating subsidiary is the sole beneficiary and has the ability to replace the trustee at will, in redesignated paragraphs (f)(2)(ii)(C) and (D); and (6) explicitly recognizing that the control required by redesignated paragraphs (f)(2)(ii)(D) may be met through an operating subsidiary of the Federal savings association. In addition, the OCC proposed technical changes that would remove the definitions of ''well capitalized'' and ''well managed'' from § 5.38, as with § 5.34, and replace the word ''subsidiary'' with the more appropriate word ''entity'' in the introductory text of paragraph (e)(2)(iii). The OCC received no comments on these proposed amendments and the OCC adopts them as proposed, with one technical change to remove unnecessary cross-references to § 5.3 in paragraph (f).

In addition, the OCC proposed to correct an inadvertent omission in the 2015 Final Rule by amending redesignated § 5.38(f)(2)(ii)(D)(*1*), which contains requirements for how a Federal savings association must effectively control an operating subsidiary to be eligible for expedited review of an application. Although the OCC made changes in the 2015 Final Rule to current §§ 5.34(e)(2)(i)(A), 5.34(e)(5)(ii)(A)(*3*)(*i*), and 5.38(e)(2)(i)(A) to address commenter's concerns regarding the application of the rule to joint ventures,[54] the OCC did not make corresponding conforming changes to current § 5.38(e)(5)(ii)(B)(*4*)(*i*), redesignated in the proposal as § 5.38(f)(2)(ii)(D)(*1*). However, all of these provisions should contain parallel language. Accordingly, the OCC proposed to revise redesignated § 5.38(f)(2)(ii)(D)(*1*) so that it parallels current § 5.34(e)(5)(ii)(A)(*3*)(*i*), redesignated in this proposal as § 5.34(f)(2)(i)(C)(*1*). The OCC received no comments on this change and adopts it as proposed.

Financial Subsidiaries of a National Bank (§ 5.39)

Section 5.39 describes the procedures for national bank acquisition of, and conduct of activities in, a financial subsidiary pursuant to section 5136A of the Revised Statutes.[55] Paragraph (h)(5)(ii) of § 5.39 specifies that the restrictions contained in section 23A(a)(1)(A) of the Federal Reserve Act [56] do not apply to a covered transaction between a bank and its financial subsidiary. However, section 609 of the Dodd-Frank Wall Street Reform and Consumer Protection Act removed this section 23A exclusion. Accordingly, the OCC proposed to remove paragraph (h)(5)(ii).

The OCC also proposed to clarify the approval process for financial subsidiary activities. First, consistent with other changes in part 5, the OCC proposed to change the terminology for filings under § 5.39 from notice to application. The OCC did not intend any substantive change in standards or procedures as a result of this proposal.

Second, as the OCC recognized in the initial proposal for § 5.39, section 24a states that OCC approval shall be based solely upon statutory factors.[57] Accordingly, the OCC initially proposed the current procedures for § 5.39 upon the understanding that the approval may occur upon a bank's submission of information demonstrating satisfaction of the statutory criteria.[58] In the current proposal, the OCC proposed to add a new paragraph (i)(3) specifying that an application is deemed approved upon filing of the information required by the procedures of paragraphs (i)(1) or (i)(2) within the time frames provided.

Finally, the OCC proposed technical changes to paragraph (d) that would remove the definitions of ''appropriate Federal banking agency,'' ''well capitalized,'' and ''well managed.''

The OCC received no comments specific to the amendments it proposed to § 5.39 and adopts them as proposed with technical changes that remove an unnecessary cross-reference to § 5.3 in paragraph (g) and correct a cross-reference in paragraph (h)(5), and with other technical changes to citations.

Change in Location of a Main Office of a National Bank or Home Office of a Federal Savings Association (§ 5.40)

The final rule makes a technical correction to § 5.40. Among other things, § 5.40(c)(2)(ii) requires a Federal savings association to obtain shareholder approval required under its charter if relocating its home office outside the limits of its city, town, or village, and must amend its charter. Because this provision applies to both Federal stock savings associations and Federal mutual savings associations, the OCC is amending this provision to include member approval as Federal mutual savings associations have members and not shareholders.

National Bank Director Residency and Citizenship Waivers (New § 5.43)

The OCC proposed a new § 5.43 to provide procedures for waivers of the national bank director residency and citizenship requirements. Section 5146 of the Revised Statues (12 U.S.C. 72) requires every director of a national bank to be a citizen of the United States and that a majority of the directors reside in the State, Territory, or District where the national bank is located, or within one hundred miles of the location of the office of the bank. These requirements reflect the principle of local ownership and control of national banks. Twelve U.S.C. 72 provides the Comptroller the discretion to waive the residency requirement and to waive the citizenship requirement for not more than a minority of the total number of directors.

[54] *See* 80 FR 28346, at 28375 (May 18, 2015).

[55] 12 U.S.C. 24a.

[56] 12 U.S.C. 371c(a)(1)(A).

[57] 65 FR 3159 (Jan. 20, 2000).

[58] *Id.*

The OCC has processed requests for waivers of the residency and citizenship requirements for many years. The ''National Bank Director Waivers'' booklet of the *Comptroller's Licensing Manual* currently describes the procedures for requesting and granting waivers. The OCC proposed codifying these procedures in a new 12 CFR 5.43 to better clarify and structure the waiver process. The OCC received no comments on this new section and adopts these provisions as proposed, with the changes discussed below.

Specifically, paragraph (a) of § 5.43 sets forth the authority for the regulation, 12 U.S.C. 72 and 93a, the latter of which grants the OCC general rulemaking authority. Paragraph (b) sets forth the scope of the section as describing the procedures for the OCC to waive the residency and citizenship requirements.

Paragraph (c) sets forth the application procedures. Under paragraph (c)(1), a national bank would file a written application with the OCC to request a waiver of the residency requirement. Paragraph (c)(1) also provides that the OCC may grant this waiver for individual directors or for any number of director positions. The OCC typically grants residency waivers for a certain number of directors on the board rather than to specific individuals, but the final rule increases flexibility by permitting either procedure. As a clarifying change, the final rule provides that the waiver is valid until the OCC revokes it in accordance with paragraph (d) of this section, or, if granted on an individual basis, until the individual no longer serves on the board.

Under paragraph (c)(2), a national bank may request a waiver of the citizenship requirements for individuals who comprise up to a minority of the total number of directors by filing a written application with the OCC. Paragraph (c)(2) also provides that the OCC may grant a waiver on an individual basis. Given the more prescriptive nature of the citizenship requirement and the greater background investigation that the OCC undertakes on proposed non-citizen directors, OCC practice is to grant waivers to individuals and not to a designated number of directors. Accordingly, the final rule specifies in paragraph (c)(2) that a citizenship waiver is valid until the individual leaves the board or the OCC revokes the waiver in accordance with paragraph (d), discussed below.

Paragraph (c)(3)(i) requires the subject of a citizenship waiver application to submit the information prescribed in the Interagency Biographical and Financial Report. Paragraph (c)(3)(ii) provides that the OCC may require additional information about the subject of a citizenship waiver application, including legible fingerprints, if appropriate. This paragraph also permits the OCC to waive any of the information requirements if the OCC determines that doing so is in the public interest. The final rule makes a technical correction to the cross-reference in this paragraph.

Paragraph (c)(4) provides exceptions to the rules of general applicability. Specifically, §§ 5.8 (public notice), 5.9 (public availability), 5.10 (comments), and 5.11 (hearings and other meetings) do not apply to applications for citizenship waivers. As noted in the preamble to the proposed rule, the OCC believes the applications will largely consist of information specific to a bank's internal practice as well as private information about the individuals subject to the waiver applications. Accordingly, these applications should not be publicly available nor subject to public notice, comment, or hearings.

Paragraph (d) provides procedures for the OCC's revocation of a residency or citizenship waiver. Under these procedures, the OCC will provide written notice before a revocation to the national bank and affected director(s) of its intention to revoke the waiver and the basis for its intention. The OCC recognizes that discretion in revoking residency and citizenship waivers is premised upon the guarantee of due process. Accordingly, this paragraph provides the bank and the affected director(s) the opportunity to respond in writing to the OCC's intention to revoke a waiver within 10 calendar days, unless the OCC determines that a shorter period is appropriate in light of relevant circumstances. The OCC will consider the written responses of the bank and affected director(s), if any, prior to deciding whether or not to revoke a residency or citizenship waiver. The OCC will notify the national bank and the director of the OCC's decision to revoke a residency or citizenship waiver in writing. If the director appeals pursuant to paragraph (e), this waiver decision is effective upon the director's receipt of the decision of the Comptroller, an authorized delegate, or the appellate official, to uphold the initial decision to revoke the residency or citizenship waiver. If the director does not appeal, the revocation is effective at the expiration of the period to appeal. As stated in the preamble to the proposed rule, the OCC believes the decision to revoke a waiver is consistent with the Comptroller's authority to grant a waiver even though 12 U.S.C. 72 does not contain any specific provisions for revoking a waiver. Absent this authority many residency waivers effectively would be perpetual as the OCC generally grants residency waivers for a designated number of director positions. Further, changing geo-political circumstances may in some circumstances warrant the revocation of citizenship waivers, particularly if foreign governments are unduly influencing directors' activities with regard to a national bank.

Paragraph (e) provides an appeals process for a director whose residency or citizenship waiver the OCC has decided to revoke. This appeals process parallels the appeals process provided for disapprovals of directors and senior executive officers in 12 CFR 5.51, and provides review by the Comptroller, an authorized delegate, or a designated appellate official. As proposed, a director may appeal on the grounds that the reasons for the initial decision to revoke were contrary to fact or arbitrary and capricious. The final rule provides that either the director or the national bank, or both, may make this appeal. This change corrects an inadvertent omission in the proposed rule and is consistent with the language in § 5.51. The Comptroller, an authorized delegate, or the appellate official will independently determine whether the reasons given for the initial decision to revoke are contrary to fact or arbitrary and capricious. If they determine either to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the initial decision to revoke the waiver. The final rule also corrects the cross-reference in paragraph (e)(4) for the effective date of a revocation.

Paragraph (f) provides that waivers outstanding on the effective date of the final rule remain in effect, unless revoked pursuant to paragraph (d). The OCC adopts this provision as proposed with a technical change for clarity. The final rule removes the language ''notwithstanding paragraph (c)(2)'' and instead adds a reference to a waiver no longer being in effect because the individual is no longer on the board, as provided in paragraph (c).

Increases in Permanent Capital of a Federal Stock Savings Association (§ 5.45)

Section 5.45 sets out the OCC's rules addressing increases in permanent capital by a Federal savings association organized in stock form. The OCC proposed two technical amendments to this section. The OCC received no

comments to these technical changes and adopts them as proposed. Specifically, the final rule changes the term ''Federal savings association'' or ''savings association'' to ''Federal stock savings association'' each time it appears, except as used in the defined term ''eligible savings association,'' to more accurately reflect the scope of this section. Second, the final rule replaces the reference to 12 CFR part 197 in paragraph (h) with 12 CFR part 16, which now applies to Federal savings associations.

The OCC invited comment on another possible change to § 5.45. Under the current rule, Federal savings associations that meet the criteria for an eligible savings association described in § 5.3 may have their applications for capital increases, when required, reviewed under an expedited process. The OCC requested comment on whether it should amend its regulations so that only well capitalized and well managed Federal savings associations are eligible to request expedited review of their applications for capital increases. The preamble to the proposed rule explained that if the OCC makes this change to § 5.45 in the final rule, it would also amend its other capital filing-related rules in part 5 based on this same rationale, §§ 5.46 (Changes in permanent capital of a national bank), 5.47 (Subordinated debt issued by a national bank), 5.55 (Capital distributions by Federal savings associations), and 5.56 (Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital).

The OCC received no comments specifically on the changes proposed or suggested for § 5.45. As discussed further below regarding § 5.46, the OCC believes that the current standard for evaluating capital filings, including the compliance rating, is appropriate. Therefore, the OCC adopts the amendments to § 5.45 as proposed.

Changes in Permanent Capital of a National Bank (§ 5.46)

Section 5.46 sets out the OCC's rules addressing changes in permanent capital for a national bank. Paragraph (g)(1)(ii) provides that prior OCC approval is required for an increase in permanent capital in certain cases. In addition, pursuant to 12 U.S.C. 57, paragraph (i)(3) of § 5.46 requires a bank to submit a notice to the appropriate licensing office after it completes an increase in capital, regardless of whether prior approval is required. The OCC proposed to clarify these procedures for increases in capital requiring prior approval by referencing paragraph (i)(3) in the introductory text of paragraph (g)(1)(ii) and removing it from paragraph (g)(1)(ii)(C). The OCC also proposed to clarify the introductory text of paragraph (g)(1)(ii) to specifically indicate that an application to increase a national bank's permanent capital may be eligible for expedited review under paragraph (i)(2). The OCC received no comments to these changes.

Paragraph (h) provides that a national bank must apply and obtain the OCC's prior approval for any reduction in its permanent capital. Paragraph (i)(2) provides expedited review procedures and currently provides that an eligible bank may request approval for decreasing its capital for up to four consecutive quarters. The OCC proposed a number of amendments to paragraphs (h) and (i) to add flexibility for national banks and to clarify procedures. First, the OCC proposed to amend paragraph (h) to permit a national bank to request approval in a standard application for a reduction in capital for multiple quarters. The request need only specify a total dollar amount for the requested period and need not specify amounts for each quarter. As a result, a national bank may request approval for a reduction in permanent capital over more than four consecutive quarters. However, this request would not be eligible for expedited review so that the OCC may have the time to carefully review the request. Second, the OCC proposed to add flexibility to the expedited process in paragraph (i)(2) by specifying that an eligible national bank need only state the total dollar amount rather than per-quarter reductions in requests for four-quarter decreases. As a conforming change, the OCC proposed to amend paragraph (i)(5) to clarify that the OCC's approval of a capital change does not expire within one year of the date of the approval if the OCC specifies a longer period.

The OCC received one comment on this proposal, which supported the proposed amendments. This commenter also recommended amending the criteria for an eligible bank in the context of requesting approval for decreasing its capital for four consecutive quarters. The commenter recommended adopting a single eligibility standard for all part 5 filings and other procedures that takes into account the criteria that are most relevant to the activity at hand, which, in this section, would relate to the bank's capital levels. However, the commenter stated that if a uniform standard is not adopted, then the OCC should not require a bank to receive a consumer compliance rating (or any other single component rating) of at least 2 in order to meet the eligible bank standard for changes to its permanent capital through the expedited review process. The commenter recommended that the OCC instead employ a standard for eligibility that relates to the bank's capital levels.

The OCC disagrees with this commenter's recommendation. The OCC believes that a consistent definition of ''eligible bank'' is appropriate across part 5. Further, ''eligible bank'' status only results in expedited processing. Since a bank has to file an application regardless of whether it is an ''eligible bank,'' the suggested change does not reduce burden. Finally, the OCC believes that expedited treatment for a bank with a consumer compliance rating lower than 2 is not appropriate when considering a capital reduction. For the reasons discussed above, the OCC has not made any changes to the final rule in response to this comment and adopts the amendments to § 5.46 as proposed.

Subordinated Debt Issued by a National Bank (§ 5.47)

Section 5.47 describes the requirements applicable to a national bank's issuance of subordinated debt, including subordinated debt intended for inclusion in tier 2 capital. The OCC proposed numerous changes to this section. Specifically, the OCC proposed to add a new definition of ''subordinated debt document'' to § 5.47(c) to mean any document pertaining to an issuance of subordinated debt, and any renewal, extension, amendment, modification, or replacement thereof, including the subordinated debt note, and any global note, pricing supplement, note agreement, trust indenture, paying agent agreement, or underwriting agreement. The OCC also proposed conforming revisions throughout § 5.47 to better reflect this terminology. The OCC received one comment on this new definition stating that the definition of ''subordinated debt document'' is broad. The OCC disagrees with this comment because the ''subordinated debt document'' definition is intended to capture the scope of documents that could impact a bank's compliance with the OCC's regulatory requirements. Therefore, the OCC adopts this definition as proposed. This change clarifies that a national bank should submit with their applications all material documents needed for the OCC to review the application for compliance with its regulatory requirements. The OCC reviews ancillary securities

documents to ensure that they do not contain language that conflicts with required disclosures or statements made in the subordinated debt note. The OCC notes that this list of documents in the definition is illustrative and not exclusive. The final rule makes a conforming change in paragraph (c) to remove the proposed numbering of the definitions.

Paragraph (d)(3)(ii) contains a list of statements and descriptions that a national bank must clearly and accurately disclose in the subordinated debt note. The OCC proposed adding language to paragraph (d)(3)(ii)(C) to clarify that a national bank is only required to disclose the OCC's authority under 12 CFR 3.11 to limit certain distributions if the disclosure requirement is applicable to the subordinated debt issuance. The OCC received no comments on this new language and adopts it as proposed. Under the final rule, a national bank is only required to incorporate this disclosure language into a subordinated debt note if the issuing bank, or any successor institution to the issuing bank, would have discretion under the terms of the subordinated debt to permanently or temporarily suspend payments without triggering an event of default. The OCC believes that this amendment will provide flexibility and reduce burden by permitting national banks to omit the provisions when warranted.

The OCC also proposed to add a new paragraph (d)(3)(ii)(D) that would require a national bank to disclose in a subordinated debt note that the subordinated debt obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding. This proposed requirement mirrors the language in 12 CFR 3.20(d)(1)(xi), which requires advanced approaches banks to disclose this information in the governing agreement, offering circular, or prospectus of an instrument to be included in tier 2 capital. The proposal also made a conforming change to the paragraph (e) introductory text to remove the reference to advanced approaches national banks. The OCC received no comments on this new paragraph or the conforming change and adopts them as proposed. As stated in the preamble to the proposal, the OCC believes that disclosing this information to potential investors in subordinated debt is beneficial for all national banks, even those that are not advanced approaches banks or that do not intend to include the debt in tier 2 capital.

Paragraphs (f)(1)(ii) and (h) govern the procedures for a national bank to include subordinated debt in tier 2 capital. Currently, these provisions provide that a national bank may not include subordinated debt as tier 2 capital unless it has filed a notice with the OCC and received notification from the OCC that the subordinated debt qualifies as tier 2 capital. The OCC proposed to make these paragraphs consistent with the general usage in part 5 by changing the terminology from notice to application. The OCC also proposed clarifying changes to these paragraphs. The OCC received no comments on these changes and adopts then as proposed. The OCC does not intend these changes to be substantive.

Additionally, the OCC proposed to provide explicit regulatory authority for a national bank to seek approval to include subordinated debt as tier 2 capital before issuance of the subordinated debt in paragraphs (f)(1)(ii) and (h)(1). National banks routinely seek confirmation from the OCC that subordinated debt will qualify as tier 2 capital prior to issuance to mitigate the risk of issuing nonqualifying subordinated debt. This paragraph codifies this practice. Relatedly, the OCC proposed a conforming revision to paragraph (h)(2)(ii), which requires the application to include the amount and date of receipt of funds, to permit submission of the projected amount and date of receipt. The OCC also proposed to add a new paragraph (h)(2)(iii) requiring the application to include the interest rate or expected calculation method for the interest rate for the subordinated debt. This paragraph would assist the OCC in reviewing applications for inclusion of the subordinated debt in tier 2 capital. The OCC received no comments on these changes and adopts them as proposed. Under the final rule, and as with current practice, the OCC will not provide final approval that the subordinated debt qualifies as tier 2 capital until after the debt is issued and final pricing is available.

Paragraphs (f)(2)(ii) and (g)(1)(ii) require OCC approval for a national bank to prepay subordinated debt. The approval requirements for prepayment of subordinated debt include specific additional requirements for prepayment that is in the form of a call option. Specifically, a national bank seeking to prepay subordinated debt in the form of a call option is required to provide: (1) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or (2) a description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance. As noted in the preamble to the proposed rule, the OCC has found that the distinction between prepayment and prepayment in the form of a call option is immaterial to OCC review, that the additional requirements are generally satisfied in most prepayment applications, and that the additional information is helpful for the OCC to determine the impact of the prepayment on the national bank's capital levels and safety and soundness. Accordingly, the OCC proposed having a single procedure for the prepayment of subordinated debt that would incorporate the requirements for prepayment in the form of a call option. The proposal contained a coordinating revision to paragraph (g)(2)(ii) regarding OCC approval. The OCC received no comments on these changes and adopts them as proposed.

Currently, § 5.47 does not explicitly require a national bank to make a filing with the OCC if the national bank makes a material change to its outstanding subordinated debt note or any related subordinated debt documents. The OCC proposed to add new paragraphs (f)(3) and (g)(1)(iii) to ensure that subordinated debt issuances remain compliant with OCC regulatory requirements, including the requirements for inclusion in tier 2 capital. These revisions would require OCC approval for a material change to an existing subordinated debt document if the bank would have been required to receive OCC approval to issue the security under paragraph (f)(1) or to include it in tier 2 capital under paragraph (h). An application to make a material change would include: (1) A description of the proposed changes; (2) a statement of whether the national bank is subject to or required to file a capital plan with the OCC, and if so, how the proposed change conforms to the capital plan; (3) a copy of the revised subordinated debt documents reflecting all proposed changes; and (4) a statement that the proposed changes to the subordinated debt documents comply with all applicable laws and regulations.

The OCC received one comment letter suggesting that the OCC not implement this OCC approval requirement for material changes to subordinated debt documents. The commenter stated that the ''material change'' standard is imprecise, the ''subordinated debt document'' definition is broad, and the overall requirement would increase

burden. The commenter also argued against tying the application requirements to the bank's consumer compliance rating, which is a component of whether a bank is an ''eligible bank'' under 12 CFR 5.3 and therefore subject to certain procedural requirements.

The OCC disagrees with this comment and is finalizing the OCC approval requirement for material changes as proposed. The OCC reviews subordinated debt documents for compliance with the OCC's licensing requirements at 12 CFR 5.47 and the OCC's capital component eligibility criteria at 12 CFR 3.20. The OCC reviews ancillary securities documents to ensure that they do not contradict the statements and disclosures made in the primary documents. As previously explained, the ''subordinated debt document'' definition is intended to capture the scope of documents that could impact a bank's compliance with the OCC's regulatory requirements.

The OCC uses the ''eligible bank'' criteria as a proxy for determining the appropriate level of review for subordinated debt issuance and prepayment actions. As discussed elsewhere in this *Supplementary Information,* the OCC believes that expedited treatment for a bank with a consumer compliance rating lower than 2 is not appropriate. Because the terms of a subordinated debt document govern the rights and obligations of the issuing bank throughout the lifetime of the security, the OCC's supervisory interest in reviewing subordinated debt documents for regulatory compliance extends past the security's date of issuance.

The commenter also requested, in the event the OCC finalized this provision as proposed, that the OCC confirm that approval would only be required in the event that the bank would have been required to receive approval to issue the security under 12 CFR 5.47(f)(1) or to include it in tier 2 capital under 12 CFR 5.47(h). In response, the OCC notes that a bank would only have to seek OCC approval of a change to a subordinated debt document if: (1) The change is material and (2) at the time of issuance of the security, the bank would have been required to receive OCC approval to issue the security under 12 CFR 5.47(f)(1) or to include it in tier 2 capital under 12 CFR 5.47(h). In response to the comment that the ''material change'' standard is imprecise, the OCC notes that it would not consider a change to a subordinated debt document to be material if it consists entirely of technical or administrative changes to the subordinated debt document, such as a change to a filing address or filing procedure. The OCC would consider a change to be material if it pertains to subjects covered by the OCC regulatory requirements at 12 CFR 3.20 and 12 CFR 5.47, such as pricing and maturity, rights and obligations of the lender and borrowers, and required regulatory disclosures.

Finally, the OCC proposed to make certain stylistic changes to the rule text of § 5.47 that are not intended to impact the substantive requirements applicable to national banks. The OCC received no comments on these changes and adopts them as proposed.

Change in Control of a National Bank or Federal Savings Association; Reporting of Stock Loans (§ 5.50)

Section 5.50 sets forth the procedures and standards for changes in control of national banks and Federal savings associations. Paragraph (d)(8) contains a definition of insured depository institution. However, that term is not used within § 5.50. Accordingly, the OCC proposed to replace that definition with the definition of ''depository institution,'' to mean a depository institution as defined in section 3(c)(1) of the FDI Act (12 U.S.C. 1813(c)(1)).

Paragraph (f)(3)(iv) states that an applicant may request a hearing by the OCC within 10 days of receipt of a notice disapproving a change in control and that following final agency action under 12 CFR part 19, further review by the courts is available. Paragraph (f)(6) provides that the OCC will notify the proposed acquiror in writing of a disapproval within three days and will indicate the basis of its disapproval. For clarity, the OCC proposed combining these provisions in a revised paragraph (f)(6). The OCC also proposed to add language stating that this disapproval notice will inform the filer of the availability of a hearing. Additionally, the OCC proposed a new paragraph (f)(6)(iii) specifying that if a filer fails to request a hearing with a timely request, the notice of disapproval constitutes a final and unappealable order. This language is currently included in 12 CFR 19.161 and the OCC stated in the preamble to the proposal that it believes the language also should be included in § 5.50 to put filers on notice of the implications of failure to request a hearing in a timely manner.

Finally, paragraph (g)(2)(i) provides procedures for the OCC's release of information related to a change in control notice, including publication of information in the OCC's Weekly Bulletin. The OCC proposed revising this provision to reflect the information that the OCC publishes in the Weekly Bulletin in practice, namely the date of filing, the disposition of the notice and date thereof, and the consummation date of the transaction, if applicable.

The OCC received no comments on these changes to § 5.50 and adopts them as proposed.

Changes in Directors and Senior Executive Officers of a National Bank or Federal Savings Association (§ 5.51)

Section 5.51 implements section 914 of the Financial Institutions Reform, Recovery, and Enforcement of 1989 (12 U.S.C. 1831i). Section 914 requires a national bank or Federal savings association to provide prior notice to the OCC of the proposed addition of any individual to the board of directors or the employment of any individual as a senior executive officer of a bank if, among other things, the bank is in troubled condition. Paragraph (c)(4) defines ''senior executive officer'' to mean the president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, chief investment officer, and any other individual the OCC identifies in writing to the national bank or Federal savings association who exercises significant influence over, or participates in, major policy making decisions of the bank or savings association without regard to title, salary, or compensation. The term also includes employees of entities retained by a national bank or Federal savings association to perform functions in lieu of directly hiring the individuals, and the individual functioning as the chief managing official of the Federal branch of a foreign bank. The OCC proposed to add chief risk officer to the definition of senior executive officer given the increase in that role at many national banks and Federal savings associations. The OCC received no comments to this change and adopts it as proposed.

Paragraph (c)(7) provides the definition of ''troubled condition,'' which is one of the circumstances in which a national bank or Federal savings association is required to file a notice under § 5.51. Pursuant to paragraph (c)(7)(ii), this definition includes a national bank or Federal savings association that is subject to a cease and desist order, a consent order, or a formal written agreement, unless otherwise informed in writing by the OCC. The OCC proposed to amend paragraph (c)(7)(ii) to specify that the cease and desist order, consent order, or formal written agreement must require the bank or savings association to improve its financial condition for the institution to be considered in ''troubled condition'' solely as a result of the

enforcement action. The OCC expects to inform a bank in writing when an enforcement action does not require action to improve the financial condition of the bank. The OCC's general policy is not to apply troubled condition status to national banks or Federal savings associations solely as a result of cease and desist orders, consent orders, or formal written agreements that do not require improvement in the financial condition of the bank or savings association, such as enforcement actions that address certain compliance-related deficiencies that do not affect the financial condition of the bank or savings association. Typically, the OCC has noted in these actions that the bank or savings association is not in troubled condition as a result of the action. The proposal updated the definition of troubled condition in § 5.51 to align with the OCC's current supervisory practice. The OCC noted in the preamble to the proposal that this practice is consistent with that of the Federal Reserve Board and the FDIC, and the proposed revision would align the OCC's regulations with the Federal Reserve Board's and FDIC's regulations implementing section 914.[59] The OCC received a comment in response to this proposed amendment that strongly supported the revised definition of ''troubled condition.'' Therefore, the OCC finalizes this definition as proposed.

Capital Distributions by Federal Savings Associations (§ 5.55)

Section 5.55 provides standards and procedures for capital distributions made by Federal savings associations. Paragraph (d)(2) defines ''capital'' as total capital, computed under 12 CFR part 3. The OCC proposed to delete this definition as unnecessary because all references to ''capital'' are either in relation to the defined term ''capital distribution'' or contain an explicit reference to calculations under 12 CFR part 3. Additionally, the OCC proposed a new definition of ''control,'' to have the same meaning as in section 10(a)(2) of the HOLA (12 U.S.C. 1467a(a)(2)), and to use this term to describe control relationships, rather than the current use of the term ''subsidiary'' in § 5.55. The OCC did not receive any comments on these updated definitions and adopts them as proposed.

Current paragraph (e)(1) of § 5.55 requires a Federal savings association to file an application if it is not an eligible savings association. Current paragraphs (e)(2) and (g)(2) of § 5.55 require eligible savings associations to file a notice if certain requirements are met. Consistent with other changes in part 5, the OCC proposed to change the terminology for notice to application and to make corresponding changes throughout § 5.55. As a result, filings that are currently notices would be applications subject to expedited review. In addition, the OCC proposed to reorganize paragraphs (e) and (g) to clarify the procedures; however no substantive change is intended. The OCC also proposed additional stylistic revisions to current paragraph (e)(4) of § 5.55 to clarify that the notice mentioned in this paragraph is that of the notice filed with the Federal Reserve Board. The OCC did not receive any comments on these changes and adopts them as proposed with clarifying technical changes.

The OCC proposed a substantive change to the application procedures. Current paragraph (e)(1)(ii) requires a Federal savings association to file an application if the total amount of all its capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years. Under 12 CFR 5.64(c)(2), a national bank may calculate its dividends in excess of a single year's current net income by offsetting certain excess dividends against retained net income from each of the prior two years, with the potential to incorporate net income from up to four years prior to the current year when determining the maximum dividend payout possible without prior OCC approval. To provide additional flexibility, the OCC proposed to permit a Federal savings association to conduct this calculation when determining whether this application requirement applies. Specifically, if the capital distribution is from retained earnings, a Federal savings association would be able to calculate the aggregate limitation for a capital distribution in accordance with 12 CFR 5.64(c)(2), substituting ''capital distributions'' for ''dividends'' in that section. The OCC did not receive any comments on this change to the application procedures and adopts it as proposed with a confirming change to a citation.

Paragraph (f)(2) provides that the capital distribution application may include a schedule proposing capital distributions over a specified period, not to exceed 12 months. The OCC proposed to remove this 12-month limitation to allow a Federal savings association more flexibility for its distributions and to align this provision with the analogous national bank provision, 12 CFR 5.46(i)(1)(ii). The OCC did not receive any comments on the removal of this 12-month limitation and adopts it as proposed.

Additionally, the OCC proposed a new paragraph (g)(3) to clarify the appropriate OCC filing office for capital distribution applications and notices. In general, a Federal savings association would file with the appropriate OCC licensing office. However, the Federal savings association must submit the application to the appropriate OCC supervisory office if the application involves solely a cash dividend from retained earnings or involves a cash dividend from retained earnings and a concurrent cash distribution from permanent capital. The OCC did not receive any comments on this change, and the OCC adopts it as proposed.

Finally, the OCC proposed to reorganize paragraph (h), which addresses OCC review of an application, by providing separate paragraphs for OCC denials and approvals. As a result, paragraph (h)(1) would address OCC denials and include the majority of current paragraph (h) and paragraph (h)(2) would address OCC approvals. In doing so, the proposal clarified that the OCC may approve an application in whole or in part and that the OCC may waive any waivable prohibition or condition to permit a distribution. The proposal also changed the cross-reference in the current introductory text to the more appropriate paragraph (e)(1). The OCC did not receive any comments on these changes to paragraph (h) of § 5.55 and adopts them as proposed.

Inclusion of Subordinated Debt Securities and Mandatorily Redeemable Preferred Stock as Federal Savings Association Supplementary (Tier 2) Capital (§ 5.56)

Section 5.56 provides the requirements and procedures for a Federal savings association to include subordinated debt and mandatorily redeemable preferred stock (collectively, ''covered securities'') in tier 2 capital. Paragraph (b) provides the filing procedures, including the application and notice procedures. Under § 5.56, the OCC must approve an application or notice before a Federal savings association may include covered securities as tier 2 capital. As with § 5.47, the OCC proposed to make this process consistent with the general usage in part 5 by changing the terminology from notice to application where appropriate throughout § 5.56. The proposal also clarified that a savings association may not include covered securities in tier 2 capital until the OCC approves the application and

[59] *See* 12 CFR 225.71(d) (Board); 12 CFR 303.101(c) (FDIC).

the securities are issued. This change is not intended to be substantive.

Paragraph (b)(2) requires an application and prior approval from the OCC for a Federal savings association to prepay covered securities included in tier 2 capital. Similar to the national bank requirement in § 5.47, paragraphs (b)(2)(ii) and (h) of § 5.56 contain additional application requirements for OCC review of prepayments in the form of a call option. As provided in the discussion for § 5.47 in this *Supplemental Information,* and for the same reasons, the OCC proposed to incorporate the application requirements currently applicable to prepayment in the form of a call option to all prepayment applications. The OCC also proposed one additional technical change in § 5.56(b)(2) to replace a reference to ''a tier 1 or tier 2 instrument'' to refer to ''tier 1 or tier 2 capital.''

Paragraph (d)(1) contains disclosure requirements for covered securities. The OCC proposed to add a new paragraph (d)(1)(i)(H) to require the covered security to state that it may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding. As discussed above regarding § 5.47, a Federal savings association that is an advanced approaches institution must make this disclosure under 12 CFR 3.20(d)(1)(xi). As stated in the preamble to the proposed rule, the OCC believes that disclosing this information to potential investors in the covered security is beneficial for all Federal savings associations, even those that are not advanced approaches Federal savings associations or that do not intend to include the debt in tier 2 capital.

In addition, the OCC proposed to replace the reference to 12 CFR part 197 in paragraphs (b)(1)(iii) and (d)(2)(i) of § 5.56 with 12 CFR part 16, which now applies to Federal savings associations. The OCC also proposed to make certain purely stylistic changes to the rule text of § 5.56 that are not intended to impact the substantive requirements applicable to Federal savings associations.

The OCC received no comments to any changes proposed to § 5.56 and adopts them as proposed. The final rule also makes a technical correction to the statutory reference to the definition of accredited investor in paragraph (d)(2)(ii).

Pass-Through Investments by a Federal Savings Association (§ 5.58)

Section 5.58 provides the licensing procedures for Federal savings associations making pass-through investments. Although based on different authority, § 5.58 is largely analogous to the provisions in § 5.36 governing national bank non-controlling investments. Accordingly, the OCC proposed amendments to § 5.58 similar to those proposed for § 5.36, and for the same reasons.

First, the OCC proposed to amend paragraph (d), Definitions, by defining ''pass-through investment'' as an investment authorized under 12 CFR 160.32(a). As discussed in this *Supplemental Information* for the proposed definition of ''non-controlling investment'' in § 5.36, the proposed definition for ''pass-through investment'' would exclude a Federal savings association holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions. The OCC received no comments on the proposed definition of ''pass-through investment'' and adopts it as proposed.

The OCC also proposed to amend paragraph (d) by removing the definitions of ''well capitalized'' and ''well managed'' because the proposed rule defined these terms in § 5.3. The OCC received no comments on these changes and adopts them as proposed, with a technical change that removes unnecessary cross-references to § 5.3 in paragraph (e).

Second, the OCC proposed to expand the activities eligible for notice to include activities that are substantially the same as previously approved activities, as proposed to be defined in § 5.3. In making this change, the proposal reorganized paragraph (e) and made conforming changes to paragraphs (e)(2) and (e)(4). Additionally, the OCC stated in the preamble to the proposed rule that it is considering removing the filing requirement for pass-through investments in enterprises engaging in activities permissible for a Federal savings association, as discussed above for national bank operating subsidiaries and non-controlling investments. Under the alternative, the OCC would not remove the filing requirement if the enterprise would be a subsidiary of the Federal savings association for purposes of section 18(m) of the FDIA Act (12 U.S.C. 1828(m)), which generally requires a Federal savings association to provide 30-days prior notice to the OCC before establishing or acquiring a subsidiary defined in section 3(w)(4) of the FDI Act (12 U.S.C. 1813(w)(4)).

The OCC received no comments to the alternative proposal in § 5.58 directly, but did receive comments to the similar alternative proposal for operating subsidiaries, § 5.34, and noncontrolling investments of national banks, § 5.36. For the reasons noted in the discussion on § 5.34, Operating subsidiaries in this *Supplemental Information,* the OCC declines to include this alternative in the final rule.

Third, the OCC proposed to revise paragraph (f)(1) of § 5.58 to permit a Federal savings association to file an application to make a pass-through investment in an entity that does not agree to OCC supervision and examination. The proposal redesignated paragraph (f)(2) as paragraph (f)(3) and added a new paragraph (f)(2) providing for expedited review for certain applications. The qualifications for expedited review are equivalent to those in proposed § 5.36(f). The OCC received no direct responses to this proposal but as discussed in this *Supplemental Information* received one comment in support of the similar proposal for noncontrolling investments of national banks under § 5.36. The OCC adopts these proposed changes to § 5.58(f), with clarifying technical changes, for the same reasons discussed in the corresponding change to § 5.36. The final rule also makes conforming changes to redesignated paragraph (f)(3) to reflect that a Federal savings association may make a pass-through investment requiring a filing under 12 U.S.C. 1828(m) in an entity that has not agreed to OCC supervision and examination.

Fourth, the OCC proposed to add a new paragraph (g) that would permit a Federal savings association to make a pass-through investment without a notice or application to the OCC. The standards would be equivalent to those in proposed § 5.36(g) except that the enterprise must not be a subsidiary of the Federal savings association for purposes of section 18(m) of the FDI Act. In such a case, an application would be required under § 5.58(f)(2). The OCC received no comments on new paragraph (g) and adopts it as proposed. Additionally, the final rule corrects a cross-reference in redesignated paragraph (h)(1).

Finally, the OCC proposed to amend redesignated paragraph (j) to provide exceptions to the rules of general applicability in the same manner as proposed § 5.36(j). As with this amendment to § 5.36, the OCC has not removed the proposed exception to public availability, § 5.9, in the final rule. However, as with § 5.36, the OCC is adopting in the final rule the proposed provision that permits the OCC to determine that some or all of

these rules of general applicability apply if it concludes that the application presents significant or novel policy, supervisory, or legal issues, with the addition of § 5.9 to this sentence.

§ 5.59 Service Corporations of Federal Savings Associations.

Section 5.59 provides procedures governing OCC review and approval of filings by Federal savings associations to establish or acquire, or to conduct new activities in existing, service corporations pursuant to the authority provided in section 5(c)(4)(B) of the HOLA, 12 U.S.C. 1464(c)(4)(B). An application under this section is eligible for expedited review if, among other things, the Federal savings association is ''well capitalized'' and ''well managed.'' However, this section currently does not define ''well managed.'' The proposal applied the proposed definition of ''well managed'' in § 5.3 to this term as used in § 5.59. The final rule adopts this amendment as proposed, with one technical change that removes the cross-reference to § 5.3 in paragraph (h)(2)(ii)(A). As indicated elsewhere in this **SUPLEMENTARY INFORMATION**, because the definitions in § 5.3 apply to all of part 5, this cross-reference is not necessary.

Earnings Limitation Under 12 U.S.C. 60 (§ 5.64)

Section 5.64 describes the calculations for earnings available for dividends under 12 U.S.C. 60. Paragraph (d) provides special rules for what the OCC referred to as ''surplus surplus,'' which is an amount in capital surplus in excess of capital stock that the national bank can demonstrate came from earnings in prior periods. A national bank had been required to retain a certain percentage of net income as capital surplus whenever it paid dividends. In addition, a variety of statutes and regulations established limits for banks based on permanent capital, including capital surplus, and ignored any amounts in retained earnings, which provided an incentive for banks to shift earnings into permanent capital. After Congress revised the statutes to provide more flexibility to include retained earnings as capital for purposes of the statutory limits, the OCC permitted banks to distribute these surplus surplus funds as dividends rather than as reductions in permanent capital given the surplus surplus funds' origin as earnings rather than paid in capital. As these statutory and regulatory changes occurred decades ago, national banks have not needed to create new surplus surplus for many years but may still incur recordkeeping burden associated with identifying regulatory surplus surplus within capital surplus. Accordingly, the OCC proposed to remove the concept of surplus surplus and associated procedures described in paragraph (d). The OCC received no comments on these proposed changes and finalizes them as proposed. The OCC notes that removal of paragraph (d) will not prevent a bank from distributing amounts contained in the capital surplus accounts. A national bank may make an appropriate filing under 12 CFR 5.46 for a reduction in capital to distribute these funds.

Dividends Payable in Property Other Than Cash (§ 5.66)

Section 5.66 provides procedures for payment of dividends in non-cash property by national banks. This section currently provides that these dividends are equivalent to a cash dividend in an amount equal to the actual current value of the property, even if the bank previously has charged down or written off the property. Before the dividend is declared, the bank should show the excess of the actual value over book value on its books as a recovery and should declare the dividend in the amount of the full book value (equivalent to the actual current value) of the property being distributed. The OCC proposed to revise this section to clarify that the dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property, regardless of whether the book value is higher or lower under GAAP. The OCC also proposed to apply this valuation methodology to all non-cash dividends, not just those for property that has been charged down or written off. Further, the amendment would provide that the bank should show the difference between the actual value and book value on its books as gain or loss, as applicable, prior to recording the non-cash dividend reflecting the actual value of the property. The OCC received no comments on these changes and adopts them as proposed. As stated in the preamble to the proposed rule, the OCC believes this approach better reflects the value of the property being distributed from the bank, particularly in cases where the non-cash property was recorded at historical cost under GAAP.

Fractional Shares (§ 5.67)

Section 5.67 provides a number of potential arrangements that a national bank may adopt to avoid the issuance of fractional shares. The OCC proposed to simplify this section for a national bank by retaining only one of these options, the remittance of the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The OCC believes this procedure is the simplest and is the predominant method of disposing of fractional shares today. Other options in the current rule include issuing warrants for fractional shares or permitting shareholders to purchase additional fractions up to one whole share. While the OCC permitted these methods historically, these methods can create significant recordkeeping costs today when bank stock may be traded in ''round lots'' of 100 shares or more. The OCC received no comments on this change and adopts it as proposed. Because a transaction that would result in the issuance of fractional shares will generally require an application with the OCC, revised § 5.67 maintains flexibility for banks by permitting the bank to propose an alternate method in the application for the stock issuance, which could include one of the options being removed from the rule.

Federal Branches and Agencies (§ 5.70)

Section 5.70 provides the filing procedures for corporate activities and transactions involving Federal branches and agencies of foreign banks. Consistent with the background investigation changes proposed to other sections, the OCC proposed adding a new paragraph (d)(3) to explicitly permit the OCC to require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report and legible fingerprints.

The OCC received no comments to this new paragraph and adopts it as proposed.

Additional Issues and General Comments

Digital and remote filings. One commenter encouraged the OCC to advance digital and remote filing procedures, such as digital signatures and virtual notarization. The OCC has already updated its licensing regulation to encourage the use of electronic filings, including permitting digital signatures in the OCC's Central Application Tracking System (CATS). Further, the OCC is unable to update to virtual notarization because notarization is governed by State law.

Public input. One commenter generally opposed the proposed changes for procedures outlining public input. The commenter further expressed that it is more difficult for community organizations to offer meaningful input under these proposed procedures, which limits the OCC's ability to determine whether an application

achieves a public benefit. The OCC disagrees with this comment. The OCC notes that ''public benefit'' is not a factor for any licensing filings, rather the OCC is seeking public comments that provide meaningful and substantive information about a bank's CRA performance. Only such comments can assist the OCC in its evaluation of a transaction.

CRA ratings. Generally, the OCC requires a rating of at least ''Satisfactory'' for approval of a filing. In response to the CRA ratings used in §§ 5.30, 5.31, 5.33, 5.40, one commenter suggested that a CRA rating of less than ''Satisfactory'' should not automatically preclude approval of a filing. The OCC is not adopting this commenter's recommendation. OCC policy provides that if an applicant bank has an overall less than ''Satisfactory'' rating, the OCC provides enhanced scrutiny of covered applications by the bank. Further, proposed § 5.33(e)(1)(iii)(A) makes clear that the CRA consideration is in conjunction with the other factors.

One commenter requested that the OCC codify the policies in PPM 5000–43 and Bulletin 2018–23 regarding CRA downgrades. The commenter also asserted that the OCC should allow expedited reexamination if a bank believes it has remediated a CRA concern. The OCC notes that this comment is outside the scope of this rulemaking.

Public comment period. One commenter questioned the proposed rule's compliance with the notice requirements of the APA noting that the Notice of Proposed Rulemaking was published on the OCC website on March 5, 2020, but not in the **Federal Register** until April 2, 2020, with the comment period ending May 4, 2020.[60] The commenter is incorrect about the requirements of the APA. The OCC notes that the APA does not provide a minimum comment period and that the generally recommended time for comment is 60 days.[61] Here, the public had notice of the proposal for 60 days beginning on March 5 when the OCC provided notice of the proposal on its website and issued a news release and OCC Bulletin on the proposal. Moreover, the proposal was published in the **Federal Register** for 32 days.[62]

General Technical Changes

The OCC proposed numerous technical changes throughout 12 CFR part 5. The OCC received no comments on these changes and adopts them as proposed, with additional conforming changes. Specifically, the final rule:

- Replaces the word ''shall'' with ''must,'' ''will,'' or other appropriate language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the **Federal Register**;
- Generally replaces the term ''notice'' with the term ''application'' where prior OCC approval is required, thereby conforming the terminology to the licensing action provided in the provision (notices would continue to include informational filings to the OCC as well as certain transactions that the OCC has the power to disapprove, such as changes in control);
- Amends the expedited review provisions throughout part 5 to refer to the OCC removing a filing from expedited review rather than making a determination that the filing is not eligible for expedited review to accord with the language and procedure in § 5.13(a)(2).
- Revises citations to the U.S. Code and the Code of Federal Regulations by adjusting cross-references, making citations more specific, and using consistent style;
- Updates and standardizes references to the OCC website;
- Simplifies gender references by replacing ''his or her'' with the neutral ''their;''
- Uniformly capitalizes the word ''State,'' in conformance with **Federal Register** drafting style; and
- Replaces the terms ''bank'' and ''savings association'' with ''national bank'' or ''Federal savings association,'' respectively, where appropriate.

The OCC also is adopting in this final rule additional corrections to cross-references and citations throughout part 5. Further, the OCC is adopting technical changes that update the cross-reference to the § 5.3 definition of ''eligible bank'' in 12 CFR 3.701(f)(1)(vi) and the cross-reference to the § 5.3 definition of ''appropriate OCC licensing office'' in 12 CFR 7.2008(c).

III. Regulatory Analyses

A. Paperwork Reduction Act

Paperwork Reduction Act

Certain provisions of the proposed rulemaking contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC reviewed the final rule and determined that it revises certain information collection requirements previously cleared by OMB under OMB Control No. 1557–0014. The OCC submitted the information collection requirements at the proposed rule stage. OMB neither approved nor disapproved the submission, requiring OCC to resubmit the collection at the final rule stage. Therefore, the OCC has submitted the revised information collection to OMB for review under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320).

Current Actions

The final rule:

- Adds new definitions to add clarity and consistency across part 5. This includes proposing a single definition *well managed* applicable throughout part 5. 12 CFR 5.3.
- Requires each proposed organizer, director, executive officer, or principal shareholder to submit information prescribed in the Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.20.
- Eliminates the bylaw amendment notice requirement for Federal savings associations that adopt without change the OCC's model or optional bylaws set forth in the rule. 12 CFR 5.21, 5.22.
- Requires that applications to convert to a Federal savings association or national bank include: A list of directors and senior executive officers of the converting institution; and a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the converting institution's stock. This amendment merely codifies current

[60] This commenter also objected to the OCC issuing the rulemaking during the COVID–19 pandemic. However, the OCC believes that it is important to move forward with updating its rules so that national banks and Federal savings associations can better address current economic issues. Furthermore the pandemic should not prevent the OCC from meeting its obligations to provide oversight and ensure the safety and soundness of OCC regulated banks and the Federal banking system.

[61] *See* E.O. 12866, section 6(a).

[62] The OCC, as well as the FDIC and Federal Reserve Board, have published other rules in the **Federal Register** for only 30 days. *See e.g.,* 84 FR 9940 (Mar. 19, 2019), 84 FR 24296 (May 24, 2019), and 84 FR 59970 (Nov. 7, 2019).

application requirements and will not result in a change in burden. 12 CFR 5.23(d)(2)(ii), 5.24(e)(2).

• Permits the OCC to require directors and senior executive officers of a converting institution to submit the Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.23, 5.24.

• Requires that applications for national banks or Federal savings associations that wish to engage in the exercise of fiduciary powers include, if requested by the OCC, the Interagency Biographical and Financial Report and legible fingerprints. 12 CFR 5.26.

• Requires a filer of a business combination application under CRA to disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2. A filer must also provide summaries of, or documents related to, all substantive discussions with respect to the development of the content of a CRA sunshine agreement. 12 CFR 5.33(e)(1)(iii).

• Removes the requirement that a disappearing national bank or Federal savings association consolidating or merging with another OCC-supervised institution provide a notice to the OCC. § 5.33(g), (k).

• For national bank operating subsidiaries, expands the after the fact notice for national banks to activities that are substantially the same as previously approved activities that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. Expands the list of eligible entities to include trusts provided that the bank or operating subsidiary has the ability to replace the trustee at will and be the sole beneficial owner of the trust. 12 CFR 5.34.

• Removes the requirement for a national bank to file an annual report identifying its operating subsidiaries that do business directly with consumers and are not functionally regulated. 12 CFR 5.34.

• For national bank non-controlling investments and Federal savings association pass-through investments, expands the activities eligible for notice to activities that are substantially the same as previously approved activities. 12 CFR 5.36, 5.58.

• Allows national banks and Federal savings associations to file an application to make a non-controlling investment or a pass-through investment, respectively, in an enterprise that has not agreed to be subject to OCC supervision and examination. 12 CFR 5.36(f), 5.58(f).

• Allows national banks and Federal savings associations to make non-controlling investments or a pass-through investments, respectively, without a filing if the activities of the enterprise are limited to those previously reported to the OCC in connection with a prior investment. 12 CFR 5.36, 5.58.

• For Federal savings association operating subsidiaries, expands the expedited approval process for Federal savings associations to include activities that are substantially the same as previously approved activities that will be conducted in accordance with the same terms and conditions applicable to the previously approved activity. Expands the list of eligible entities to include trusts provided that the Federal savings association or operating subsidiary has the ability to replace the trustee at will and be the sole beneficial owner of the trust. 12 CFR 5.38.

• Permits national banks to request approval for a reduction in permanent capital for multiple quarters. 12 CFR 5.46.

• Regarding subordinated debt notes, allows national banks to omit inapplicable provisions when warranted, and require national banks to disclose in subordinated debt notes that the subordinated debt obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding. 12 CFR 5.47.

• Revises the standard for when prior approval is required for a national bank's issuance of subordinated debt and for prepayment of any subordinated debt that is not included in tier 2 capital 12 CFR 5.47(f).

• Requires OCC approval for a material change to an existing subordinated debt document if the national bank would have been required to receive OCC approval to issue the security under § 5.47(f)(1) or to include it in tier 2 capital under § 5.47(h). 12 CFR 5.47.

• Adds the position of *chief risk officer* to the definition of senior executive officer. This change requires prior OCC approval for the employment of an individual as a chief risk officer by a national bank or Federal savings association in troubled condition. 12 CFR 5.51.

• Requires a covered security (inclusion of subordinated debt and mandatorily redeemable preferred stock) issued by a Federal savings association to state that it may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding. 12 CFR 5.56.

• Permits the OCC to require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report and legible fingerprints. This amendment merely codifies current application requirements and will not result in a change in burden. 12 CFR 5.70.

Title of Information Collection: Licensing Manual.

Frequency: Event generated.

Affected Public: Businesses or other for-profit.

Estimated number of respondents: 3,698.

Total estimated annual burden: 12,981 hours.

Comments are invited on:

a. Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

b. The accuracy or the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; facsimile to (202) 395–6974; or email to *oira_submission@omb.eop.gov,* Attention, Federal Banking Agency Desk Officer.

B. Regulatory Flexibility Act Analysis

In general, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency, in connection with a final rule, to prepare a Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the SBA for purposes of the RFA to include commercial banks and savings

institutions with total assets of $600 million or less and trust companies with total revenue of $41.5 million or less). However, under section 605(b) of the RFA, this analysis is not required if an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 1,163 institutions (commercial banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 745 are small entities.[63] To measure whether a rule will have a ''significant economic impact,'' the OCC focuses on the potential costs of the rule to OCC-supervised small entities, consistent with guidance on the RFA published by the Office of Advocacy of the Small Business Administration.[64] Because the rule applies to all OCC-supervised depository institutions, the final rule would affect all small OCC-supervised entities, and thus a substantial number of them.

The OCC classifies the economic impact of total costs on an OCC-regulated entity as significant if the total costs for the entity in a single year are greater than 5 percent of total salaries and benefits, or greater than 2.5 percent of total non-interest expense. The OCC estimates that the monetized direct cost of this rulemaking will range from a low of approximately $4,600 per bank (40 hours × $115 per hour[65]) to a high of approximately $18,400 per bank (160 hours × $115 per hour).[66] Using the upper bound average direct cost per bank, the OCC finds the compliance costs will have a significant economic impact on no more than 18 small banks, which is not a substantial number.[67] Therefore, the OCC finds that this final rule does not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, a Regulatory Flexibility Analysis is not required.

C. Unfunded Mandates Reform Act of 1995

The OCC has analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*). Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, adjusted annually for inflation (currently $157 million). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

Based on the OCC estimate that the monetized direct cost of this rulemaking would range from a low of approximately $4,600 per bank to a high of approximately $18,400 per bank, the OCC's overall estimate of the total effect of the final rule ranges from approximately $5.4 million to approximately $21.4 million for the approximately 1,163 institutions supervised by the OCC. Therefore, the OCC finds that the final rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

D. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) (12 U.S.C. 4802(a)), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC must consider, consistent with the principles of safety and soundness and the public interest: (1) Any administrative burdens that the rule would place on depository institutions, including small depository institutions and customers of depository institutions; and (2) the benefits of the rule. The has considered the changes made by this final rule and believes that the overall effective date of January 11, 2021 will provide OCC-regulated institutions with adequate time to comply with the rule.[68] With respect to administrative compliance requirements, the OCC has considered the administrative burdens and the benefits of this final rule and believes that any burdens are necessary for safety and soundness and proper OCC supervision. The final rule's benefits include increased flexibility for filing procedures, elimination of redundant or unnecessary reporting requirements consistent with safety and soundness, and updated policies and procedures that increase clarity and reduce ambiguity for banks seeking compliance with 12 CFR part 5 requirements. Further discussion of the consideration by the OCC of these administrative compliance requirements is found in other sections of the final rule's **SUPPLEMENTARY INFORMATION** section.

E. Effective Date

The APA[69] requires that a substantive rule must be published not less than 30 days before its effective date, except for: (1) Substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[70] The January 11, 2021 effective date of this final rule for all but one of its amendments meets the APA effective date requirements, as it will take effect at least 30 days after its publication date of December 11, 2020. One technical amendment takes effect on December 11, 2020. This amendment removes the reference to 12 CFR part 195, the Federal savings association CRA rule, in § 5.20(e)(2)(ii) because the OCC recently amended 12 CFR part 25 to include Federal savings associations and removed 12 CFR part 195 as of October 1, 2020.[71] Because this is a technical amendment that aligns § 5.20(e)(2)(ii) with revised part 25, the OCC believes

[63] The OCC bases its estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $600 million and $41.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2019, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the U.S. Small Business Administration's *Table of Standards.*

[64] *See,* ''A Guide for Government Agencies; How to Comply with the Regulatory Flexibility Act,'' (pp. 18–20), *available at: https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[65] This per hour dollar amount is based on the U.S. Bureau of Labor Statistics data for wages (by industry and occupation).

[66] The OCC believes that substantially all of banks' direct costs will be associated with reviewing the final rule and, when necessary, modifying policies and procedures to correct any inconsistencies between banks' internal policies and the final modified rules. The overall impact estimate of the final rule is a conservative one because it is difficult to monetize the potential offsetting benefits associated with the final changes. Benefits from these changes will accrue over the long-term and are therefore more difficult to monetize for purposes of this estimate.

[67] The OCC's threshold for a substantial number of small entities is five percent of OCC-supervised small entities, or 37 as of December 31, 2019.

[68] The OCC is making one technical change that takes effect on December 11, 2020. This amendment removes the reference to 12 CFR part 195, the Federal savings association CRA rule, in § 5.20(e)(2)(ii) because the OCC recently amended 12 CFR part 25 to include Federal savings associations and removed 12 CFR part 195 as of this date.

[69] Codified at 5 U.S.C. 551 *et seq.*

[70] 5 U.S.C. 553(d).

[71] *See* 85 CFR 34734 (June 5, 2020).

it has good cause to issue this rule without a delayed effective date.

Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [72] As described in the final rule's **SUPPLEMENTARY INFORMATION** section, the final rule includes a number of technical, clarifying, or conforming amendments that the OCC did not include in its proposed rule. Because these amendments are not substantive and merely correct or clarify the rule, update the rule to reflect current law, or fix citation and regulatory text format, the OCC believes that public notice of these changes is unnecessary and therefore that it has good cause to adopt these changes without notice and comment.

F. Congressional Review Act

For purposes of the Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major rule.'' [73] If a rule is deemed a ''major rule'' by OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[74]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) a significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[75]

OMB has determined that this final rule is not a major rule. As required by the Congressional Review Act, the OCC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

[72] 5 U.S.C. 553(b)(3)(A).

[73] 5 U.S.C. 801 *et seq.*

[74] 5 U.S.C. 801(a)(3).

[75] 5 U.S.C. 804(2).

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Capital, National banks, Federal savings associations, Risk.

12 CFR Part 5

Administrative practice and procedure, Federal savings associations, National banks, Reporting and recordkeeping requirements, Securities.

12 CFR Part 7

Computer technology, Credit, Derivatives, Federal savings associations, Insurance, Investments, Metals, National banks, Reporting and recordkeeping requirements, Securities, Security bonds.

For the reasons set out in the preamble, the OCC proposes to amend 12 CFR chapter I as follows:

PART 3—CAPITAL ADEQUACY STANDARDS

■ 1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, 5412(b)(2)(B), and Pub. L. 116–136, 134 Stat. 281.134 Stat. 281.

§ 3.701 [Amended]

■ 2. Amend § 3.701(f)(1)(vi) by removing the phrase ''12 CFR 5.3(g)'' and adding in its place the phrase ''12 CFR 5.3''.

PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

■ 3. The authority citation for part 5 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 24a, 35, 93a, 214a, 215, 215a, 215a–1, 215a–2, 215a–3, 215c, 371d, 481, 1462a, 1463, 1464, 1817(j), 1831i, 1831u, 2901 *et seq.,* 3101 *et seq.,* 3907, and 5412(b)(2)(B).

§ 5.2 [Amended]

■ 4. Amend § 5.2 by:

■ a. In paragraph (b), removing the word ''filings,'' and adding in its place the phrase ''filings as it deems necessary, for example,'' and removing the word ''applicant'' and adding in its place the word ''filer''; and

■ b. In paragraph (c), removing the phrase ''on the OCC's Internet Web page''.

■ 5. Revise § 5.3 to read as follows.

§ 5.3 Definitions.

As used in this part:

Application means a submission requesting OCC approval to engage in various corporate activities and transactions.

Appropriate Federal banking agency has the meaning set forth in section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q).

Appropriate OCC licensing office means the OCC office that is responsible for processing applications or notices to engage in various corporate activities or transactions, as described at *www.occ.gov.*

Appropriate OCC supervisory office means the OCC office that is responsible for the supervision of a national bank or Federal savings association, as described in subpart A of 12 CFR part 4.

Capital and surplus means:

(1) For qualifying community banking organizations that have elected to use the community bank leverage ratio framework, as set forth under the OCC's Capital Adequacy Standards at part 3 of this chapter:

(i) A qualifying community banking organization's tier 1 capital, as used under § 3.12 of this chapter; plus

(ii) A qualifying community banking organization's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, as reported in the national bank's or Federal savings association's Consolidated Report of Condition and Income (Call Report); or

(2) For all other national banks and Federal savings associations:

(i) A national bank's or Federal savings association's tier 1 and tier 2 capital calculated under the OCC's risk-based capital standards set forth in part 3 of this chapter, as applicable, as reported in the Call Report, respectively; plus

(ii) The balance of the national bank's or Federal savings association's allowance for loan and lease losses or adjusted allowances for credit losses, as applicable, not included in the institution's tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (2)(i) of this definition, as reported in the Call Report.

Depository institution means any bank or savings association.

Eligible bank or eligible savings association means a national bank or Federal savings association that:

(1) Is well capitalized under § 5.3;

(2) Has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMELS);

(3) Has a Community Reinvestment Act (CRA), 12 U.S.C. 2901 *et seq.,* rating of ''Outstanding'' or ''Satisfactory,'' if applicable;

(4) Has a consumer compliance rating of 1 or 2 under the Uniform Interagency

Consumer Compliance Rating System; and

(5) Is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive (*see* 12 CFR part 6, subpart B) or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the bank or savings association may be treated as an ''eligible bank or eligible savings association'' for purposes of this part.

Eligible depository institution means:

(1) With respect to a national bank, a State bank or a Federal or State savings association that meets the criteria for an ''eligible bank or eligible savings association'' under § 5.3 and is FDIC-insured; and

(2) With respect to a Federal savings association, a State or national bank or a State savings association that meets the criteria for an ''eligible bank or eligible savings association'' under § 5.3 and is FDIC-insured.

FDIC means the Federal Deposit Insurance Corporation.

Filer means a person or entity that submits a notice or application to the OCC under this part.

Filing means an application or notice submitted to the OCC under this part.

GAAP means generally accepted accounting principles as used in the United States.

MSA means metropolitan statistical area as defined by the Director of the Office of Management and Budget.

Nonconforming assets and nonconforming activities mean assets or activities, respectively, that are impermissible for national banks or Federal savings associations to hold or conduct, as applicable, or, if permissible, are held or conducted in a manner that exceeds limits applicable to national banks or Federal savings associations, as applicable. Assets include investments in subsidiaries or other entities.

Notice, in general, means a submission notifying the OCC that a national bank or Federal savings association intends to engage in or has commenced certain corporate activities or transactions. The specific meaning of *notice* depends on the context of the rule in which it is used and may provide the OCC with authority to disapprove the notice or may be informational requiring no official OCC action.

OTS means the former Office of Thrift Supervision.

Previously approved activity means:

(1) In the case of a national bank, any activity approved in published OCC precedent for a national bank, an operating subsidiary of a national bank, or a non-controlling investment of a national bank; and

(2) In the case of a Federal savings association, any activity approved in published OCC or OTS precedent for a Federal savings association, an operating subsidiary of a Federal savings association, or a pass-through investment of a Federal savings association.

Principal city means an area designated as a ''principal city'' by the Office of Management and Budget.

Short-distance relocation means moving the premises of a branch or main office of a national bank or a branch or home office of a Federal savings association within a:

(1) One thousand foot-radius of the site if the branch, main office, or home office is located within a principal city of an MSA;

(2) One-mile radius of the site if the branch, main office, or home office is not located within a principal city, but is located within an MSA; or

(3) Two-mile radius of the site if the branch, main office, or home office is not located within an MSA.

Well capitalized means:

(1) In the case of a national bank or Federal savings association, the capital level described in 12 CFR 6.4(b)(1);

(2) In the case of a Federal branch or agency, the capital level described in 12 CFR 4.7(b)(1)(iii); or

(3) In the case of another depository institution, the capital level designated as ''well capitalized'' by the institution's appropriate Federal banking agency pursuant to section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831*o*).

Well managed means:

(1) In the case of a national bank or Federal savings association:

(i) Unless otherwise determined in writing by the OCC, the national bank or Federal savings association has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination, and at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of a national bank or Federal savings association that has not been examined by the OCC, the existence and use of managerial resources that the OCC determines are satisfactory.

(2) In the case of a Federal branch or agency of a foreign bank:

(i) Unless determined otherwise in writing by the OCC, the Federal branch or agency has received a composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 at its most recent examination, and at least a rating of 2 for risk management, if such a rating is given; or

(ii) In the case of a Federal branch or agency that has not been examined by the OCC, the existence and use of managerial resources that the OCC determines are satisfactory.

(3) In the case of another depository institution:

(i) Unless otherwise determined in writing by the appropriate Federal banking agency, the institution has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (or an equivalent rating under an equivalent rating system) in connection with the most recent examination or subsequent review of the depository institution and, at least a rating of 2 for management, if such a rating is given; or

(ii) In the case of another depository institution that has not been examined by its appropriate Federal banking agency, the existence and use of managerial resources that the appropriate Federal banking agency determines are satisfactory.

■ 6. Amend § 5.4 by:

■ a. In paragraph (a), removing the word ''shall'' and adding in its place the word ''must'';

■ b. In paragraph (b), removing the phrase ''on the OCC's Internet Web page'';

■ c. In paragraph (c), removing the word ''applicant'' wherever it appears and adding in its place the word ''filer'';

■ d. In paragraph (d):

■ i. Removing the phrases ''An applicant'' and ''an applicant'' and adding in their place the phrases ''A filer'' and ''a filer'', respectively; and

■ ii. Removing the phrase ''the OCC's Internet Web page at'';

■ e. In paragraph (e), removing the phrase ''An applicant'' and adding in its place the phrase ''A filer'';

■ f. Revising paragraph (f); and

■ g. Adding paragraph (g).

The addition and revision read as follows:

§ 5.4 Filing required.

* * * * *

(f) *Prefiling meeting.* Before submitting a filing to the OCC, a potential filer is encouraged to contact the appropriate OCC licensing office to determine the need for a prefiling meeting. The OCC decides whether to require a prefiling meeting on a case-by-case basis. Submission of a draft business plan or other relevant information before any prefiling meeting may expedite the filing review process. A potential filer considering a novel,

complex, or unique proposal is encouraged to contact the appropriate OCC licensing office to schedule a prefiling meeting early in the development of its proposal for the early identification and consideration of policy issues. Information on model business plans can be found in the Comptroller's Licensing Manual.

(g) *Certification.* A filer must certify that any filing or supporting material submitted to the OCC contains no material misrepresentations or omissions. The OCC may review and verify any information filed in connection with a notice or an application. Any person responsible for any material misrepresentation or omission in a filing or supporting materials may be subject to enforcement action and other penalties, including criminal penalties provided in 18 U.S.C. 1001.

■ 7. Amend § 5.5 by revising paragraph (a) to read as follows:

§ 5.5 Filing fees.

(a) *Procedure.* A filer must submit the appropriate filing fee, if any, in connection with its filing. Filing fees must be paid by check payable to the OCC or by other means acceptable to the OCC. Additional information on filing fees, including where to file, can be found in the Comptroller's Licensing Manual. The OCC generally does not refund the filing fees.

* * * * *

■ 8. Amend § 5.7 by redesignating paragraph (b) as paragraph (c) and adding a new paragraph (b) to read as follows:

§ 5.7 Investigations.

* * * * *

(b) *Fingerprints.* For certain filings, the OCC collects fingerprints for submission to the Federal Bureau of Investigation for a national criminal history background check.

* * * * *

§ 5.8 [Amended]

■ 9. Amend § 5.8 by:

■ a. In paragraph (a), removing the phrase ''An applicant shall publish'' and adding in its place the phrase ''A filer must publish'' and removing the phrase ''the applicant proposes'' and adding in its place the phrase ''the filer proposes'';

■ b. In paragraphs (a) and (b), removing the word ''shall'' and adding in its place the word ''must'';

■ c. In paragraphs (b) and (g)(1), removing the word ''applicant'' and adding in its place the word ''filer'';

■ d. In paragraphs (c) and (d), removing the phrase ''applicant shall'' and adding in its place the phrase ''filer must''; and

■ e. In paragraphs (e) and (g) introductory text, removing the phrase ''an applicant'' and adding in its place the phrase ''a filer''.

§ 5.9 [Amended]

■ 10. Amend § 5.9 by:

■ a. In paragraph (b), in the second sentence, removing the word ''Applicants'' and adding in its place the word ''Filers''; and

■ b. In paragraph (c), in the first sentence, removing the word ''applicant'' and adding in its place the word ''filer''.

§ 5.10 [Amended]

■ 11. Amend § 5.10 by:

■ a. In paragraphs (b)(2)(i) and (b)(3), removing the word ''applicant'' and adding in its place the word ''filer'';

■ b. In paragraph (b)(2)(ii), removing the word ''application'' and adding in its place the word ''filing''; and

■ c. In paragraph (b)(3), revising the paragraph heading by removing the word ''*Applicant*'' and adding in its place the word ''*Filer*''.

§ 5.11 [Amended]

■ 12. Amend § 5.11 by:

■ a. In paragraphs (a), (e), and (g)(2), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';

■ b. In paragraphs (a), (d)(1), (e), (g)(1), and (g)(2), removing the word ''applicant'' and adding in its place the word ''filer'';

■ c. In paragraph (c), removing the word ''shall'' and adding in its place the word ''will'';

■ d. In paragraphs (e) and (f), removing the phrase ''his or her'' and adding in its place the word ''their'';

■ e. In paragraph (h), removing the word ''applicant's'' and adding in its place the word ''filer's''; and

■ f. In paragraph (i)(1) removing the phrase ''an application'' and adding in its place the phrase ''a filing'' and removing the phrase ''the application'' and adding in its place the phrase ''the filing''; and

■ g. In paragraph (i)(2), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer''.

§ 5.12 [Amended]

■ 13. Amend § 5.12 by removing the phrase ''an application'' and adding in its place the phrase ''a filing''.

■ 14. Amend § 5.13 by:

■ a. In paragraphs (a) introductory text and (b)(1), (d), and (g), removing the phrase ''the applicant'' wherever it appears and adding in its place the phrase ''the filer'';

■ b. Revising paragraph (a)(2);

■ c. In paragraph (b)(3), removing the phrase ''The applicant'' and adding in its place the phrase ''The filer'';

■ d. In paragraph (c), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'';

■ e. In paragraph (f), removing the phrase ''An applicant'' and adding in its place the phrase ''A filer'';

■ f. In paragraph (g), removing the word ''applicant's'' and adding in its place the word filer's'';

■ g. Revising paragraph (h); and

■ h. Adding paragraph (i).

The revisions and addition read as follows:

§ 5.13 Decisions.

(a) * * *

(2) *Expedited review.* The OCC grants qualifying national banks and Federal savings associations expedited review within a specified time after filing or commencement of the public comment period for certain filings.

(i) The OCC may extend the expedited review period or remove a filing from expedited review procedures if it concludes that the filing, or an adverse comment regarding the filing, presents a significant supervisory, CRA (if applicable), or compliance concern or raises a significant legal or policy issue requiring additional OCC review. The OCC will provide the filer with a written explanation if it decides not to process an application from a qualifying national bank or Federal savings association under expedited review pursuant to this paragraph.

(ii) Adverse comments that the OCC determines do not raise a significant supervisory, CRA (if applicable), or compliance concern or a significant legal or policy issue; are frivolous, non-substantive, or filed primarily as a means of delaying action on the filing; or raise a CRA concern that has been satisfactorily resolved do not affect the OCC's decision under paragraph (a)(2)(i) of this section. The OCC considers a comment to be non-substantive if it is a generalized opinion that a filing should or should not be approved or a conclusory statement, lacking factual or analytical support. The OCC considers a CRA concern to have been satisfactorily resolved if the OCC previously reviewed (*e.g.,* in an examination, other supervisory activity, or a prior filing made by the current filer) a concern presenting substantially the same issue in substantially the same assessment area during substantially the same time, and the OCC determines that the

concern would not warrant denial or imposition of a condition on approval of the application.

(iii) If a bank or savings association makes a filing for any activity or transaction that is dependent upon the approval of another filing under this part, or if requests for approval for more than one activity or transaction are combined in a single filing under applicable sections of this part, none of the subject filings may be deemed approved upon expiration of the applicable time periods, unless all of the filings are subject to expedited review procedures and the longest of the time periods expires without the OCC issuing a decision or notifying the bank or savings association that the filings are not eligible for expedited review under the standards in paragraph (a)(2)(i) of this section.

* * * * *

(h) *Nullifying a decision.* The OCC may nullify any decision on a filing either prior to or after consummation of the transaction if:

(1) The OCC discovers a material misrepresentation or omission in any information provided to the OCC in the filing or supporting materials;

(2) The decision is contrary to law, regulation, or OCC policy thereunder; or

(3) The decision was granted due to clerical or administrative error, or a material mistake of law or fact.

(i) *Modifying, Suspending, or Rescinding a Decision.* The OCC may modify, suspend, or rescind a decision on a filing if a material change in the information or circumstance on which the OCC relied occurs prior to the date of the consummation of the transaction to which the decision pertains.

■ 15. Amend § 5.20 by:

■ a. In paragraph (b), paragraph (e)(1)(iii) introductory text, and paragraphs (h)(1)(i), (h)(2), (h)(3)(i), (h)(5)(i), (h)(5)(ii), (h)(5)(iii), (h)(7), (i)(2), (k)(1), (l)(1), and (l)(2), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';

■ b. In paragraph (d)(2), removing the phrase ''section 2'' and adding in its place ''section 2(a)(2)'' and removing the phrase ''section 10'' and adding in its place ''section 10(a)(2)'';

■ c. Redesignating paragraphs (d)(7) and (8) as paragraphs (d)(8) and (9), respectively, and adding new paragraphs (d)(7) and (d)(10);

■ d. In redesignated paragraph (d)(8), adding the word ''natural'' before the word ''persons''; and

■ e. In redesignated paragraph (d)(9), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'';

■ f. In paragraph (e)(1)(ii)(A), removing the word ''applicants'' and adding in its place the word ''filers'';

■ g. Effective December 11, 2020, revising paragraph (e)(2);

■ h. In paragraph (e)(3), removing the phrase ''Federal Deposit Insurance Corporation (FDIC)'' and adding in its place the word ''FDIC'';

■ i. In paragraph (g)(4)(ii), removing the word ''shall'' and adding in its place the word ''may'' and removing the phrase ''withdrawal of preliminary approval'' and adding in its place the phrase ''nullification or rescission of a preliminary approval'';

■ j. In paragraphs (i)(1) and (j)(2), removing the word ''applicant'' and adding in its place the word ''filer'';

■ k. Redesignating paragraphs (i)(3) through (5) as paragraphs (i)(4) through (i)(6) and adding a new paragraph (i)(3);

■ l. In redesignated paragraph (i)(4), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';

■ m. In redesignated paragraph (i)(5), removing the phrase ''spokesperson and other interested persons'' and adding in its place the phrase ''contact person and other relevant parties'';

■ n. In redesignated paragraph (i)(6)(i), removing the phrase ''paragraph (i)(5)(iii)'' wherever it appears and adding in its place the phrase ''paragraph (i)(6)(iii)'';

■ o. In redesignated paragraphs (i)(6)(ii)(A) and (B), and (iii) and (iv), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';

■ p. In redesignated paragraph (i)(6)(iii), removing the phrase ''or part 197'';

■ q. Revising paragraph (j)(1); and

■ r. In paragraphs (k)(2) and (l)(1), removing the phrase ''An applicant'' wherever it appears and adding in its place the phrase ''A filer''.

The additions and revision read as follows:

§ 5.20 Organizing a national bank or Federal savings association.

* * * * *

(d) * * *

(7) *Organizer* means a member of the organizing group.

* * * * *

(10) *Principal shareholder* means a person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of their immediate family, will own, control, or hold 10 percent or more of the voting stock of the proposed national bank or Federal savings association.

(e) * * *

(2) *Community Reinvestment Act.* Twelve CFR part 25 requires the OCC to take into account a proposed insured national bank's or Federal savings association's description of how it will meet its CRA objectives.

* * * * *

(i) * * *

(3) *Biographical and financial reports*—(i) Each proposed organizer, director, executive officer, or principal shareholder must submit to the appropriate OCC licensing office:

(A) The information prescribed in the Interagency Biographical and Financial Report, available at *www.occ.gov;* and

(B) Legible fingerprints.

(ii) The OCC may require additional information about any proposed organizer, director, executive officer, or principal shareholder, if appropriate. The OCC may waive any of the information requirements of this paragraph if the OCC determines that it is in the public interest.

* * * * *

(j) * * *

(1) Notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2); or

* * * * *

■ 16. Amend § 5.21 by:

■ a. In paragraph (d), removing the word ''shall'' and adding in its place the word ''do'';

■ b. In paragraph (e) introductory text, removing the word ''shall'' and adding in its place the word ''must'' in the first and second sentence; and removing the word ''shall'' and adding in its place the word ''will'' in the last sentence;

■ c. In the form ''Federal Mutual Charter'' following paragraph (e):

■ i. Removing the phrase ''shall be'' and adding in its place the word ''is'' in Section 2 and Section 7;

■ ii. In Section 6:

■ A. Removing the phrase ''shall be permitted'' and adding in its place the phrase ''is permitted'';

■ B. Removing the phrase ''shall cast'' and adding in its place the phrase ''may cast''; and

■ C. Removing the phrase ''accounts shall be'' and adding in its place the phrase ''accounts are'';

■ iii. In Section 7:

■ A. Removing the phrase ''shall be'' and adding in its place the word ''is'';

■ B. Removing the phrase ''shall not'' and adding in its place the phrase ''may not''; and

■ iv. Removing the word ''shall'' and adding in its place the word ''will'' wherever it appears in Section 8 and Section 9;

■ d. Revising paragraph (f)(2) and adding paragraph (f)(3);

■ e. Revising paragraph (g) introductory text;
■ f. Revising paragraph (g)(1):
■ g. In paragraph (g)(2), removing the phrase ''has complied'' and adding in its place the word ''complies'';
■ h. Revising paragraph (i); and
■ g. Revising paragraph (j).

The revisions and addition read as follows.

§ 5.21 Federal mutual savings association charter and bylaws.

* * * * *

(f) * * *

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraph (f)(2)(ii) of this section, a Federal mutual savings association must file the proposed charter amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (f)(2)(i)(B) of this section, the charter amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(2)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a charter amendment that would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; or involve a significant issue of law or policy.

(ii) *Notice requirement.* No application under paragraph (f)(2)(i) of this section is required if the text of the amendment is contained within paragraphs (e) or (g) of this section. In such case, the Federal mutual savings association must submit a notice with the charter amendment to the OCC within 30 days after adoption.

(3) *Effectiveness.* A charter amendment is effective after approval by the OCC, if required pursuant to paragraph (f)(2) of this section, and adoption by the association, provided the association follows the requirements of its charter in adopting the amendment.

(g) *Optional charter amendments.* The following charter amendments are subject to the notice requirement in paragraph (f)(2)(ii) of this section if adopted without change:

(1) *Purpose and powers.* Add a second paragraph to section 4, as follows:

Section 4. Purpose and powers. * * * The association has the express power: (i) To act as fiscal agent of the United States when designated for that purpose by the Secretary of the Treasury, under such regulations as the Secretary may prescribe, to perform all such reasonable duties as fiscal agent of the United States as may be required, and to act as agent for any other instrumentality of the United States when designated for that purpose by any such instrumentality; (ii) To sue and be sued, complain and defend in any court of law or equity; (iii) To have a corporate seal, affixed by imprint, facsimile or otherwise; (iv) To appoint officers and agents as its business requires and allow them suitable compensation; (v) To adopt bylaws not inconsistent with the Constitution or laws of the United States and rules and regulations adopted thereunder and under this Charter; (vi) To raise unlimited capital by accepting payments on savings, demand, or other accounts, as are authorized by rules and regulations made by the OCC, and the holders of all such accounts or other accounts as will, to such extent as may be provided by such rules and regulations, be members of the association and will have such voting rights and such other rights as are thereby provided; (vii) To issue notes, bonds, debentures, or other obligations, or securities, provided by or under any provision of Federal statute as from time to time is in effect; (viii) To provide for redemption of insured accounts; (ix) To borrow money without limitation and pledge and otherwise encumber any of its assets to secure its debts; (x) To lend and otherwise invest its funds as authorized by statute and the rules and regulations of the OCC; (xi) To wind up and dissolve, merge, consolidate, convert, or reorganize; (xii) To purchase, hold, and convey real estate and personalty consistent with its objects, purposes, and powers; (xiii) To mortgage or lease any real estate and personalty and take such property by gift, devise, or bequest; and (xiv) To exercise all powers conferred by law. In addition to the foregoing powers expressly enumerated, this association has the power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers.

* * * * *

(i) *Availability of chartering documents.* A Federal mutual savings association must make available a true copy of its charter and bylaws and all amendments thereto to accountholders at all times in each office of the savings association, and must upon request deliver to any accountholders a copy of such charter and bylaws or amendments thereto.

(j) *Bylaws for Federal mutual savings associations*—(1) *In general.* A Federal mutual savings association must operate under bylaws that contain provisions that comply with all requirements specified by the OCC in this paragraph and that are not otherwise inconsistent with the provisions of this paragraph; the association's charter; and all other applicable laws, rules, and regulations *provided that,* a bylaw provision inconsistent with the provisions of this paragraph may be adopted with the approval of the OCC. Bylaws may be adopted, amended or repealed by a majority of the votes cast by the members at a legal meeting or a majority of the association's board of directors. The bylaws for a Federal mutual savings bank must substitute the term ''savings bank'' for ''association''. The term ''trustee'' may be substituted for the term ''director''.

(2) *Requirements.* The following requirements are applicable to Federal mutual savings associations:

(i) *Annual meetings of members.* (A) An association must provide for and conduct an annual meeting of its members for the election of directors and at which any other business of the association may be conducted. Such meeting must be held at any convenient place the board of directors may designate, and at a date and time within 150 days after the end of the association's fiscal year. The association's bylaws may provide for telephonic or electronic participation of members at an annual meeting. Members participating in an annual meeting telephonically or electronically will be deemed present in person for purposes of the quorum requirement in paragraph (j)(2)(v) of this section.

(B) At each annual meeting, the officers must make a full report of the financial condition of the association and of its progress for the preceding year and must outline a program for the succeeding year.

(C) If the association's bylaws provide for telephonic or electronic participation in member meetings, the association must follow the procedures for telephonic or electronic participation of the State corporate governance procedures it is permitted to elect pursuant to paragraph (j)(3)(ii) of this section, if those State corporate governance procedures include telephonic or electronic participation procedures; the Delaware General Corporation Law, Del. Code Ann. Tit. 8 (1991, as amended 1994, and as

amended thereafter) (with ''member'' substituting for ''stockholder''); or the Model Business Corporation Act (with ''member'' substituting for ''shareholder''), provided, however, that such procedures are not inconsistent with applicable Federal statutes and regulations and safety and soundness. The association must indicate the use of these procedures in its bylaws.

(ii) *Special meetings of members.* Procedures for calling any special meeting of the members and for conducting such a meeting must be set forth in the bylaws. The board of directors of the association or the holders of 10 percent or more of the voting capital must be entitled to call a special meeting. The association's bylaws may provide for telephonic or electronic participation of members at a special meeting pursuant to the procedures specified in paragraph (j)(2)(i)(C) of this section. Members participating in a special meeting telephonically or electronically will be deemed present in person for purposes of the quorum requirement in paragraph (j)(2)(v) of this section. For purposes of this paragraph, ''voting capital'' means FDIC-insured deposits as of the voting record date.

(iii) *Notice of meeting of members.* Notice specifying the date, time, and place of the annual or any special meeting and adequately describing any business to be conducted must be published for two successive weeks immediately prior to the week in which such meeting will convene in a newspaper of general circulation in the city or county in which the principal place of business of the association is located, or mailed postage prepaid at least 15 days and not more than 45 days prior to the date on which such meeting will convene to each of its members of record. A similar notice must be posted in a conspicuous place in each of the offices of the association during the 14 days immediately preceding the date on which such meeting will convene. The bylaws may permit a member to waive in writing any right to receive personal delivery of the notice. When any meeting is adjourned for 30 days or more, notice of the adjournment and reconvening of the meeting must be given as in the case of the original meeting.

(iv) *Fixing of record date.* The bylaws must provide for the fixing of a record date and a method for determining from the books of the association the members entitled to vote. Such date may not be more than 60 days nor fewer than 10 days prior to the date on which the action, requiring such determination of members, is to be taken. The same determination must apply to any adjourned meeting.

(v) *Member quorum.* Any number of members present and voting, represented in person or by proxy, at a regular or special meeting of the members constitutes a quorum. A majority of all votes cast at any meeting of the members determines any question, unless otherwise required by regulation. At any adjourned meeting, any business may be transacted that might have been transacted at the meeting as originally called. Members present at a duly constituted meeting may continue to transact business until adjournment.

(vi) *Voting by proxy.* Procedures must be established for voting at any annual or special meeting of the members by proxy pursuant to the rules and regulations of the OCC. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the member. All proxies with a term greater than eleven months or solicited at the expense of the association must run to the board of directors as a whole, or to a committee appointed by a majority of such board.

(vii) *Communications between members.* Provisions relating to communications between members must be consistent with § 144.8 of this chapter. No member, however, may have the right to inspect or copy any portion of any books or records of a Federal mutual savings association containing:

(A) A list of depositors in or borrowers from such association;

(B) Their addresses;

(C) Individual deposit or loan balances or records; or

(D) Any data from which such information could be reasonably constructed.

(viii) *Number of directors, membership.* The bylaws must set forth a specific number of directors, not a range. The number of directors may not be fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS prior to July 21, 2011 or by the OCC. Each director of the association must be a member of the association. Directors may be elected for periods of one to three years and until their successors are elected and qualified, but if a staggered board is chosen, provision must be made for the election of approximately one-third or one-half of the board each year, as appropriate. State-chartered savings banks converting to Federal savings banks may include alternative provisions for the election and term of office of directors so long as such provisions are authorized by the OCC, and provide for compliance with the standard provisions of this paragraph no later than six years after the conversion to a Federal savings association.

(ix) *Meetings of the board.* The board of directors determines the place, frequency, time, procedure for notice, which must be at least 24 hours unless waived by the directors, and waiver of notice for all regular and special meetings. The board also may permit telephonic or electronic participation at meetings. The bylaws may provide for action to be taken without a meeting if unanimous written consent is obtained for such action. A majority of the authorized directors constitutes a quorum for the transaction of business. The act of a majority of the directors present at any meeting at which there is a quorum will be the act of the board.

(x) *Officers, employees and agents.* (A) The bylaws must contain provisions regarding the officers of the association, their functions, duties, and powers. The officers of the association must consist of a president, one or more vice presidents, a secretary, and a treasurer or comptroller, each of whom must be elected annually by the board of directors. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed in the bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary.

(B) Any officer may be removed by the board of directors with or without cause, but such removal, other than for cause, must be without prejudice to the contractual rights, if any, of the person so removed. Termination for cause, for purposes of this section and § 5.22, includes termination because of the person's personal dishonesty; incompetence; willful misconduct; breach of fiduciary duty involving personal profit; intentional failure to perform stated duties; willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease and desist order; or material breach of any provision of an employment contract.

(xi) *Vacancies, resignation or removal of directors.* In the event of a vacancy on the board, the board of directors may, by its affirmative vote, fill such vacancy, even if the remaining directors constitute less than a quorum. A director elected to fill a vacancy may serve only until the next election of directors by the members. The bylaws must set out the procedure for the resignation of a director. Directors may be removed only for cause, as defined in

paragraph (j)(2)(x)(B) of this section, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.

(xii) *Powers of the board.* The board of directors has the power to exercise any and all of the powers of the association not expressly reserved by the charter to the members.

(xiii) *Nominations for directors.* The bylaws must provide that nominations for directors may be made at the annual meeting by any member and must be voted upon, except, however, the bylaws may require that nominations by a member must be submitted to the secretary and then prominently posted in the principal place of business at least 10 days prior to the date of the annual meeting. However, if such provision is made for prior submission of nominations by a member, then the bylaws must provide for a nominating committee, which, except in the case of a nominee substituted as a result of death or other incapacity, must submit nominations to the secretary and have such nominations similarly posted at least 15 days prior to the date of the annual meeting.

(xiv) *New business.* The bylaws must provide procedures for the introduction of new business at the annual meeting.

(xv) *Amendment.* Bylaws may include any provision for their amendment that would be consistent with applicable law, rules, and regulations and adequately addresses its subject and purpose.

(A) Amendments will be effective:

(*1*) After approval by a majority vote of the authorized board, or by a majority of the vote cast by the members of the association at a legal meeting; and

(*2*) After receipt of any applicable regulatory approval.

(B) When an association fails to meet its quorum requirement, solely due to vacancies on the board, the bylaws may be amended by an affirmative vote of a majority of the sitting board.

(xvi) *Miscellaneous.* The bylaws also may address any other subjects necessary or appropriate for effective operation of the association.

(3) *Form of filing*—(i) *Application requirement.* Except as provided in paragraphs (j)(3)(ii) or (j)(3)(iii) of this section, a Federal mutual savings association must file the proposed bylaw amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (j)(3)(i)(B) of this section, the bylaw amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the bylaw amendment is denied or that the amendment contains procedures of the type described in paragraph (j)(3)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter and bylaws in adopting the amendment.

(B) *Amendments not subject to expedited review.* A bylaw amendment is not subject to expedited review if it would render more difficult or discourage a merger, proxy contest, the assumption of control by a mutual account holder of the association, or the removal of incumbent management; involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability; or be inconsistent with the requirements of this paragraph or with applicable laws, rules, regulations, or the association's charter.

(ii) *Corporate governance election and notice requirement.* A Federal mutual association may elect to follow the corporate governance procedures of the laws of the State where the home office of the institution is located, provided that such procedures are not inconsistent with applicable Federal statutes, regulations, and safety and soundness, and such procedures are not of the type described in paragraph (j)(3)(i)(B) of this section. If this election is selected, a Federal mutual association must designate in its bylaws the provision or provisions from the body of law selected for its corporate governance procedures, and must submit a notice containing a copy of such bylaws, within 30 days after adoption. The notice must indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (j)(3)(i)(B) of this section.

(iii) *No filing required.* No filing is required for purposes of paragraph (j)(3) of this section if a bylaw amendment adopts the language of the OCC's model or optional bylaws without change.

(4) *Effectiveness.* A bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

(5) *Effect of subsequent charter or bylaw change.* Notwithstanding any subsequent change to its charter or bylaws, the authority of a Federal mutual savings association to engage in any transaction is determined only by the association's charter or bylaws then in effect.

■ 17. Amend § 5.22 by:

■ a. In paragraph (d), removing the word ''shall'' and adding in its place the word ''do'';

■ b. In paragraph (e) introductory text removing the word ''shall'' wherever it appears and adding in its place the word ''must'' and removing ''§ 192.3(c)(13)'' and adding in its place ''§ 192.485'';

■ c. In the form ''Federal Stock Charter'' following paragraph (e):

■ i. In *Section 2,* removing the phrase ''shall be'' and adding in its place the word ''is'';

■ ii. Revising *Section 5;*

■ iii. In *Section 6,* removing the phrase ''shall not be entitled'' and adding in its place the phrase ''are not entitled'';

■ iv. In *Section 7,* removing the phrase ''shall be'' and adding in its place the phrase ''will be'' and removing the phrase ''shall not be'' and adding in its place the phrase ''may not be''; and

■ v. In *Section 8,* removing the phrase ''shall be'' and adding in its place ''may be'';

■ d. Revising paragraph (f)(2) and adding paragraph (f)(3);

■ e. Revising paragraph (g) introductory text;

■ f. In paragraph (g)(1), removing the phrase ''has complied'' and adding in its place the word ''complies'';

■ g. Revising paragraph (g)(4);

■ h. Removing the word ''shall'' wherever it appears and adding in its place the word ''will'' in paragraph (g)(6); and

■ i. Revising paragraph (g)(7);

■ j. In paragraph (h):

■ i. Removing the phrase ''shall file'' and adding in its place the word ''files'';

■ ii. Removing the phrase ''for approval'' and adding in its place the phrase ''pursuant to paragraph (f)(2)(i) of this section'';

■ iii. Removing the word ''state'' and adding in its place the word ''State''; and

■ iv. Removing the phrase ''shall not'' and adding in its place the phrase ''may not'';

■ k. In paragraph (i), removing the phrase ''under (c) of this part'' and adding in its place ''in the form ''Federal Stock Charter'' in paragraph (e) of this section'';

■ l. Revising paragraphs (j)(2) and (3);

■ m. In paragraph (j)(4), removing the phrase ''shall be'' and adding in its place the word ''is'':

■ n. Revising paragraphs (k)(1) through (7);

■ o. Revising paragraphs (l)(1) through (10);

■ p. In paragraph (m)(1) removing the phrase ''shall be a president'' and adding in its place the phrase ''must consist of a president''; removing the phrase ''shall be elected'' and adding in its place the phrase ''must be elected''; and removing the word ''chairman'' and

adding in its place the word ''chair''; and

■ q. In paragraph (m)(2) removing the phrase ''shall be'' and adding in its place the phrase ''will be'' and removing the last sentence; and

■ r. Revising paragraph (n).

The addition and revisions read as follows.

§ 5.22 Federal stock savings association charter and bylaws.

* * * * *

(e) * * *

Federal Stock Charter

* * * * *

Section 5. Capital stock. The total number of shares of all classes of the capital stock that the association has the authority to issue is __, all of which is common stock of par [or if no par is specified then shares have a stated] value of __per share. The shares may be issued from time to time as authorized by the board of directors without the approval of its shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares must be paid in full before their issuance and may not be less than the par [or stated] value. Neither promissory notes nor future services may constitute payment or part payment for the issuance of shares of the association. The consideration for the shares must be cash, tangible or intangible property (to the extent direct investment in such property would be permitted to the association), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, is conclusive. Upon payment of such consideration, such shares are deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend is deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) may be issued, directly or indirectly, to officers, directors, or controlling persons of the association other than as part of a general public offering or as qualifying shares to a director, unless the issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting. The holders of the common stock exclusively possess all voting power. Each holder of shares of common stock is entitled to one vote for each share held by such holder, except as to the cumulation of votes for the election of directors, unless the charter provides that there will be no such cumulative voting. Subject to any provision for a liquidation account, in the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock will be entitled, after payment or provision for payment of all debts and liabilities of the association, to receive the remaining assets of the association available for distribution, in cash or in kind. Each share of common stock must have the same relative rights as and be identical in all respects with all the other shares of common stock.

* * * * *

(f) * * *

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraph (f)(2)(ii) of this section, a Federal stock savings association must file the proposed charter amendment with, and obtain the prior approval of the OCC.

(A) *Expedited review.* Except as provided in paragraph (f)(2)(i)(B) of this section, the charter amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the amendment is denied or that the amendment contains procedures of the type described in paragraph (f)(2)(ii)(B) of this section and is not subject to expedited review, provided the association follows the requirements of its charter in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a charter amendment that would render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a block of the association's stock, the removal of incumbent management, or involve a significant issue of law or policy.

(ii) *Notice requirement.* No application under paragraph (f)(2)(i) of this section is required if the amendment is contained within paragraphs (e) or (g) of this section. In such case, the Federal stock savings association must submit a notice with the charter amendment to the OCC within 30 days after adoption.

(3) *Effectiveness.* A charter amendment is effective after approval by the OCC, if required, and adoption by the association, provided the association follows the requirements of its charter in adopting the amendments.

(g) *Optional charter amendments.* The following charter amendments are subject to the notice requirement in paragraph (f)(2)(ii) of this section if adopted without change:

* * * * *

(4) *Capital stock.* A Federal stock association may amend its charter by revising Section 5 to read as follows:

Section 5. Capital stock. The total number of shares of all classes of capital stock that the association has the authority to issue is __, of which __is common stock of par [or if no par value is specified the stated] value of __per share and of which [list the number of each class of preferred and the par or if no par value is specified the stated value per share of each such class]. The shares may be issued from time to time as authorized by the board of directors without further approval of shareholders, except as otherwise provided in this Section 5 or to the extent that such approval is required by governing law, rule, or regulation. The consideration for the issuance of the shares must be paid in full before their issuance and may not be less than the par [or stated] value. Neither promissory notes nor future services may constitute payment or part payment for the issuance of shares of the association. The consideration for the shares must be cash, tangible or intangible property (to the extent direct investment in such property would be permitted), labor, or services actually performed for the association, or any combination of the foregoing. In the absence of actual fraud in the transaction, the value of such property, labor, or services, as determined by the board of directors of the association, will be conclusive. Upon payment of such consideration, such shares will be deemed to be fully paid and nonassessable. In the case of a stock dividend, that part of the retained earnings of the association that is transferred to common stock or paid-in capital accounts upon the issuance of shares as a stock dividend will be deemed to be the consideration for their issuance.

Except for shares issued in the initial organization of the association or in connection with the conversion of the association from the mutual to the stock form of capitalization, no shares of capital stock (including shares issuable upon conversion, exchange, or exercise of other securities) may be issued, directly or indirectly, to officers, directors, or controlling persons of the

association other than as part of a general public offering or as qualifying shares to a director, unless their issuance or the plan under which they would be issued has been approved by a majority of the total votes eligible to be cast at a legal meeting.

Nothing contained in this Section 5 (or in any supplementary sections hereto) entitles the holders of any class of a series of capital stock to vote as a separate class or series or to more than one vote per share, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there will be no such cumulative voting: *Provided,* That this restriction on voting separately by class or series does not apply:

i. To any provision which would authorize the holders of preferred stock, voting as a class or series, to elect some members of the board of directors, less than a majority thereof, in the event of default in the payment of dividends on any class or series of preferred stock;

ii. To any provision that would require the holders of preferred stock, voting as a class or series, to approve the merger or consolidation of the association with another corporation or the sale, lease, or conveyance (other than by mortgage or pledge) of properties or business in exchange for securities of a corporation other than the association if the preferred stock is exchanged for securities of such other corporation: *Provided,* That no provision may require such approval for transactions undertaken with the assistance or pursuant to the direction of the OCC or the Federal Deposit Insurance Corporation;

iii. To any amendment which would adversely change the specific terms of any class or series of capital stock as set forth in this Section 5 (or in any supplementary sections hereto), including any amendment which would create or enlarge any class or series ranking prior thereto in rights and preferences. An amendment which increases the number of authorized shares of any class or series of capital stock, or substitutes the surviving association in a merger or consolidation for the association, is not considered to be such an adverse change.

A description of the different classes and series (if any) of the association's capital stock and a statement of the designations, and the relative rights, preferences, and limitations of the shares of each class of and series (if any) of capital stock are as follows:

A. *Common stock.* Except as provided in this Section 5 (or in any supplementary sections thereto) the holders of the common stock exclusively possess all voting power. Each holder of shares of the common stock is entitled to one vote for each share held by each holder, except as to the cumulation of votes for the election of directors, unless the charter otherwise provides that there will be no such cumulative voting.

Whenever there has been paid, or declared and set aside for payment, to the holders of the outstanding shares of any class of stock having preference over the common stock as to the payment of dividends, the full amount of dividends and of sinking fund, retirement fund, or other retirement payments, if any, to which such holders are respectively entitled in preference to the common stock, then dividends may be paid on the common stock and on any class or series of stock entitled to participate therewith as to dividends out of any assets legally available for the payment of dividends.

In the event of any liquidation, dissolution, or winding up of the association, the holders of the common stock (and the holders of any class or series of stock entitled to participate with the common stock in the distribution of assets) will be entitled to receive, in cash or in kind, the assets of the association available for distribution remaining after: (i) Payment or provision for payment of the association's debts and liabilities; (ii) distributions or provision for distributions in settlement of its liquidation account; and (iii) distributions or provision for distributions to holders of any class or series of stock having preference over the common stock in the liquidation, dissolution, or winding up of the association. Each share of common stock will have the same relative rights as and be identical in all respects with all the other shares of common stock.

B. *Preferred stock.* The association may provide in supplementary sections to its charter for one or more classes of preferred stock, which must be separately identified. The shares of any class may be divided into and issued in series, with each series separately designated so as to distinguish the shares thereof from the shares of all other series and classes. The terms of each series must be set forth in a supplementary section to the charter. All shares of the same class must be identical except as to the following relative rights and preferences, as to which there may be variations between different series:

a. The distinctive serial designation and the number of shares constituting such series;

b. The dividend rate or the amount of dividends to be paid on the shares of such series, whether dividends are cumulative and, if so, from which date(s), the payment date(s) for dividends, and the participating or other special rights, if any, with respect to dividends;

c. The voting powers, full or limited, if any, of shares of such series;

d. Whether the shares of such series are redeemable and, if so, the price(s) at which, and the terms and conditions on which, such shares may be redeemed;

e. The amount(s) payable upon the shares of such series in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association;

f. Whether the shares of such series are entitled to the benefit of a sinking or retirement fund to be applied to the purchase or redemption of such shares, and if so entitled, the amount of such fund and the manner of its application, including the price(s) at which such shares may be redeemed or purchased through the application of such fund;

g. Whether the shares of such series are convertible into, or exchangeable for, shares of any other class or classes of stock of the association and, if so, the conversion price(s) or the rate(s) of exchange, and the adjustments thereof, if any, at which such conversion or exchange may be made, and any other terms and conditions of such conversion or exchange.

h. The price or other consideration for which the shares of such series are issued; and

i. Whether the shares of such series which are redeemed or converted have the status of authorized but unissued shares of serial preferred stock and whether such shares may be reissued as shares of the same or any other series of serial preferred stock.

Each share of each series of serial preferred stock must have the same relative rights as and be identical in all respects with all the other shares of the same series.

The board of directors has authority to divide, by the adoption of supplementary charter sections, any authorized class of preferred stock into series, and, within the limitations set forth in this section and the remainder of this charter, fix and determine the relative rights and preferences of the shares of any series so established.

Prior to the issuance of any preferred shares of a series established by a supplementary charter section adopted by the board of directors, the association must file with the OCC a dated copy of that supplementary section of this charter established and designating the

series and fixing and determining the relative rights and preferences thereof.

* * * * *

(7) *Anti-takeover provisions following mutual to stock conversion.* Notwithstanding the law of the State in which the association is located, a Federal stock association may amend its charter by renumbering existing sections as appropriate and adding a new section 8 as follows:

Section 8. Certain Provisions Applicable for Five Years. Notwithstanding anything contained in the Association's charter or bylaws to the contrary, for a period of [specify number of years up to five] years from the date of completion of the conversion of the Association from mutual to stock form, the following provisions will apply:

A. *Beneficial Ownership Limitation.* No person may directly or indirectly offer to acquire or acquire the beneficial ownership of more than 10 percent of any class of an equity security of the association. This limitation does not apply to a transaction in which the association forms a holding company without change in the respective beneficial ownership interests of its stockholders other than pursuant to the exercise of any dissenter and appraisal rights, the purchase of shares by underwriters in connection with a public offering, or the purchase of less than 25 percent of a class of stock by a tax-qualified employee stock benefit plan as defined in 12 CFR 192.25.

In the event shares are acquired in violation of this section 8, all shares beneficially owned by any person in excess of 10 percent will be considered ''excess shares'' and will not be counted as shares entitled to vote and may not be voted by any person or counted as voting shares in connection with any matters submitted to the stockholders for a vote.

For purposes of this section 8, the following definitions apply:

1. The term ''person'' includes an individual, a group acting in concert, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization or similar company, a syndicate or any other group formed for the purpose of acquiring, holding or disposing of the equity securities of the association.

2. The term ''offer'' includes every offer to buy or otherwise acquire, solicitation of an offer to sell, tender offer for, or request or invitation for tenders of, a security or interest in a security for value.

3. The term ''acquire'' includes every type of acquisition, whether effected by purchase, exchange, operation of law or otherwise.

4. The term ''acting in concert'' means (a) knowing participation in a joint activity or parallel action towards a common goal of acquiring control whether or not pursuant to an express agreement, or (b) a combination or pooling of voting or other interests in the securities of an issuer for a common purpose pursuant to any contract, understanding, relationship, agreement or other arrangement, whether written or otherwise.

B. *Cumulative Voting Limitation.* Stockholders may not cumulate their votes for election of directors.

C. *Call for Special Meetings.* Special meetings of stockholders relating to changes in control of the association or amendments to its charter may be called only upon direction of the board of directors.

* * * * *

(j) * * *

(2) *Form of filing*—(i) *Application requirement.* Except as provided in paragraphs (j)(2)(ii) or (j)(2)(iii) of this section, a Federal stock savings association must file the proposed bylaw amendment with, and obtain the prior approval of, the OCC.

(A) *Expedited review.* Except as provided in paragraph (j)(2)(i)(B) of this section, the bylaw amendment will be deemed approved as of the 30th day after filing, unless the OCC notifies the filer that the application is denied or that the amendment contains procedures of the type described in paragraph (j)(2)(i)(B) of this section and is not eligible for expedited review, provided the association follows the requirements of its charter and bylaws in adopting the amendment.

(B) *Amendments exempted from expedited review.* Expedited review is not available for a bylaw amendment that would:

(*1*) Render more difficult or discourage a merger, tender offer, or proxy contest, the assumption of control by a holder of a large block of the association's stock, or the removal of incumbent management; or

(*2*) Be inconsistent with paragraphs (k) through (n) of this section, with applicable laws, rules, regulations or the association's charter or involve a significant issue of law or policy, including indemnification, conflicts of interest, and limitations on director or officer liability.

(ii) *Corporate governance election and notice requirement.* A Federal stock association may elect to follow the corporate governance procedures of: The laws of the State where the home office of the association is located; the laws of the State where the association's holding company, if any, is incorporated or chartered; Delaware General Corporation law; or The Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not of the type described in paragraph (j)(2)(i)(B) of this section. If this election is selected, a Federal stock association must designate in its bylaws the provision or provisions from the body or bodies of law selected for its corporate governance procedures, and must file a notice containing a copy of such bylaws, within 30 days after adoption. The notice must indicate, where not obvious, why the bylaw provisions meet the requirements stated in paragraph (j)(2)(i)(B) of this section.

(iii) *No filing required.* No filing is required for purposes of paragraph (j)(2) of this section if a bylaw amendment adopts the language of the OCC's model or optional bylaws without change.

(3) *Effectiveness.* A bylaw amendment is effective after approval by the OCC, if required, and adoption by the association, provided that the association follows the requirements of its charter and bylaws in adopting the amendment.

* * * * *

(k) * * *

(1) *Shareholder meetings.* (i) *In general.* A meeting of the shareholders of the association for the election of directors and for the transaction of any other business of the association must be held annually within 150 days after the end of the association's fiscal year. Unless otherwise provided in the association's charter, special meetings of the shareholders may be called by the board of directors or on the request of the holders of 10 percent or more of the shares entitled to vote at the meeting, or by such other persons as may be specified in the bylaws of the association.

(ii) *Location of shareholder meetings.* (A) *In general.* All annual and special meetings of shareholders of the association may be held at any convenient place the board of directors may designate. The association's bylaws may provide for the telephonic or electronic participation of shareholders in these meetings. Shareholders participating in an annual or special meeting telephonically or electronically will be deemed present in person for purposes of the quorum requirement in paragraph (k)(5) of this section.

(B) *Procedures for telephonic or electronic participation.* If the

association's bylaws provide for telephonic or electronic participation in shareholder meetings, the association must elect to follow corporate governance procedures for these meetings pursuant to paragraph (j)(2)(ii) of this section that include procedures for telephonic or electronic participation in shareholder meetings. The association must indicate the use of these elected procedures in its bylaws.

(2) *Notice of shareholder meetings.* Written notice stating the place, day, and hour of the meeting and the purpose or purposes for which the meeting is called must be delivered not fewer than 20 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chair of the board, the president, the secretary, or the directors, or other persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice will be deemed to be delivered when deposited in the mail, addressed to the shareholder at the address appearing on the stock transfer books or records of the association as of the record date prescribed in paragraph (k)(3) of this section, with postage thereon prepaid. When any shareholders' meeting, either annual or special, is adjourned for 30 days or more, notice of the adjourned meeting must be given as in the case of an original meeting. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned is not subject to the shareholder notice requirement.

(3) *Fixing of record date.* For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or shareholders entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors must fix in advance a date as the record date for any such determination of shareholders. Such date in any case may not be more than 60 days and, in case of a meeting of shareholders, not less than 10 days prior to the date on which the particular action, requiring such determination of shareholders, is to be taken. When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination will apply to any adjournment thereof.

(4) *Voting lists.* (i) At least 20 days before each meeting of the shareholders, the officer or agent having charge of the stock transfer books for the shares of the association must make a complete list of the stockholders of record entitled to vote at such meeting, or any adjournments thereof, arranged in alphabetical order, with the address and the number of shares held by each. This list of shareholders must be kept on file at the home office of the association and is subject to inspection by any shareholder of record or the stockholder's agent during the entire time of the meeting. The original stock transfer book will constitute *prima facie* evidence of the stockholders entitled to examine such list or transfer books or to vote at any meeting of stockholders. Notwithstanding anything in this section, however, a Federal stock association that is wholly owned is not subject to the voting list requirements.

(ii) In lieu of making the shareholders list available for inspection by any shareholders as provided in paragraph (k)(4)(i) of this section, the board of directors may perform such acts as required by paragraphs (a) and (b) of Rule 14a–7 of the General Rules and Regulations under the Securities and Exchange Act of 1934 (17 CFR 240.14a–7) as may be duly requested in writing, with respect to any matter which may be properly considered at a meeting of shareholders, by any shareholder who is entitled to vote on such matter and who must defray the reasonable expenses to be incurred by the association in performance of the act or acts required.

(5) *Shareholder quorum.* A majority of the outstanding shares of the association entitled to vote, represented in person or by proxy, constitutes a quorum at a meeting of shareholders. The shareholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum. If a quorum is present, the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter will be the act of the stockholders, unless the vote of a greater number of stockholders voting together or voting by classes is required by law or the charter. Directors, however, are elected by a plurality of the votes cast at an election of directors.

(6) *Shareholder voting*—(i) *Proxies.* Unless otherwise provided in the association's charter, at all meetings of shareholders, a shareholder may vote in person or by proxy executed in writing by the shareholder or by a duly authorized attorney in fact. Proxies may be given telephonically or electronically as long as the holder uses a procedure for verifying the identity of the shareholder. Proxies solicited on behalf of the management must be voted as directed by the shareholder or, in the absence of such direction, as determined by a majority of the board of directors. No proxy maybe valid more than eleven months from the date of its execution except for a proxy coupled with an interest.

(ii) *Shares controlled by association.* Neither treasury shares of its own stock held by the association nor shares held by another corporation, if a majority of the shares entitled to vote for the election of directors of such other corporation are held by the association, may be voted at any meeting or counted in determining the total number of outstanding shares at any given time for purposes of any meeting.

(7) *Nominations and new business submitted by shareholders.* Nominations for directors and new business submitted by shareholders must be voted upon at the annual meeting if such nominations or new business are submitted in writing and delivered to the secretary of the association at least five days prior to the date of the annual meeting. Ballots bearing the names of all the persons nominated must be provided for use at the annual meeting.

* * * * *

(l) * * *

(1) *General powers and duties.* The business and affairs of the association must be under the direction of its board of directors. Directors need not be stockholders unless the bylaws so require.

(2) *Number and term.* The bylaws must set forth a specific number of directors, not a range. The number of directors may not be fewer than five nor more than fifteen, unless a higher or lower number has been authorized by the OTS prior to July 21, 2011 or the OCC. Directors must be elected for a term of one to three years and until their successors are elected and qualified. If a staggered board is chosen, the directors must be divided into two or three classes as nearly equal in number as possible and one class must be elected by ballot annually.

(3) *Regular meetings.* The board of directors determines the place, frequency, time and procedure for notice of regular meetings. The bylaws may provide for telephonic or electronic participation at these meetings.

(4) *Quorum.* A majority of the number of directors constitutes a quorum for the transaction of business at any meeting of the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present will be the act of the board of directors, unless a greater number is prescribed by regulation of the OCC.

(5) *Vacancies.* Any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors even with less than a quorum of the board of directors. A director elected to fill a vacancy may serve only until the next election of directors by the shareholders. Any directorship to be filled by reason of an increase in the number of directors may be filled by election by the board of directors for a term of office continuing only until the next election of directors by the shareholders.

(6) *Removal or resignation of directors.* (i) At a meeting of shareholders called expressly for that purpose, any director may be removed only for cause, as termination for cause is defined in § 5.21(j)(2)(x)(B), by a vote of the holders of a majority of the shares then entitled to vote at an election of directors. Associations may provide for procedures regarding resignations in the bylaws.

(ii) If less than the entire board is to be removed, no one of the directors may be removed if the votes cast against the removal would be sufficient to elect a director if then cumulatively voted at an election of the class of directors of which such director is a part.

(iii) Whenever the holders of the shares of any class are entitled to elect one or more directors by the provisions of the charter or supplemental sections thereto, the provisions of this section apply, in respect to the removal of a director or directors so elected, to the vote of the holders of the outstanding shares of that class and not to the vote of the outstanding shares as a whole.

(7) *Executive and other committees.* The board of directors, by resolution adopted by a majority of the full board, may designate from among its members an executive committee and one or more other committees. No committee may have the authority of the board of directors with reference to: The declaration of dividends; the amendment of the charter or bylaws of the association; recommending to the stockholders a plan of merger, consolidation, or conversion; the sale, lease, or other disposition of all, or substantially all, of the property and assets of the association otherwise than in the usual and regular course of its business; a voluntary dissolution of the association; a revocation of any of the foregoing; or the approval of a transaction in which any member of the executive committee, directly or indirectly, has any material beneficial interest. The designation of any committee and the delegation of authority thereto does not operate to relieve the board of directors, or any director, of any responsibility imposed by law or regulation.

(8) *Notice of special meetings.* Written notice of at least 24 hours regarding any special meeting of the board of directors or of any committee designated thereby must be given to each director in accordance with the bylaws, although such notice may be waived by the director. The attendance of a director at a meeting constitutes a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting need be specified in the notice or waiver of notice of such meeting. The bylaws may provide for telephonic or electronic participation at a special meeting.

(9) *Action without a meeting.* Any action required or permitted to be taken by the board of directors at a meeting may be taken without a meeting if a consent in writing, setting forth the actions so taken, is signed by all of the directors.

(10) *Presumption of assent.* A director of the association who is present at a meeting of the board of directors at which action on any association matter is taken is presumed to have assented to the action taken unless their dissent or abstention is entered in the minutes of the meeting or unless a written dissent to such action is filed with the person acting as the secretary of the meeting before the adjournment thereof or is forwarded by registered mail to the secretary of the association within five days after the date on which a copy of the minutes of the meeting is received. Such right to dissent does not apply to a director who voted in favor of such action.

* * * * *

(n) *Certificates for shares and their transfer*—(1) *Certificates for shares.* Certificates representing shares of capital stock of the association must be in such form as determined by the board of directors and approved by the OCC. The name and address of the person to whom the shares are issued, with the number of shares and date of issue, must be entered on the stock transfer books of the association. All certificates surrendered to the association for transfer must be cancelled and no new certificate may be issued until the former certificate for a like number of shares has been surrendered and cancelled, except that in the case of a lost or destroyed certificate a new certificate may be issued upon such terms and indemnity to the association as the board of directors may prescribe.

(2) *Transfer of shares.* Transfer of shares of capital stock of the association may be made only on its stock transfer books. Authority for such transfer may be given only by the holder of record or by a legal representative, who must furnish proper evidence of such authority, or by an attorney authorized by a duly executed power of attorney and filed with the association. The transfer may be made only on surrender for cancellation of the certificate for the shares. The person in whose name shares of capital stock stand on the books of the association is deemed by the association to be the owner for all purposes.

■ 18. Amend § 5.23 by:

■ a. In paragraph (b)(2), removing the phrase ''an industrial bank or a credit union, chartered in'' and adding in its place the phrase ''an industrial bank, or a credit union chartered in'';

■ b. In paragraphs (c), (d)(2)(ii) introductory text, (e), and (f)(1), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';

■ c. In paragraphs (c), (d)(1), and (d)(2)(i), removing the word ''applicant'' wherever it appears and adding in its place the word ''filer'';

■ d. In paragraph (c), removing the phrase ''Federal Deposit Insurance Corporation (FDIC)'' and adding in its place the word ''FDIC'';

■ e. Removing paragraph (d)(2)(ii)(A), redesignating paragraphs (d)(2)(ii)(B) through (K) as paragraphs (d)(2)(ii)(A) through (J), respectively and adding new paragraphs (d)(2)(ii)(K) and (d)(2)(ii)(L);

■ f. In redesignated paragraph (d)(2)(ii)(D), removing the phrase ''state-chartered'' and adding in its place the phrase ''State-chartered'' and removing the word ''state'' and adding in its place the word ''State'';

■ g. In redesignated paragraph (d)(2)(ii)(F), removing the citations ''§ 5.36, § 5.38'' and adding in their place ''§ 5.38, § 5.58'';

■ h. In redesignated paragraph (d)(2)(ii)(G), removing the comma after the phrase ''engages in'';

■ i. In redesignated paragraph (d)(2)(ii)(I), removing the word ''state'' and adding in its place the word ''State'' wherever it appears and removing the word ''and'' after the phrase ''after conversion;'';

■ j. In redesignated paragraph (d)(2)(ii)(J), removing the period after the phrase ''from the OCC'' and adding in its place a semicolon;

■ k. In paragraph (d)(2)(iii), removing the word ''HOLA'' and adding in its

place ''Home Owners' Loan Act (12 U.S.C. 1464(c))'';
■ l. Redesignating paragraphs (d)(2)(iv) through (v) as paragraphs (d)(2)(v) through (vi) and adding a new paragraph (d)(2)(iv);
■ m. In redesignated paragraph (d)(2)(vi), removing the word ''applicant'' and adding in its place the word ''filer'';
■ n. Revising paragraph (d)(4);
■ o. In paragraph (e), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'';
■ p. In paragraph (f)(1), removing the word ''state'' and adding in its place the word ''State''; and
■ q. In paragraph (g) removing the phrase ''shall continue'' and adding in its place the word ''continues'' and removing the phrase ''shall be'' and adding in its place the word ''is''.

The additions and revision read as follows.

§ 5.23 Conversion to become a Federal savings association

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(K) Include a list of directors and senior executive officers, as defined in § 5.51, of the converting institution; and

(L) Include a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the institution's voting stock.

* * * * *

(iv) The OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report, available at *www.occ.gov,* and legible fingerprints.

* * * * *

(4) *Expedited review.* An application by an eligible bank to convert to a Federal savings association charter is deemed approved by the OCC as of the 45th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

■ 19. Amend § 5.24 by:
■ a. In paragraphs (b), (c)(1), (c)(2), (d), (e)(2) introductory text, and (e)(3), removing the word ''state'' wherever it appears and adding in its place the word ''State'';
■ b. In paragraphs (b), (e)(2) introductory text, and (f), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';
■ c. In paragraph (c)(2), removing the word ''*state*'' and adding in its place the word ''*State*'';
■ d. In paragraphs (d), and (e)(1), removing the word ''applicant'' wherever it appears and adding in its place the word ''filer'';
■ e. Removing paragraph (e)(2)(i) and redesignating paragraphs (e)(2)(ii) through (x) as paragraphs (e)(2)(i) through (ix), respectively, and adding paragraphs (e)(2)(x) and (xi);
■ f. In redesignated paragraphs (e)(2)(iv) and (e)(2)(ix), removing the word ''state'' wherever it appears and adding in its place the word ''State'';
■ g. At the end of redesignated paragraph (e)(2)(viii), removing the word ''and'';
■ h. At the end of redesignated paragraph (e)(2)(ix), removing the period and adding in its place a semicolon;
■ i. Redesignating paragraphs (e)(4) through (5) as paragraphs (e)(5) through (6), respectively, and adding a new paragraph (e)(4);
■ j. In redesignated paragraph (e)(6), removing the word ''applicant'' and adding the word ''filer'' in its place;
■ k. Revising paragraph (h); and
■ l. In paragraph (i):
■ i. In the first sentence, removing the phrase ''shall continue'' and adding in its place the word ''continues''; and
■ ii. In the second sentence, removing the phrase ''shall be'' and adding in its place the word ''is''.

The additions and revisions read as follows.

§ 5.24 Conversion to become a national bank.

* * * * *

(e) * * *

(2) * * *

(x) Include a list of directors and senior executive officers, as defined in § 5.51, of the converting institution; and

(xi) Include a list of individuals, directors, and shareholders who directly or indirectly, or acting in concert with one or more persons or companies, or together with members of their immediate family, do or will own, control, or hold 10 percent or more of the institution's voting stock.

* * * * *

(4) The OCC may require directors and senior executive officers of the converting institution to submit the Interagency Biographical and Financial Report, available at *www.occ.gov,* and legible fingerprints.

* * * * *

(h) *Expedited review.* An application by an eligible savings association to convert to a national bank charter is deemed approved by the OCC as of the 45th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

§ 5.25 [Amended]

■ 20. Amend § 5.25 by:
■ a. In the section heading and in paragraphs (b), (c), (d)(1), (d)(2), (d)(3)(i), and (d)(4), removing the word ''state'' wherever it appears and adding in its place the word ''State''
■ b. In paragraphs (b), (d)(3)(i), and (d)(3)(ii) introductory text, removing the word ''shall'' wherever it appears and adding in its place the word ''must''; and
■ c. In paragraphs (d)(1) and (d)(3)(i), removing the phrase ''defined in 214(a)'' wherever it appears and adding in its place the phrase ''defined in 12 U.S.C. 214(a)''.

■ 21. Amend § 5.26 by:
■ a. In paragraph (a), removing the phrase ''12 U.S.C. 92a and'' and adding in its place the phrase ''12 U.S.C. 92a,'';
■ b. In paragraphs (b)(2) and (b)(4), removing the phrase ''Office of Thrift Supervision'' wherever it appears and adding in its place the word ''OTS'';
■ c. In paragraphs (b)(3), (b)(4), (e)(1)(ii), (e)(1)(iii), (e)(2)(i)(B), (e)(2)(i)(E), and (e)(2)(iii)(B), removing the word ''state'' wherever it appears and adding in its place the word ''State''; and
■ d. In paragraph (e)(2)(i) introductory text, removing the word ''shall'' and adding in its place the word ''must'';
■ e. Revising paragraph (e)(2)(i)(C);
■ f. In paragraph (e)(2)(ii), removing the word ''applicant'' and adding in its place the word ''filer''; and
■ g. Revising paragraphs (e)(3) and (6).

.

The revisions read as follows.

§ 5.26 Fiduciary powers of national banks and Federal savings associations.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(C) Sufficient biographical information on proposed senior trust management personnel, as identified by the OCC, to enable the OCC to assess their qualifications, including, if requested by the OCC, legible fingerprints and the Interagency Biographical and Financial Report, available at *www.occ.gov;*

* * * * *

(3) *Expedited review.* An application by an eligible bank or eligible savings

association to exercise fiduciary powers is deemed approved by the OCC as of the 30th day after the application is received by the OCC, unless the OCC notifies the bank or savings association prior to that date that the filing has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

* * * * *

(6) *Notice of fiduciary activities in additional States.* (i) Except as provided in paragraphs (e)(6)(iii) through (iv) of this section, a national bank or Federal savings association with existing OCC approval to exercise fiduciary powers must provide written notice to the OCC no later than 10 days after it begins to engage in any of the activities specified in § 9.7(d) of this chapter in a State in addition to the State or States described in the application for fiduciary powers that the OCC has approved.

(ii) A notice submitted pursuant to paragraph (e)(6)(i) of this section must identify the new State or States involved, identify the fiduciary activities to be conducted, and describe the extent to which the activities differ materially from the fiduciary activities the national bank or Federal savings association previously conducted.

(iii) No notice under paragraph (e)(6)(i) of this section is required if the national bank or Federal savings association provides the information required by paragraph (e)(6)(ii) of this section through other means, such as a merger application.

(iv) No notice is required if the national bank or Federal savings association is conducting only activities ancillary to its fiduciary business through a trust representative office or otherwise.

* * * * *

■ 22. Amend § 5.30 by:

■ a. In paragraphs (b), (f)(1), (f)(4), (g), (h)(1), and (j), removing the word ''shall'' wherever it appears and adding in its place the word ''must'';

■ b. In paragraph (c)(2), removing ''12 CFR 5.24'' and adding in its place ''§ 5.24'';

■ c. Revising paragraphs (d)(1)(i) and (iii);

■ d. In paragraph (d)(2), removing the word ''*state*'' and adding in its place the word ''*State*'';

■ e. In paragraphs (d)(2), (d)(3), (g), and (h)(4), removing the word ''state'' wherever it appears and adding in its place the word ''State'';

■ f. In paragraph (d)(5), adding a sentence after the second sentence;

■ g. In paragraph (f)(1), removing the phrase ''paragraph (f)(2)'' and adding in its place the phrase ''paragraphs (f)(2) or (f)(3)''; and

■ h. In paragraph (f)(6), removing the phrase ''is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2)'' and adding in its place the phrase ''has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2)''.

The revisions read as follows.

§ 5.30 Establishment, acquisition, and relocation of a branch of a national bank.

* * * * *

(d) * * *

(1) * * *

(i) A branch established by a national bank includes a seasonal agency described in 12 U.S.C. 36(c), a mobile facility, a temporary facility, an intermittent facility, or a drop box.

* * * * *

(iii) A branch does not include a remote service unit (RSU) as described in 12 CFR 7.4003. This encompasses RSUs that are automated teller machines (ATMs), including interactive ATMs. A branch also does not include a loan production office, a deposit production office, a trust office, an administrative office, a data processing office, or any other office that does not engage in at least one of the activities in paragraph (d)(1) of this section.

* * * * *

(5) * * * A mobile branch may be stationed continuously at a single location within the geographic area it is approved to serve for a period of up to four months. * * *

■ 23. Amend § 5.31 by:

■ a. In paragraph (a) removing the period after ''1464'' and adding in its place a comma; and adding a comma after ''2907'';

■ b. In paragraphs (b), (f)(1)(i), (f)(3), (i), (j)(2), and (k)(2)(ii) removing the word ''shall'' and adding in its place the word ''must'' wherever it appears;

■ c. In paragraph (c)(2), removing ''12 CFR 5.23'' and adding in its place ''§ 5.23'' and removing ''12 CFR 5.33'' and adding in its place ''§ 5.33'';

■ d. In paragraphs (c)(3) and paragraph (j)(1), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act'' wherever it appears;

■ e. In paragraph (d)(1), removing the word ''*office*'';

■ f. In paragraph (d)(2), removing the word ''*state*'' and adding in its place the word ''*State*'';

■ g. In paragraphs (d)(2), (g)(2), and (j)(2), removing the word ''state'' and adding in its place the word ''State'' wherever it appears;

■ h. In paragraph (f)(1)(iii), removing the word ''Federal'' and removing the phrase ''is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2)'' and adding in its place the phrase ''has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2)'';

■ i. In paragraph (f)(2)(ii), removing the phrase '', as defined in § 5.3(l)'';

■ j. In paragraph (f)(2)(iii) introductory text, removing the phrase ''as defined in § 5.3(g)'';

■ k. In the heading to paragraph (j), removing the word ''*HOLA*'' and adding in its place ''*Home Owners' Loan Act*''; and

■ k. Adding paragraph (j)(3).

The addition reads as follows.

§ 5.31 Establishment, acquisition, and relocation of a branch and establishment of an agency office of a Federal savings association.

* * * * *

(j) * * *

(3) For purposes of 12 U.S.C. 1464(m)(1), a branch in the District of Columbia includes any location at which accounts are opened, payments are received, or withdrawals are made. This includes an Automated Teller Machine that performs one or more of these functions.

* * * * *

§ 5.32 [Amended]

■ 24. Amend § 5.32 by:

■ a. In paragraphs (c), (f), (h)(1), and (h)(2), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears ;

■ b. In paragraph (d)(1), removing the phrase ''shall be'' and adding in its place the word ''is'';

■ c. In paragraph (d)(2)(i), removing the word ''shall'' and adding in its place the word ''will'';

■ d. In paragraph (e), removing the phrase ''his or her'' and adding in its place the word ''their'';

■ e. In paragraph (f), removing the word Applicants'' and adding in its place the word ''Filers''; and

■ f. In paragraph (h)(1), removing the phrase ''An applicant'' and adding in its place the phrase ''A filer''; and

■ g. In paragraph (h)(2), removing the word ''applicant'' and adding in its place the word ''filer''.

■ 25. Revise § 5.33 to read as follows:

§ 5.33 Business combinations involving a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 24(Seventh), 93a, 181, 214a, 214b, 215, 215a, 215a–1, 215a–3, 215b, 215c, 1462a, 1463, 1464, 1467a, 1828(c), 1831u, 2903, and 5412(b)(2)(B).

(b) *Scope.* This section sets forth the provisions governing business combinations and the standards for:

(1) OCC review and approval of an application by a national bank or a Federal savings association for a business combination resulting in a national bank or Federal savings association; and

(2) Requirements of notices and other procedures for national banks and Federal savings associations involved in other combinations in which a national bank or Federal savings association is not the resulting institution.

(c) *Licensing requirements.* As prescribed by this section, a national bank or Federal savings association must submit an application and obtain prior OCC approval for a business combination when the resulting institution is a national bank or Federal savings association. As prescribed by this section, a national bank or Federal savings association must give notice to the OCC prior to engaging in any other combination where the resulting institution will not be a national bank or Federal savings association.[1] A national bank must submit an application and obtain prior OCC approval for any merger between the national bank and one or more of its nonbank affiliates.

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

(1) *Bank* means any national bank or any State bank.

(2) *Business combination* means:

(i) Any merger or consolidation between a national bank or a Federal savings association and one or more depository institutions or State trust companies, in which the resulting institution is a national bank or Federal savings association;

(ii) In the case of a Federal savings association, any merger or consolidation with a credit union in which the resulting institution is a Federal savings association;

(iii) In the case of a national bank, any merger between a national bank and one or more of its nonbank affiliates;

(iv) The acquisition by a national bank or a Federal savings association of all, or substantially all, of the assets of another depository institution; or

(v) The assumption by a national bank or a Federal savings association of any deposit liabilities of another insured depository institution or any deposit accounts or other liabilities of a credit union or any other institution that will become deposits at the national bank or Federal savings association.

(3) *Business reorganization* means either:

(i) A business combination between eligible banks and eligible savings associations, or between an eligible bank or an eligible savings association and an eligible depository institution, that are controlled by the same holding company or that will be controlled by the same holding company prior to the combination; or

(ii) A business combination between an eligible bank or an eligible savings association and an interim national bank or interim Federal savings association chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank or eligible savings association for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible bank or eligible savings association (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank or savings association.

(4) *Company* means a corporation, limited liability company, partnership, business trust, association, or similar organization.

(5) For business combinations under paragraphs (g)(4) and (5) of this section, a company or shareholder is deemed to *control* another company if:

(i) Such company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other company; or

(ii) Such company or shareholder controls in any manner the election of a majority of the directors or trustees of the other company. No company is deemed to own or control another company by virtue of its ownership or control of shares in a fiduciary capacity.

(6) *Credit union* means a financial institution subject to examination by the National Credit Union Administration Board.

(7) *Home State* means, with respect to a national bank, the State in which the main office of the national bank is located and, with respect to a State bank, the State by which the bank is chartered.

(8) *Interim national bank or interim Federal savings association* means a national bank or Federal savings association that does not operate independently but exists solely as a vehicle to accomplish a business combination.

(9) *Nonbank affiliate* of a national bank means any company (other than a bank or Federal savings association) that controls, is controlled by, or is under common control with the national bank.

(10) *Other combination* means:

(i) Any merger or consolidation between a national bank or a Federal savings association and one or more depository institutions or State trust companies, in which the resulting institution is not a national bank or Federal savings association;

(ii) In the case of a Federal stock savings association, any merger or consolidation with a credit union in which the resulting institution is a credit union;

(iii) The transfer by a national bank or a Federal savings association of any deposit liabilities to another insured depository institution, a credit union or any other institution; or

(iv) The acquisition by a national bank or a Federal savings association of all, or substantially all, of the assets, or the assumption of all or substantially all of the liabilities, of any company other than a depository institution.

(11) *Savings association* and *State savings association* have the meaning set forth in section 3(b) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b).

(12) *State trust company* means a trust company organized under State law that is not engaged in the business of receiving deposits, other than trust funds.

(e) *Policy and related filing requirements*—(1) *Factors*—(i) *In general.* When the OCC evaluates any application for a business combination, the OCC considers the following factors:

(A) The capital level of any resulting national bank or Federal savings association;

(B) The conformity of the transaction to applicable law, regulation, and supervisory policies;

(C) The purpose of the transaction;

(D) The impact of the transaction on safety and soundness of the national bank or Federal savings association; and

(E) The effect of the transaction on the national bank's or Federal savings association's shareholders (or members in the case of a mutual savings association), depositors, other creditors, and customers.

(ii) *Bank Merger Act.* When the OCC evaluates an application for a business combination under the Bank Merger Act, the OCC also considers the following factors:

(A) *Competition.* (*1*) The OCC considers the effect of a proposed

[1] Other combinations, as defined in paragraph (d)(10) of this section, do not require an application under this section. However, some may require an application under § 5.53.

business combination on competition. The filer must provide a competitive analysis of the transaction, including a definition of the relevant geographic market or markets. A filer may refer to the Comptroller's Licensing Manual for procedures to expedite its competitive analysis.

(*2*) The OCC will deny an application for a business combination if the combination would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States. The OCC also will deny any proposed business combination whose effect in any section of the United States may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the probable effects of the transaction in meeting the convenience and needs of the community clearly outweigh the anticompetitive effects of the transaction. For purposes of weighing against anticompetitive effects, a business combination may have favorable effects in meeting the convenience and needs of the community if the depository institution being acquired has limited long-term prospects, or if the resulting national bank or Federal savings association will provide significantly improved, additional, or less costly services to the community.

(B) *Financial and managerial resources and future prospects.* The OCC considers the financial and managerial resources and future prospects of the existing or proposed institutions.

(C) *Convenience and needs of community.* The OCC considers the probable effects of the business combination on the convenience and needs of the community served. The filer must describe these effects in its application, including any planned office closings or reductions in services following the business combination and the likely impact on the community. The OCC also considers additional relevant factors, including the resulting national bank's or Federal savings association's ability and plans to provide expanded or less costly services to the community.

(D) *Money laundering.* The OCC considers the effectiveness of any insured depository institution involved in the business combination in combating money laundering activities, including in overseas branches.

(E) *Financial stability.* The OCC considers the risk to the stability of the United States banking and financial system.

(F) *Deposit concentration limit.* The OCC will not approve a transaction that would violate the deposit concentration limit in 12 U.S.C. 1828(c)(13) for interstate merger transactions, as defined in 12 U.S.C. 1828(c)(13)(C)(i).

(iii) *Community Reinvestment Act*—(A) *In General.* The OCC takes into account the filer's Community Reinvestment Act (CRA) record of performance in considering an application for a business combination. The OCC's conclusion of whether the CRA performance is or is not consistent with approval of an application is considered in conjunction with the other factors of this section.

(B) *Interstate mergers under 12 U.S.C. 1831u.* The OCC considers the CRA record of performance of the filer and its resulting bank affiliates and the filer's record of compliance with applicable State community reinvestment laws when required by 12 U.S.C. 1831u(b)(3).

(C) *CRA Sunshine.* A filer must:

(*1*) Disclose whether it has entered into and disclosed a covered agreement, as defined in 12 CFR 35.2, in accordance with 12 CFR 35.6 and 35.7; and

(*2*) Provide summaries of, or documents relating to, all substantive discussions with respect to the development of the content of a covered agreement disclosed in (e)(1)(iii)(C)(*1*) that include the names of participants, dates, and synopsis of the discussions.

(iv) *Interstate mergers under 12 U.S.C. 1831u.* The OCC considers the standards and requirements contained in 12 U.S.C. 1831u for interstate merger transactions between insured banks, when applicable.

(2) *Acquisition and retention of branches.* A filer must disclose the location of any branch it will acquire and retain in a business combination, including approved but unopened branches. The OCC considers the acquisition and retention of a branch under the standards set out in § 5.30 or § 5.31, as applicable, but it does not require a separate application.

(3) *Subsidiaries.* (i) A filer must identify any subsidiary, financial subsidiary investment, bank service company investment, service corporation investment, or other equity investment to be acquired in a business combination and state the activities of each subsidiary or other company in which the filer would be acquiring an investment. The OCC does not require a separate application or notice under §§ 5.34, 5.35, 5.36, 5.38, 5.39, 5.58, and 5.59.

(ii) A national bank filer proposing to acquire, through a business combination, a subsidiary, financial subsidiary investment, bank service company investment, service corporation investment, or other equity investment of any entity other than a national bank must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the filer were establishing the subsidiary, or making such investment, pursuant to §§ 5.34, 5.35, 5.36, or 5.39.

(iii) A Federal savings association filer proposing to acquire, through a business combination, a subsidiary, bank service company investment, service corporation investment, or other equity investment of any entity other than a Federal savings association must provide the same information and analysis of the subsidiary's activities, or of the investment, that would be required if the filer were establishing the subsidiary, or making such investment, pursuant to §§ 5.35, 5.38, 5.58, or 5.59.

(4) *Interim national bank or interim Federal savings association*—(i) *Application.* A filer for a business combination that plans to use an interim national bank or interim Federal savings association to accomplish the transaction must file an application to organize an interim national bank or interim Federal savings association as part of the application for the related business combination.

(ii) *Conditional approval.* The OCC grants conditional preliminary approval to form an interim national bank or interim Federal savings association when it acknowledges receipt of the application for the related business combination.

(iii) *Corporate status.* An interim national bank or interim Federal savings association becomes a legal entity and may enter into legally valid agreements when it has filed, and the OCC has accepted, the interim national bank's duly executed articles of association and organization certificate or the Federal savings association's charter and bylaws. OCC acceptance occurs:

(A) On the date the OCC advises the interim national bank that its articles of association and organization certificate are acceptable or advises the interim Federal savings association that its charter and bylaws are acceptable; or

(B) On the date the interim national bank files articles of association and an organization certificate that conform to the form for those documents provided by the OCC in the Comptroller's Licensing Manual or the date the interim Federal savings association files

a charter and bylaws that conform to the requirements set out in this part 5.

(iv) *Other corporate procedures.* A filer should consult the Comptroller's Licensing Manual to determine what other information is necessary to complete the chartering of the interim national bank as a national bank or the interim Federal savings association as a Federal savings association.

(5) *Nonconforming assets.* (i) A filer must identify any nonconforming activities and assets, including nonconforming subsidiaries, of other institutions involved in the business combination that will not be disposed of or discontinued prior to consummation of the transaction. The OCC generally requires a national bank or Federal savings association to divest or conform nonconforming assets, or discontinue nonconforming activities, within a reasonable time following the business combination.

(ii) Any resulting Federal savings association must conform to the requirements of sections 5(c) and 10(m) of the Home Owners' Loan Act (12 U.S.C. 1464(c) and 1467a(m)) within the time period prescribed by the OCC.

(6) *Fiduciary powers.* (i) A filer must state whether the resulting national bank or Federal savings association intends to exercise fiduciary powers pursuant to § 5.26(b).

(ii) If a filer intends to exercise fiduciary powers after the combination and requires OCC approval for such powers, the filer must include the information required under § 5.26(e)(2).

(7) *Expiration of approval.* Approval of a business combination, and conditional approval to form an interim national bank or interim Federal savings association, if applicable, expires if the business combination is not consummated within six months after the date of OCC approval, unless the OCC grants an extension of time.

(8) *Adequacy of disclosure.* (i) A filer must inform shareholders of all material aspects of a business combination and must comply with any applicable requirements of the Federal securities laws and securities regulations of the OCC. Accordingly, a filer must ensure that all proxy and information statements prepared in connection with a business combination do not contain any untrue or misleading statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

(ii) A national bank or Federal savings association filer with one or more classes of securities subject to the registration provisions of section 12(b) or (g) of the Securities Exchange Act of 1934, 15 U.S.C. 78*l*(b) or 78*l*(g), must file preliminary proxy material or information statements for review with the Director, Bank Advisory, OCC, Washington, DC 20219. Any other filer must submit the proxy materials or information statements it uses in connection with the combination to the appropriate OCC licensing office no later than when the materials are sent to the shareholders.

(f) *Exceptions to rules of general applicability*—(1) *National bank or Federal savings association filer*—(i) *In general.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10 and 5.11 apply.

(ii) *Statutory notice.* If an application is subject to the Bank Merger Act or to another statute that requires notice to the public, a national bank or Federal savings association filer must follow the public notice requirements contained in 12 U.S.C. 1828(c)(3) or the other statute and §§ 5.8(b) through 5.8(e), 5.10, and 5.11.

(2) *Interim national bank or interim Federal savings association.* Sections 5.8, 5.10, and 5.11 do not apply to an application to organize an interim national bank or interim Federal savings association. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that any or all parts of §§ 5.8, 5.10, and 5.11 apply. The OCC treats an application to organize an interim national bank or interim Federal savings association as part of the related application to engage in a business combination and does not require a separate public notice and public comment process.

(3) *State bank, or State savings association, State trust company, or credit union as resulting institution.* Sections 5.7 through 5.13 do not apply to transactions covered by paragraphs (g)(7) through (g)(9) of this section.

(g) *Provisions governing consolidations and mergers with different types of entities*—(1) *Consolidations and mergers under 12 U.S.C. 215 or 215a of a national bank with other national banks and State banks as defined in 12 U.S.C. 215b(1) resulting in a national bank.* A national bank entering into a consolidation or merger authorized pursuant to 12 U.S.C. 215 or 215a, respectively, is subject to the approval procedures and requirements with respect to treatment of dissenting shareholders set forth in those provisions.

(2) *Interstate consolidations and mergers under 12 U.S.C. 215a–1 resulting in a national bank*—(i) With the approval of the OCC, an insured national bank may consolidate or merge with an insured out-of-State bank, as defined in 12 U.S.C. 1831u(g)(8), with the national bank as the resulting institution.

(ii) Unless it has elected to follow the procedures set out in paragraph (h) of this section, the resulting national bank entering into the consolidation or merger must comply with the procedures of 12 U.S.C. 215 or 215a, as applicable.

(iii) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i), any national bank that will not be the resulting bank in a consolidation or merger pursuant to 12 U.S.C. 215a–1 must comply with the procedures of 12 U.S.C. 215 or 215a, as applicable.

(iv) *Corporate existence.* The corporate existence of each bank participating in a consolidation or merger continues in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating bank are transferred to the resulting national bank, as set forth in 12 U.S.C. 215(b), (e) and (f) or 12 U.S.C. 215a(a), (e), and (f), as applicable.

(3) *Consolidations and mergers of a national bank with Federal savings associations under 12 U.S.C. 215c resulting in a national bank.* (i) With the approval of the OCC, any national bank and any Federal savings association may consolidate or merge with a national bank as the resulting institution by complying with the following procedures:

(A) Unless it has elected to follow the procedures set out in paragraph (h) of this section, a national bank entering into the consolidation or merger must follow the procedures of 12 U.S.C. 215 or 215a, respectively, as if the Federal savings association were a national bank.

(B)(*1*) A Federal savings association entering into the consolidation or merger must comply with the requirements of paragraph (n) of this section and follow the procedures set out in paragraph (o) of this section.

(*2*) For purposes of this paragraph (g)(3), a combination in which a national bank acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of a Federal savings association will be treated as a

consolidation for the Federal savings association.

(ii)(A) Unless the national bank has elected to follow the procedures set out in paragraph (h) of this section, national bank shareholders who dissent from a plan to consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 215 as if the Federal savings association were a national bank.

(B) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations pursuant to paragraph (o)(1)(i)(A) of this section, Federal savings association shareholders who dissent from a plan to consolidate or merge may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 215 or 215a as if the Federal savings association were a national bank.

(C) Unless the national bank or Federal savings association has elected to follow the procedures applicable to State banks or State savings associations, respectively, pursuant to paragraph (h)(1)(i) or (o)(1)(i)(A) of this section, respectively, the OCC will conduct an appraisal or reappraisal of the value of a national bank or Federal savings association held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 215 or 215a, as applicable, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(iii) The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(4) *Mergers of a national bank with its nonbank affiliates under 12 U.S.C. 215a–3 resulting in a national bank.* (i) With the approval of the OCC, a national bank may merge with one or more of its nonbank affiliates, with the national bank as the resulting institution, in accordance with the provisions of this paragraph, provided that the law of the State or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers. If the national bank is an insured bank, the transaction is also subject to approval by the FDIC under the Bank Merger Act, 12 U.S.C. 1828(c).

(ii) Unless it has elected to follow the procedures set out in paragraph (h) of this section, a national bank entering into the merger must follow the procedures of 12 U.S.C. 215a as if the nonbank affiliate were a State bank, except as otherwise provided herein.

(iii) A nonbank affiliate entering into the merger must follow the procedures for such mergers set out in the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(iv) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate entering into the merger must be determined in the manner prescribed by the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each institution participating in the merger continues in the resulting national bank, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating institutions are transferred to the resulting national bank, as set forth in 12 U.S.C. 215a(a), (e), and (f) in the same manner and to the same extent as in a merger between a national bank and a State bank under 12 U.S.C. 215a(a), as if the nonbank affiliate were a State bank.

(5) *Mergers of an uninsured national bank with its nonbank affiliates under 12 U.S.C. 215a–3 resulting in a nonbank affiliate.* (i) With the approval of the OCC, a national bank that is not an insured bank as defined in 12 U.S.C. 1813(h) may merge with one or more of its nonbank affiliates, with the nonbank affiliate as the resulting entity, in accordance with the provisions of this paragraph, provided that the law of the State or other jurisdiction under which the nonbank affiliate is organized allows the nonbank affiliate to engage in such mergers.

(ii) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, a national bank entering into the merger must follow the procedures of 12 U.S.C. 214a, as if the nonbank affiliate were a State bank, except as otherwise provided in this section.

(iii) A nonbank affiliate entering into the merger must follow the procedures for such mergers set out in the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(iv)(A) National bank shareholders who dissent from an approved plan to merge may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the nonbank affiliate were a State bank. The OCC may conduct an appraisal or reappraisal of dissenters' shares of stock in a national bank involved in the merger if all parties agree that the determination is final and binding on each party and agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the nonbank affiliate involved in the merger must be determined in the manner prescribed by the law of the State or other jurisdiction under which the nonbank affiliate is organized.

(v) The corporate existence of each entity participating in the merger continues in the resulting nonbank affiliate, and all the rights, franchises, property, appointments, liabilities, and other interests of the participating national bank are transferred to the resulting nonbank affiliate as set forth in 12 U.S.C. 214b, in the same manner and to the same extent as in a merger between a national bank and a State bank under 12 U.S.C. 214a, as if the nonbank affiliate were a State bank.

(6) *Consolidations and mergers of a Federal savings association with other Federal savings associations, national banks, State banks, State savings banks, State savings associations, State trust companies, or credit unions resulting in a Federal savings association.* (i) With the approval of the OCC, a Federal savings association may consolidate or merge with another Federal savings association, a national bank, a State bank, a State savings association, a State trust company, or a credit union with the Federal savings association as the resulting institution by complying with the following procedures:

(A)(*1*) The filer Federal savings association must comply with the requirements of paragraph (n) of this section and follow the procedures set out in paragraph (o) of this section.

(*2*) For purposes of this paragraph (g)(6), a combination in which a Federal savings association acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of another other participating institution will be treated as a consolidation for the acquiring Federal savings association and as a consolidation by a Federal savings association whose assets are acquired, if any.

(B)(*1*) Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, a national bank entering into a merger or consolidation with a Federal savings

association when the resulting institution will be a Federal savings association must comply with the requirements of 12 U.S.C. 214a and 12 U.S.C. 214c as if the Federal savings association were a State bank. However, for these purposes the references in 12 U.S.C. 214c to ''law of the State in which such national banking association is located'' and ''any State authority'' mean ''laws and regulations governing Federal savings associations'' and ''Office of the Comptroller of the Currency'' respectively.

(*2*) Unless the national bank has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, national bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a State bank. The OCC will conduct an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 214a, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(C)(*1*) A Federal savings association entering into a merger or consolidation with another Federal savings association when the resulting institution will be the other Federal savings association must comply with the requirements of paragraph (n) of this section and the procedures of paragraph (o) of this section.

(*2*) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), Federal savings association shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 214a as if the other Federal savings association were a State bank. The OCC will conduct an appraisal or reappraisal of the value of the Federal savings association shares held by dissenting shareholders in accordance with the provisions of 12 U.S.C. 214a, except that the costs and expenses of any appraisal or reappraisal may be apportioned and assessed by the Comptroller as he or she may deem equitable against all or some of the parties. In making this determination the Comptroller will consider whether any party has acted arbitrarily or not in good faith in respect to the rights provided by this paragraph.

(*3*) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), the plan of merger or consolidation must provide the manner of disposing of the shares of the resulting Federal savings association not taken by the dissenting shareholders of the Federal savings association.

(D)(*1*) A State bank, State savings association, State trust company, or credit union entering into a consolidation or merger with a Federal savings association when the resulting institution will be a Federal savings association must follow the procedures for such consolidations or mergers set out in the law of the State or other jurisdiction under which the State bank, State savings association, State trust company, or credit union is organized.

(*2*) The rights of dissenting shareholders and appraisal of dissenters' shares of stock in the State bank, State savings association, or State trust company, entering into the consolidation or merger will be determined in the manner prescribed by the law of the State or other jurisdiction under which the State bank, State savings association, or State trust company is organized.

(ii) The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(7) *Consolidations and mergers under 12 U.S.C. 214a of a national bank with State banks resulting in a State bank as defined in 12 U.S.C. 214(a)*—(i) *In general.* Prior OCC approval is not required for the merger or consolidation of a national bank with a State bank as defined in 12 U.S.C. 214(a). Termination of a national bank's existence and status as a national banking association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* A national bank desiring to merge or consolidate with a State bank as defined in 12 U.S.C. 214(a) when the resulting institution will be a State bank must comply with the requirements and follow the procedures of 12 U.S.C. 214a and 214c and must provide notice to the OCC under paragraph (k) of this section.

(iii) *Dissenters' rights and appraisal procedures.* National bank shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their national bank shares if they comply with the requirements of 12 U.S.C. 214a. The OCC conducts an appraisal or reappraisal of the value of the national bank shares held by dissenting shareholders as provided for in 12 U.S.C. 214a.

(iv) *Liquidation account.* The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(8) *Interstate consolidations and mergers between an insured national bank and insured State banks resulting in a State bank.*—(i) *In general.* Prior OCC approval is not required for the merger or consolidation of an insured national bank with an insured out-of-State State bank, as defined in 12 U.S.C. 1831u(g)(8), with the State bank as the resulting institution, that has been approved by the appropriate Federal banking agency for the State bank. Termination of a national bank's existence and status as a national banking association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* Unless it has elected to follow the procedures applicable to State banks under paragraph (h)(1)(i) of this section, the national bank entering into the consolidation or merger must comply with the procedures of 12 U.S.C. 214a, as applicable.

(iii) *Notice.* The national bank must provide a notice to the OCC under paragraph (k) of this section.

(9) *Consolidations and mergers of a Federal savings association with State banks, State savings banks, State savings associations, State trust companies, or credit unions resulting in a State bank, State savings bank, State savings association, State trust company, or credit union*—(i) *Policy.* Prior OCC approval is not required for the merger or consolidation of a Federal savings association with a State bank, State savings bank, State savings association, State trust company, or credit union when the resulting institution will be a State institution or credit union. Termination of a national bank's or Federal savings association's existence and status as a national banking association or Federal savings association is automatic, and its charter cancelled, upon completion of the

statutory and regulatory requirements for engaging in the consolidation or merger and consummation of the consolidation or merger.

(ii) *Procedures.* (A) A Federal savings association desiring to merge or consolidate with a State bank, State savings bank, State savings association, State trust company, or credit union when the resulting institution will be a State institution or credit union must comply with the requirements of paragraph (n) of this section and the procedures of paragraph (o) of this section and must provide notice to the OCC under paragraph (k) of this section.

(B) For purposes of this paragraph (g)(9), a combination in which a State bank, State savings bank, State savings association, State trust company, or credit union acquires all or substantially all of the assets, or assumes all or substantially all of the liabilities, of a Federal savings association must be treated as a consolidation by the Federal savings association.

(iii) *Dissenters' rights and appraisal procedures.* (A) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), Federal savings association shareholders who dissent from a plan to merge or consolidate may receive in cash the value of their Federal savings association shares if they comply with the requirements of 12 U.S.C. 214a as if the Federal savings association were a national bank. The OCC conducts an appraisal or reappraisal of the value of the Federal savings association shares held by dissenting shareholders only if all parties agree that the determination will be final and binding. The parties also must agree on how the total expenses of the OCC in making the appraisal will be divided among the parties and paid to the OCC.

(B) Unless the Federal savings association has elected to follow the procedures applicable to State savings associations under paragraph (o)(1)(i)(A), the plan of merger or consolidation must provide the manner of disposing of the shares of the resulting State institution not taken by the dissenting shareholders of the Federal savings association.

(iv) *Liquidation account.* The consolidation or merger agreement must address the effect upon, and the terms of the assumption of, any liquidation account of any participating institution by the resulting institution.

(h) *Procedural requirements for national bank combinations*—(1) *Permissible elections.* A national bank participating in a combination pursuant to paragraph (g)(2), (g)(3), (g)(4), (g)(5), (g)(6), or (g)(8) of this section may elect to follow with respect to the combination:

(i) The procedures applicable to a State bank chartered by the State where the national bank's main office is located; or

(ii) Paragraph (p) of this section, if applicable.

(2) *Rules of Construction.* For purposes of paragraph (h)(1) of this section:

(i) Any references to a State agency in the applicable State procedures should be read as referring to the OCC; and

(ii) Unless otherwise specified in Federal law, all filings required by the applicable State procedures must be made to the OCC.

(i) *Expedited review for business reorganizations and streamlined applications.* A filing that qualifies as a business reorganization as defined in paragraph (d)(3) of this section, or a filing that qualifies as a streamlined application as described in paragraph (j) of this section, is deemed approved by the OCC as of the 15th day after the close of the comment period, unless the OCC notifies the filer that the filing is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2). An application under this paragraph must contain all necessary information for the OCC to determine if it qualifies as a business reorganization or streamlined application.

(j) *Streamlined applications.* (1) A filer may qualify for a streamlined business combination application in the following situations:

(i) At least one party to the transaction is an eligible bank or eligible savings association, and all other parties to the transaction are eligible banks, eligible savings associations, or eligible depository institutions, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets of the target institution are no more than 50 percent of the total assets of the acquiring bank or Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application;

(ii) The acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the filers in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application;

(iii) The acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank or acquiring Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application; or

(iv) In the case of a transaction under paragraph (g)(4) of this section, the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately following consummation of the transaction, the filers in a prefiling communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

(2) Notwithstanding paragraph (j)(1) of this section, a filer does not qualify for a streamlined business combination application if the transaction is part of a conversion under part 192 of this chapter.

(3) When a business combination qualifies for a streamlined application, the filer should consult the Comptroller's Licensing Manual to determine the abbreviated application information required by the OCC. The OCC encourages prefiling communications between the filers and the appropriate OCC licensing office before filing under paragraph (j) of this section.

(k) *Exit notice to OCC*—(1) *Notice required.* As provided in paragraphs (g)(7)(ii), (g)(8)(iii), and (g)(9)(ii) of this section, a national bank or Federal savings association engaging in a consolidation or merger in which it is not the filer and the resulting institution must file a notice rather than an application to the appropriate OCC licensing office advising of its intention.

(2) *Timing of notice.* The national bank or Federal savings association must submit the notice at the time the application to merge or consolidate is filed with the responsible agency under the Bank Merger Act, 12 U.S.C. 1828(c), or if there is no such filing then no later than 30 days prior to the effective date of the merger or consolidation.

(3) *Content of notice.* The notice must include the following:

(i)(A) A short description of the material features of the transaction, the identity of the acquiring institution, the identity of the State or Federal regulator to whom the application was made, and the date of the application; or

(B) A copy of a filing made with another Federal or State regulatory agency seeking approval from that agency for the transaction under the Bank Merger Act or other applicable statute;

(ii) The planned consummation date for the transaction;

(iii) Information to demonstrate compliance by the national bank or Federal savings association with applicable requirements to engage in the transactions (*e.g.,* board approval or shareholder or accountholder requirements); and

(iv) If the national bank or Federal savings association submitting the notice maintains a liquidation account established pursuant to part 192 of this chapter, the notice must state that the resulting institution will assume such liquidation account.

(4) *Termination of status.* The national bank or Federal savings association must advise the OCC when the transaction is about to be consummated. Termination of a national bank's or Federal savings association's existence and status as a national banking association or Federal savings association is automatic, and its charter cancelled, upon completion of the statutory and regulatory requirements and consummation of the consolidation or merger. When the national bank or Federal savings association files the notice under paragraph (k)(1) of this section, the OCC provides instructions to the national bank or Federal savings association for terminating its status as a national bank or Federal savings association, including surrendering its charter to the OCC immediately after consummation of the transaction.

(5) *Expiration.* If the action contemplated by the notice is not completed within six months after the OCC's receipt of the notice, a new notice must be submitted to the OCC, unless the OCC grants an extension of time.

(l) *Mergers and consolidations; transfer of assets and liabilities to the resulting institution.* (1) In any consolidation or merger in which the resulting institution is a national bank or Federal savings association, on the effective date of the merger or consolidation, all assets and property (real, personal and mixed, tangible and intangible, choses in action, rights, and credits) then owned by each participating institution or which would inure to any of them, immediately by operation of law and without any conveyance, transfer, or further action, become the property of the resulting national bank or Federal savings association. The resulting national bank or Federal savings association is deemed to be a continuation of the entity of each participating institution, and will succeed to such rights and obligations of each participating institution and the duties and liabilities connected therewith.

(2) The authority in paragraph (l)(1) of this section is in addition to any authority granted by applicable statutes for specific transactions and is subject to the National Bank Act, the Home Owners' Loan Act, and other applicable statutes.

(m) *Certification of combination; effective date.* (1) When a national bank or Federal savings association is the filer and will be the resulting entity in a consolidation or merger, after receiving approval from the OCC, it must complete any remaining steps needed to complete the transaction, provide the OCC with a certification that all other required regulatory or shareholder approvals have been obtained, and inform the OCC of the planned consummation date.

(2) When the transaction is consummated, the filer must notify the OCC of the consummation date. The OCC will issue a letter certifying that the combination was effective on the date specified in the filer's notice.

(n) *Authority for and certain limits on business combinations and other transactions by Federal savings associations.* (1) Federal savings associations may enter into business combinations only in accordance with this section, the Bank Merger Act, and sections 5(d)(3)(A) and 10(s) of the Home Owners' Loan Act (12 U.S.C. 1464(d)(3)(A) and 1467a(s)).

(2) A Federal savings association may consolidate or merge with another depository institution, a State trust company or a credit union, may engage in another business combination listed in paragraphs (d)(2)(iv) and (v) of this section, or may engage in any other combination listed in paragraph (d)(10), provided that:

(i) The combination is in compliance with, and receives all approvals required under, any applicable statutes and regulations;

(ii) Any resulting Federal savings association meets the requirements for insurance of accounts; and

(iii) A consolidation or merger involving a mutual savings association or the transfer of all or substantially all of the deposits of a mutual savings association must result in a mutually held depository institution that is insured by the FDIC, unless:

(A) The transaction is approved under part 192 governing mutual to stock conversions;

(B) The transaction involves a mutual holding company reorganization under 12 U.S.C. 1467a(o) or a similar transaction under State law; or

(C) The transaction is part of a voluntary liquidation for which the OCC has provided non-objection under § 5.48.

(3) Where the resulting institution is a Federal mutual savings association, the OCC may approve a temporary increase in the number of directors of the resulting institution provided that the association submits a plan for bringing the board of directors into compliance with the requirements of § 5.21(e) within a reasonable period of time.

(4)(i) The Federal savings associations described in paragraph (n)(4)(ii) of this section below must provide affected accountholders with a notice of a proposed account transfer and an option of retaining the account in the transferring Federal savings association. The notice must allow affected accountholders at least 30 days to consider whether to retain their accounts in the transferring Federal savings association.

(ii) The following savings associations must provide the notices:

(A) A Federal mutual savings association transferring account liabilities to an institution the accounts of which are not insured by the Deposit Insurance Fund or the National Credit Union Share Insurance Fund; and

(B) Any Federal mutual savings association transferring account liabilities to a stock form depository institution.

(o) *Procedural requirements for Federal savings association approval of combinations*—(1) *In general*—(i) *Permissible elections.* A Federal savings association participating in a combination may elect to follow the applicable procedures with respect to the combination:

(A) The procedures applicable to a State savings association chartered by the State where the Federal savings association's home office is located: or

(B) The standard procedures provided in paragraph (o)(2) of this section.

(ii) *Rules of Construction.* For purposes of paragraph (o)(1)(i) of this section:

(A) Any references to a State agency in the applicable State procedures should be read as referring to the OCC; and

(B) Unless otherwise specified in Federal law, all filings required by the applicable State procedures must be made to the OCC.

(2) *Standard procedures*—(i) *Board approval.* Before a Federal savings association files a notice or application for any consolidation or merger, the combination and combination agreement must be approved by majority vote of the entire board of each constituent Federal savings association in the case of Federal stock savings associations or a two-thirds vote of the entire board of each constituent Federal savings association in the case of Federal mutual savings associations.

(ii) *Shareholder vote*—(A) *General rule.* Except as otherwise provided in this paragraph (o)(2)(ii), an affirmative vote of two-thirds of the outstanding voting stock of any constituent Federal stock savings association is required for approval of a consolidation or merger. If any class of shares is entitled to vote as a class pursuant to § 5.22(g)(4), an affirmative vote of a majority of the shares of each voting class and two-thirds of the total voting shares is required. The required vote must be taken at a meeting of the savings association.

(B) *General exception.* Stockholders of the resulting Federal stock savings association need not authorize a consolidation or merger if the transaction meets the requirements of paragraph (p) of this section.

(C) *Exceptions for certain combinations involving an interim association.* Stockholders of a Federal stock savings association need not authorize by a two-thirds affirmative vote consolidations or mergers involving an interim Federal savings association or interim State savings association when the resulting Federal stock savings association is acquired pursuant to the regulations of the Board of Governors of the Federal Reserve System at 12 CFR 238.15(e) (relating to the creation of a savings and loan holding company by a savings association). In those cases, an affirmative vote of 50 percent of the shares of the outstanding voting stock of the Federal stock savings association plus one affirmative vote is required. If any class of shares is entitled to vote as a class pursuant to the charter provisions in § 5.22(g)(4), an affirmative vote of 50 percent of the shares of each voting class plus one affirmative vote is required. The required votes must be taken at a meeting of the association.

(3) *Change of name or home office.* If the name of the resulting Federal savings association or the location of the home office of the resulting Federal savings association will change as a result of the business combination, the resulting Federal savings association must amend its charter accordingly.

(4) *Mutual member vote.* Notwithstanding any other provision of this section, the OCC may require that a consolidation, merger or other business combination be submitted to the voting members of any mutual savings association participating in the proposed transaction at duly called meetings and that the transaction, to be effective, must be approved by such voting members.

(p) *Exception to voting requirements.* Shareholders of a resulting national bank or Federal stock savings association need not authorize a consolidation or merger if:

(1) Either:

(i) The transaction does not involve an interim bank or an interim savings association; or

(ii) The transaction involves an interim bank or an interim savings association and the existing shareholders of the national bank or Federal stock savings association will directly hold the shares of the resulting national bank or Federal stock savings association;

(2) The national bank's articles of association or the Federal stock savings association's charter, as applicable, is not changed;

(3) Each share of stock outstanding immediately prior to the effective date of the consolidation or merger is to be an identical outstanding share or a treasury share of the resulting national bank or Federal stock savings association after such effective date; and

(4) Either:

(i) No shares of voting stock of the resulting national bank or Federal stock savings association and no securities convertible into such stock are to be issued or delivered under the plan of combination; or

(ii) The authorized unissued shares or the treasury shares of voting stock of the resulting national bank or Federal stock savings association to be issued or delivered under the plan of merger or consolidation, plus those initially issuable upon conversion of any securities to be issued or delivered under such plan, do not exceed 20 percent of the total shares of voting stock of such national bank or Federal stock savings association outstanding immediately prior to the effective date of the consolidation or merger.

■ 26. Amend § 5.34 by:

■ a. In paragraph (a), removing ''3101 *et seq.*'' and adding in its place ''and 3102(b).'';

■ b. In paragraph (c), removing the phrase ''(e)(5)(i)(B) of this section shall apply'' and adding in its place the phrase ''(f)(2)(i)(C)(*2*) of this section applies'';

■ c. Revising paragraph (d);

■ d. In paragraphs (e)(1)(i)(B), (e)(3), and (e)(4)(ii), removing the word ''state'' and adding in its place the word ''State'' wherever it appears;

■ e. Revising paragraph (e)(2)(i)(A);

■ f. In paragraph (e)(2)(i)(C), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ g. In paragraph (e)(2)(ii) introductory text, removing the phrase ''following subsidiaries'' and adding in its place the phrase ''following entities'';

■ h. In paragraph (e)(2)(ii)(A), removing the phrase ''part 24; and'' and adding in its place the phrase ''12 CFR part 24;'';

■ i. Removing the period and adding in its place ''; and'' in paragraph (e)(2)(ii)(B);

■ j. Adding paragraph (e)(2)(ii)(C);

■ k. In paragraph (e)(2)(iii)(B), removing the word ''shall'' and adding in its place the word ''may'';

■ l. In paragraphs (e)(4)(i) and (e)(4)(ii), removing the word ''shall'' and adding in its place the word ''will'';

■ m. Removing paragraph (e)(7);

■ n. Redesignating paragraphs (e)(5) and (e)(6) as paragraphs (f) and (g), respectively ; and

■ o. Revising redesignated paragraph (f).

The addition and revisions read as follows.

§ 5.34 Operating subsidiaries of a national bank.

* * * * *

(d) *Definition.* For purposes of this section, *authorized product* means a product that would be defined as insurance under section 302(c) of the Gramm-Leach-Bliley Act (15 U.S.C. 6712) that, as of January 1, 1999, the OCC had determined in writing that national banks may provide as principal or national banks were in fact lawfully providing the product as principal, and as of that date no court of relevant jurisdiction had, by final judgment, overturned a determination by the OCC that national banks may provide the

product as principal. An authorized product does not include title insurance, or an annuity contract the income of which is subject to treatment under section 72 of the Internal Revenue Code of 1986 (26 U.S.C. 72).

(e) * * *

(2) * * *

(i) * * *

(A) The bank has the ability to control the management and operations of the subsidiary, and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the bank or an operating subsidiary thereof;

* * * * *

(ii) * * *

(C) A trust formed for purposes of securitizing assets held by the bank as part of its banking business.

* * * * *

(f) *Procedures*—(1) *Application required.* (i) Except for an operating subsidiary that qualifies for the notice procedures in paragraph (f)(2) of this section or is exempt from application or notice requirements under paragraph (f)(6) of this section, a national bank must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary or to perform a new activity in an existing operating subsidiary.

(ii) The application must explain, as appropriate, how the bank ''controls'' the enterprise, describing in full detail structural arrangements where control is based on factors other than bank ownership of more than 50 percent of the voting interest of the subsidiary and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management. In the case of a limited partnership or limited liability company that does not qualify for the notice procedures set forth in paragraph (f)(2) of this section, the bank must provide a statement explaining why it is not eligible. The application also must include a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the bank and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the main office or a previously approved branch of the bank. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefiling meeting with the OCC. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(2) *Notice process only for certain qualifying filings.* (i) Except for an operating subsidiary that is exempt from application or notice procedures under paragraph (f)(6) of this section, a national bank that is well capitalized and well managed may establish or acquire an operating subsidiary, or perform a new activity in an existing operating subsidiary, by providing the appropriate OCC licensing office written notice prior to, or within 10 days after, acquiring or establishing the subsidiary, or commencing the new activity, if:

(A) The activity is listed in paragraph (f)(5) of this section or, except as provided in paragraph (f)(2)(ii) of this section, the activity is substantively the same as a previously approved activity and the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(B) The entity is a corporation, limited liability company, limited partnership, or trust; and

(C) The bank or an operating subsidiary thereof:

(*1*) Has the ability to control the management and operations of the subsidiary and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the bank or an operating subsidiary thereof. The ability to control the management and operations means:

(*i*) In the case of a subsidiary that is a corporation, the bank or an operating subsidiary thereof holds voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management;

(*ii*) In the case of a subsidiary that is a limited partnership, the bank or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management;

(*iii*) In the case of a subsidiary that is a limited liability company, the bank or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management; or

(*iv*) In the case of a subsidiary that is a trust, the bank or an operating subsidiary thereof has the ability to replace the trustee at will;

(*2*) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary and:

(*i*) In the case of a subsidiary that is a limited partnership, the bank or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by virtue solely of their status as limited partners;

(*ii*) In the case of a subsidiary that is a limited liability company, the bank or an operating subsidiary thereof is the sole managing member of the limited liability company, provided that under the limited liability company agreement, other limited liability company members have no authority to bind the limited liability company by virtue solely of their status as members; or

(*iii*) In the case of a subsidiary that is a trust, the bank or an operating subsidiary thereof is the sole beneficial owner of the trust; and

(*3*) Is required to consolidate its financial statements with those of the subsidiary under GAAP.

(ii) A national bank must file an application under paragraph (f)(1) of this section if a State has or will charter or license the proposed operating subsidiary as a bank, trust company, or savings association.

(iii) The written notice must include a complete description of the bank's investment in the subsidiary and of the activity conducted and a representation and undertaking that the activity will be conducted in accordance with OCC policies contained in guidance issued by the OCC regarding the activity. To the extent that the notice relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank must describe the type of insurance activity in which the

company is engaged and has present plans to conduct. The bank also must list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. Any bank receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(3) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(4) *OCC review and approval.* The OCC reviews a national bank's application to determine whether the proposed activities are legally permissible under Federal banking laws and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent national bank. As part of this process, the OCC may request additional information and analysis from the filer.

(5) *Activities eligible for notice.* The following activities qualify for the notice procedures in paragraph (f)(2) of this section, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a national bank:

(i) Holding and managing assets acquired by the parent bank or its operating subsidiaries, including investment assets and property acquired by the bank through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(ii) Providing services to or for the bank or its affiliates, including accounting, auditing, appraising, advertising and public relations, and financial advice and consulting;

(iii) Making loans or other extensions of credit, and selling money orders, savings bonds, and travelers checks;

(iv) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(v) Providing courier services between financial institutions;

(vi) Providing management consulting, operational advice, and services for other financial institutions;

(vii) Providing check guaranty, verification and payment services;

(viii) Providing data processing, data warehousing and data transmission products, services, and related activities and facilities, including associated equipment and technology, for the bank or its affiliates;

(ix) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts, furnishing economic forecasts or other economic information, providing investment advice related to futures and options on futures, and providing consumer financial counseling;

(x) Providing tax planning and preparation services;

(xi) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(xii) Underwriting and reinsuring credit related insurance to the extent permitted under section 302 of the Gramm-Leach-Bliley Act (15 U.S.C. 6712);

(xiii) Leasing of personal property and acting as an agent or adviser in leases for others;

(xiv) Providing securities brokerage or acting as a futures commission merchant, and providing related credit and other related services;

(xv) Underwriting and dealing, including making a market, in bank permissible securities and purchasing and selling as principal, asset backed obligations;

(xvi) Acting as an insurance agent or broker, including title insurance to the extent permitted under section 303 of the Gramm-Leach-Bliley Act (15 U.S.C. 6713);

(xvii) Reinsuring mortgage insurance on loans originated, purchased, or serviced by the bank, its subsidiaries, or its affiliates, provided that if the subsidiary enters into a quota share agreement, the subsidiary assumes less than 50 percent of the aggregate insured risk covered by the quota share agreement. A ''quota share agreement'' is an agreement under which the reinsurer is liable to the primary insurance underwriter for an agreed upon percentage of every claim arising out of the covered book of business ceded by the primary insurance underwriter to the reinsurer;

(xviii) Acting as a finder pursuant to 12 CFR 7.1002 to the extent permitted by published OCC precedent for national banks; [2]

(xix) Offering correspondent services to the extent permitted by published OCC precedent for national banks;

(xx) Acting as agent or broker in the sale of fixed or variable annuities;

(xxi) Offering debt cancellation or debt suspension agreements;

(xxii) Providing real estate settlement, closing, escrow, and related services; and real estate appraisal services for the subsidiary, parent bank, or other financial institutions;

(xxiii) Acting as a transfer or fiscal agent;

(xxiv) Acting as a digital certification authority to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent;

(xxv) Providing or selling public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising material, postage stamps, and Electronic Benefits Transfer (EBT) script, and similar media, to the extent permitted by published OCC precedent for national banks, subject to the terms and conditions contained in that precedent;

(xxvi) Providing data processing, and data transmission services, facilities (including equipment, technology, and personnel), databases, advice and access to such services, facilities, databases and advice, for the parent bank and for others, pursuant to 12 CFR 7.5006 to the extent permitted by published OCC precedent for national banks;

(xxvii) Providing bill presentment, billing, collection, and claims-processing services;

(xxviii) Providing safekeeping for personal information or valuable confidential trade or business information, such as encryption keys, to the extent permitted by published OCC precedent for national banks;

(xxix) Providing payroll processing;

(xxx) Providing branch management services;

(xxxi) Providing merchant processing services except when the activity involves the use of third parties to solicit or underwrite merchants; and

(xxxii) Performing administrative tasks involved in benefits administration.

(6) *No application or notice required.* A national bank may acquire or

[2] *See, e.g.,* the OCC's monthly publication ''Interpretations and Actions.'' Beginning with the May 1996 issue, electronic versions of ''Interpretations and Actions'' are available at *www.occ.gov.*

establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, without filing an application or providing notice to the OCC, if the bank is well managed and well capitalized and the:

(i) Activities of the new subsidiary are limited to those activities previously reported by the bank in connection with the establishment or acquisition of a prior operating subsidiary;

(ii) Activities in which the new subsidiary will engage continue to be legally permissible for the subsidiary;

(iii) Activities of the new subsidiary will be conducted in accordance with any conditions imposed by the OCC in approving the conduct of these activities for any prior operating subsidiary of the bank; and

(iv) The standards set forth in paragraphs (f)(2)(i)(B) and (C) of this section are satisfied.

(7) *Fiduciary powers.* (i) If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the national bank must have fiduciary powers under 12 U.S.C. 92a and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.

(ii) Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the national bank must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 and 12 CFR part 9.

(8) *Expiration of approval.* Approval expires if the national bank has not established or acquired the operating subsidiary or commenced the new activity in an existing operating subsidiary within 12 months after the date of the approval, unless the OCC shortens or extends the time period.

* * * * *

■ 27. Amend § 5.35 by:

■ a. Revising the section heading;

■ b. In paragraph (a), adding the word ''and'' before ''5412(b)(2)(B),''

■ c. In paragraphs (b) and (d)(6), removing the word ''shall'' and adding in its place the word ''must'';

■ d. In paragraphs (d)(2), (d)(3), (g)(2), and (g)(4), removing the word ''state'' and adding in its place the word ''State'' wherever it appears;

■ e. In paragraph (d)(2) removing the phrase ''section 3 of the Federal Deposit Insurance Act'' and adding in its place the phrase ''section 3(a)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(a)(3)'';

■ f. In paragraph (d)(3):

■ i. After the words ''an insured bank'', removing the phrase ''(as defined in section 3 of the Federal Deposit Insurance Act)'' and adding in its place the phrase ''(as defined in section 3(h) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(h))'';

■ ii. After the words ''a savings association'', removing the phrase ''(as defined in section 3 of the Federal Deposit Insurance Act)'' and adding in its place the phrase ''(as defined in section 3(b)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(b)(1))'';

■ iii. Removing the phrase ''Federal Deposit Insurance Corporation'' and adding in its place the word ''FDIC'';

■ g. In paragraph (d)(4), removing the phrase ''section 3 of the Federal Deposit Insurance Act'' and adding in its place the phrase ''section 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(2)'';

■ h. Revising paragraph (f)(2)(ii)(A);

■ i. In paragraph (f)(2)(ii)(B), removing the phrase ''§ 5.34(e)(5)(v) or § 5.38(e)(5)(v)'' and adding in its place the phrase ''§ 5.34(f)(5) or § 5.38(f)(5)''; and

■ j. Revising paragraph (i).

The revision and addition read as follows.

§ 5.35 Bank service company investments by a national bank or Federal savings association.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(A) The national bank or Federal savings association is well capitalized and well managed; and

* * * * *

(i) *Investment limitations.* A national bank or Federal savings association must comply with the investment limitations specified in 12 U.S.C. 1862.

* * * * *

■ 28. Amend § 5.36 by:

■ a. In paragraph (a), removing the phrase ''and 93a.'' and adding in its place the phrase ''93a, and 3101 *et seq.*'';

■ b. In paragraph (b), removing the phrase ''and 5.37'' and adding in its place the phrase ''5.37, and 5.39'';

■ c. Revising paragraph (c);

■ d. Revising paragraph (e) introductory text;

■ e. In paragraph (e)(1), removing the word ''state'' and adding in its place the word ''State'' wherever it appears;

■ f. Revising paragraphs (e)(2) through (4)

■ g. Revising paragraph (f);

■ h. Redesignating paragraphs (g) through (i) as paragraph (h) through (j);

■ i. Adding new paragraph (g);

■ j. In redesignated paragraph (h)(1), removing ''(g)(1)'' wherever it appears and adding in its place (h)(1);

■ k. Revising redesignated paragraphs (i) and (j).

The addition and revisions read as follows.

§ 5.36 Other equity investments by a national bank.

* * * * *

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

(1) *Enterprise* means any corporation, limited liability company, partnership, trust, or similar business entity.

(2) *Non-controlling investment* means an equity investment made pursuant to 12 U.S.C. 24(Seventh) that is not governed by procedures prescribed by another OCC rule. A *non-controlling investment* does not include a national bank holding interests in a trust formed for the purposes of securitizing assets held by the bank as part of its banking business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions.

* * * * *

(e) *Non-controlling investments; notice procedure.* Except as provided in paragraphs (f), (g), and (h) of this section, a national bank may make a non-controlling investment, directly or through its operating subsidiary, in an enterprise that engages in an activity described in § 5.34(f)(5) or in an activity that is substantively the same as a previously approved activity by filing a written notice. The bank must file this written notice with the appropriate OCC licensing office no later than 10 days after making the investment. The written notice must:

* * * * *

(2) State:

(i) Which paragraphs of § 5.34(f)(5) describe the activity; or

(ii) If the activity is substantively the same as a previously approved activity:

(A) How the activity is substantively the same as a previously approved activity;

(B) The citation to the applicable precedent; and

(C) That the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(3) Certify that the bank is well capitalized and well managed at the time of the investment;

(4) Describe how the bank has the ability to prevent the enterprise from engaging in activities that are not set forth in § 5.34(f)(5) or not contained in published OCC precedent for previously

approved activities, or how the bank otherwise has the ability to withdraw its investment;

* * * * *

(f) *Non-controlling investment; application procedure*—(1) *In general.* A national bank must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a non-controlling investment in an enterprise if the non-controlling investment does not qualify for the notice procedure set forth in paragraph (e) of this section because the bank is unable to make the representation required by paragraph (e)(2) or the certifications required by paragraphs (e)(3) or (e)(7) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and, if possible, the information required by paragraphs (e)(2), (e)(3), and (e)(7) of this section. If the bank is unable to make the representation set forth in paragraph (e)(2) of this section, the bank's application must explain why the activity in which the enterprise engages is a permissible activity for a national bank and why the filer should be permitted to hold a non-controlling investment in an enterprise engaged in that activity. A bank may not make a non-controlling investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(2) *Expedited review.* An application submitted by a national bank is deemed approved by the OCC as of the 10th day after the application is received by the OCC if:

(i) The national bank makes the representation required by paragraph (e)(2) and the certification required by paragraph (e)(3) of this section;

(ii) The book value of the national bank's non-controlling investment for which the application is being submitted is no more than 1% of the bank's capital and surplus;

(iii) No more than 50% of the enterprise is owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association; and

(iv) The OCC has not notified the national bank that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(g) *Non-controlling investment; no application or notice required.* A national bank may make or acquire, either directly or through an operating subsidiary, a non-controlling investment in an enterprise without an application or notice to the OCC, if the:

(1) Activities of the enterprise are limited to those activities previously reported by the bank in connection with the making or acquiring of a non-controlling investment;

(2) Activities of the enterprise continue to be legally permissible for a national bank;

(3) The bank's non-controlling investment will be made in accordance with any conditions imposed by the OCC in approving any prior non-controlling investment in an enterprise conducting these same activities; and

(4) The bank is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section.

* * * * *

(i) *Non-controlling investments by Federal branches.* A Federal branch that is well capitalized and well managed may make a non-controlling investment in accordance with paragraph (e) of this section in the same manner and subject to the same conditions and requirements as a national bank, and subject to any additional requirements that may apply under 12 CFR 28.10(c).

(j) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.9, 5.10, and 5.11 apply.

§ 5.37 [Amended]

■ 29. Amend § 5.37 by:

■ a. In paragraph (a), removing ''317d'' and adding in its place ''371d'';

■ b. Removing paragraph (c)(3);

■ c. In paragraph (d)(1)(i) and (d)(3)(i), removing the word ''shall'' and adding in its place the word ''must'' it appears;

■ d. In paragraph (d)(1)(i), removing the phrase ''any corporation'' and adding in its place the phrase ''any corporation, partnership, or similar entity (*e.g.,* a limited liability company)'';

■ e. In paragraph (d)(3)(i), removing the phrase ''as defined in 12 CFR part 6'';

■ f. In paragraph (d)(4), removing ''12 CFR 5.59'' and adding in its place ''§ 5.59''; and

■ g. In paragraph (d)(5), adding '' 5.9,'' after ''5.8,'' wherever it appears.

■ 30. Amend § 5.38 by:

■ a. In paragraph (a), adding the word ''and'' before ''5412(b)(2)(B)'';

■ b. In paragraph (b), adding ''(12 U.S.C. 1828(m))'' after the word ''Act'';

■ c. Removing and reserving paragraph (d);

■ d. Revising paragraph (e)(2)(i)(A);

■ e. In paragraph (e)(2)(i)(C), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ f. In paragraph (e)(2)(iii) introductory text, removing the phrase ''following subsidiaries'' and adding in its place the phrase ''following entities'';

■ g. Removing the word ''and'' at the end of paragraph (e)(2)(iii)(A);

■ h. In paragraph (e)(2)(iii)(B), removing the period and adding in its place ''; and'';

■ i. Adding new paragraph (e)(2)(iii)(C);

■ j. In paragraph (e)(2)(iv)(B), removing the word ''shall'' and adding in its place the word ''may'';

■ k. In paragraph (e)(3), removing the word ''state'' and adding in its place the word ''State'';

■ l. In paragraph (e)(4)(i), removing the word ''shall'' and adding in its place the word ''must'';

■ m. Redesignating paragraphs (e)(5) through (7) as paragraphs (f) through (h);

■ n. Revising redesignated paragraph (f); and

■ o. In redesignated paragraph (h), removing the word ''shall'' wherever it appears and adding in its place the word ''may''.

The addition and revisions read as follows.

§ 5.38 Operating subsidiaries of a Federal savings association.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(A) The savings association has the ability to control the management and operations of the subsidiary, and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the savings association or an operating subsidiary thereof;

* * * * *

(iii) * * *

(C) A trust formed for purpose of securitizing assets held by the savings association as part of its business.

* * * * *

(f) *Procedures*—(1) *Application required.* (i) A Federal savings association must first submit an application to, and receive prior approval from, the OCC to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary.

(ii) The application must explain, as appropriate, how the savings association ''controls'' the enterprise, describing in full detail structural arrangements

where control is based on factors other than savings association ownership of more than 50 percent of the voting interest of the subsidiary and the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management. In the case of a limited partnership or limited liability company that does not qualify for the expedited review procedure set forth in paragraph (f)(2) of this section, the savings association must provide a statement explaining why it is not eligible. The application also must include a complete description of the savings association's investment in the subsidiary, the proposed activities of the subsidiary, the organizational structure and management of the subsidiary, the relations between the savings association and the subsidiary, and other information necessary to adequately describe the proposal. To the extent that the application relates to the initial affiliation of the savings association with a company engaged in insurance activities, the savings association must describe the type of insurance activity in which the company is engaged and has present plans to conduct. The savings association must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable. The application must state whether the operating subsidiary will conduct any activity at a location other than the home office or a previously approved branch of the savings association. The OCC may require a filer to submit a legal analysis if the proposal is novel, unusually complex, or raises substantial unresolved legal issues. In these cases, the OCC encourages filers to have a prefiling meeting with the OCC. Any savings association receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(2) *Expedited review.* (i) An application to establish or acquire an operating subsidiary, or to perform a new activity in an existing operating subsidiary, that meets the requirements of this paragraph is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the filer prior to that date that the filing has been removed from expedited review, or the expedited review process is extended under § 5.13(a)(2). Any savings association receiving approval under this paragraph is deemed to have agreed that the subsidiary will conduct the activity in a manner consistent with published OCC guidance.

(ii) An application is eligible for expedited review if all of the following requirements are met:

(A) The savings association is well capitalized and well managed;

(B) The activity is listed in paragraph (f)(5) this section or is substantively the same as a previously approved activity and the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(C) The entity is a corporation, limited liability company, limited partnership or trust; and

(D) The savings association or an operating subsidiary thereof:

(*1*) Has the ability to control the management and operations of the subsidiary and no other person or entity has the ability to exercise effective control or influence over the management or operations of the subsidiary to an extent equal to or greater than that of the savings association or an operating subsidiary thereof. The ability to control the management and operations means:

(*i*) In the case of a subsidiary that is a corporation, the savings association or an operating subsidiary thereof holds voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management;

(*ii*) In the case of a subsidiary that is a limited partnership, the savings association or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management;

(*iii*) In the case of a subsidiary that is a limited liability company, the savings association or an operating subsidiary thereof has the ability to control the management and operations of the subsidiary by controlling the selection and termination of senior management; or

(*iv*) In the case of a subsidiary that is a trust, the savings association or an operating subsidiary thereof has the ability to replace the trustee at will;

(*2*) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary, and:

(*i*) In the case of a subsidiary that is a limited partnership, the savings association or an operating subsidiary thereof is the sole general partner of the limited partnership, provided that under the partnership agreement, limited partners have no authority to bind the partnership by virtue solely of their status as limited partners;

(*ii*) In the case of a subsidiary that is a limited liability company, the savings association or an operating subsidiary thereof is the sole managing member of the limited liability company, provided that under the limited liability company agreement, other limited liability company members have no authority to bind the limited liability company by virtue solely of their status as members; or

(*iii*) In the case of a subsidiary that is a trust, the savings association or an operating subsidiary thereof is the sole beneficial owner of the trust; and

(*3*) Is required to consolidate its financial statements with those of the subsidiary under GAAP. A filer proposing to qualify for expedited review must include in the application all necessary information showing the application meets the requirements.

(3) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.10, and 5.11 apply.

(4) *OCC review and approval.* The OCC reviews a Federal savings association's application to determine whether the proposed activities are legally permissible under Federal savings association law and to ensure that the proposal is consistent with safe and sound banking practices and OCC policy and does not endanger the safety or soundness of the parent Federal savings association. As part of this process, the OCC may request additional information and analysis from the filer.

(5) *Activities eligible for expedited review.* The following activities qualify for the expedited review procedures in paragraph (f)(2) of this section, provided the activity is conducted pursuant to the same terms and conditions as would be applicable if the activity were conducted directly by a Federal savings association:

(i) Holding and managing assets acquired by the parent savings association or its operating subsidiaries, including investment assets and property acquired by the savings association through foreclosure or otherwise in good faith to compromise a doubtful claim, or in the ordinary course of collecting a debt previously contracted;

(ii) Providing services to or for the savings association or its affiliates, including accounting, auditing,

appraising, advertising and public relations, and financial advice and consulting;

(iii) Making loans or other extensions of credit, and selling money orders and travelers checks;

(iv) Purchasing, selling, servicing, or warehousing loans or other extensions of credit, or interests therein;

(v) Providing management consulting, operational advice, and services for other financial institutions;

(vi) Providing check payment services;

(vii) Acting as investment adviser (including an adviser with investment discretion) or financial adviser or counselor to governmental entities or instrumentalities, businesses, or individuals, including advising registered investment companies and mortgage or real estate investment trusts;

(viii) Providing financial and transactional advice and assistance, including advice and assistance for customers in structuring, arranging, and executing mergers and acquisitions, divestitures, joint ventures, leveraged buyouts, swaps, foreign exchange, derivative transactions, coin and bullion, and capital restructurings;

(ix) Underwriting and reinsuring credit life and disability insurance;

(x) Leasing of personal property;

(xi) Providing securities brokerage;

(xii) Underwriting and dealing, including making a market, in savings association permissible securities and purchasing and selling as principal, asset backed obligations;

(xiii) Acting as an insurance agent or broker for credit life, disability, and unemployment insurance; single property interest insurance; and title insurance;

(xiv) Offering correspondent services to the extent permitted by published OCC precedent for Federal savings associations;

(xv) Acting as agent or broker in the sale of fixed annuities;

(xvi) Offering debt cancellation or debt suspension agreements;

(xvii) Providing escrow services;

(xviii) Acting as a transfer agent; and

(xix) Providing or selling postage stamps.

(6) *Redesignation.* A Federal savings association that proposes to redesignate a service corporation as an operating subsidiary must submit a notification to the OCC at least 30 days prior to the redesignation date. The notification must include a description of how the redesignated service corporation meets all of the requirements of this section to be an operating subsidiary, a resolution of the savings association's board of directors approving the redesignation, and the proposed effective date of the redesignation. The savings association may effect the redesignation on the proposed date unless the OCC notifies the savings association otherwise prior to that date. The OCC may require an application if the redesignation presents policy, supervisory, or legal issues.

(7) *Fiduciary powers.* (i) If an operating subsidiary proposes to accept fiduciary appointments for which fiduciary powers are required, such as acting as trustee or executor, then the Federal savings association must have fiduciary powers under section 5(n) of the Home Owners' Loan Act, 12 U.S.C. 1464(n), and the subsidiary also must have its own fiduciary powers under the law applicable to the subsidiary.

(ii) Unless the subsidiary is a registered investment adviser, if an operating subsidiary proposes to exercise investment discretion on behalf of customers or provide investment advice for a fee, the Federal savings association must have prior OCC approval to exercise fiduciary powers pursuant to § 5.26 (or a predecessor provision) and 12 CFR part 150.

(8) *Expiration of approval.* Approval expires if the Federal savings association has not established or acquired the operating subsidiary, or commenced the new activity in an existing operating subsidiary within 12 months after the date of the approval, unless the OCC shortens or extends the time period.

■ 31. Amend § 5.39 by:

■ a. Revising paragraph (a);

■ b. In paragraph (b), removing the phrase ''a notice'' and adding in its place the phrase ''an application'', and removing ''§ 5.34(e)(5)'' and adding in its place ''§ 5.34(f)'';

■ c. In paragraph (b) and paragraph (e)(1) introductory text, removing ''(12 U.S.C. 24a)'' and adding in its place ''(12 U.S.C. 24a(a)(2)(A)(i))'';

■ d. In paragraphs (b), (h)(2), and (j)(1)(ii), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears;

■ e. In paragraph (d)(1), removing the phrase ''shall have'' and adding in its place the word ''has'';

■ f. Removing paragraphs (d)(2), (d)(11) and (d)(12) and redesignating paragraphs (d)(3) through (d)(10) as paragraphs (d)(2) through (d)(9);

■ g. In paragraphs (e)(1)(ii) and (j)(2), removing the word ''state'' and adding in its place the word ''State'' wherever it appears;

■ h. In paragraph (f)(1), removing the phrase ''Gramm-Leach-Bliley Act (GLBA)), 113 Stat. 1407–1409, (15 U.S.C. 6712 or 15 U.S.C. 6713)'' and adding in its place the phrase ''Gramm-Leach-Bliley Act, (15 U.S.C. 6712 or 15 U.S.C. 6713))'';

■ i. In paragraph (f)(3), removing ''(12 U.S.C. 1843) of the Bank Holding Company Act'' and adding in its place ''of the Bank Holding Company Act (12 U.S.C. 1843(k)(4)(H) or (I))'', and removing the phrase ''GLBA, 113 Stat. 1381'' and adding in its place the phrase ''Gramm-Leach-Bliley Act (12 U.S.C. 1843 note)'';

■ j. In paragraph (h)(2), removing the phrase ''generally accepted accounting principles'' and adding in its place the word ''GAAP'';

■ k. In paragraph (h)(5) introductory text, removing the phrase ''paragraph (a)(6)'' and adding the phrase ''paragraph (d)(5)'';

■ l. Revising paragraph (h)(5)(i);

■ m. Removing and reserving paragraph (h)(5)(ii);

■ n. In paragraphs (h)(5)(vi), removing the word ''GLBA'' and adding in its place the phrase ''Gramm-Leach-Bliley Act'';

■ o. Removing the phrase ''shall be'' and adding in its place the word ''is'' in paragraph (h)(6);

■ p. Revising paragraph (i);

■ q. In paragraph (j)(1)(i), removing the phrase ''OCC shall'' and adding in its place the phrase ''OCC will'' and removing the phrase ''shall be'' and adding in its place the word ''is''; and

■ r. In paragraph (k), removing the word ''GLBA'' and adding in its place the phrase ''Gramm-Leach-Bliley Act''.

The revisions read as follows.

§ 5.39 Financial subsidiaries of a national bank.

(a) *Authority.* 12 U.S.C. 24a and 93a.

* * * * *

(h) * * *

(5) * * *

(i) A financial subsidiary is deemed to be an affiliate of the bank and is not deemed to be a subsidiary of the bank;

* * * * *

(i) *Procedures to engage in activities through a financial subsidiary.* A national bank that intends, directly or indirectly, to acquire control of, or hold an interest in, a financial subsidiary, or to commence a new activity in an existing financial subsidiary, must obtain OCC approval through the procedures set forth in paragraph (i)(1) or (i)(2) of this section.

(1) *Certification with subsequent application.* (i) At any time, a national bank may file a ''Financial Subsidiary Certification'' with the appropriate OCC licensing office listing the bank's depository institution affiliates and certifying that the bank and each of

those affiliates is well capitalized and well managed.

(ii) Thereafter, at such time as the bank seeks OCC approval to acquire control of, or hold an interest in, a new financial subsidiary, or commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) in an existing subsidiary, the bank may file an application with the appropriate OCC licensing office at the time of acquiring control of, or holding an interest in, a financial subsidiary, or commencing such activity in an existing subsidiary. The application must be labeled ''Financial Subsidiary Application'' and must:

(A) State that the bank's Certification remains valid;

(B) Describe the activity or activities conducted by the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(C) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8) or (c)(13)), a copy of the order or interpretation should be attached);

(D) Certify that the bank will be well capitalized after making adjustments required by paragraph (h)(1) of this section;

(E) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45 percent of the bank's consolidated total assets or $50 billion (or the increased level established by the indexing mechanism); and

(F) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(2) *Combined certification and application.* A national bank may file a combined certification and application with the appropriate OCC licensing office at least five business days prior to acquiring control of, or holding an interest in, a financial subsidiary, or commencing a new activity authorized pursuant to section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)) in an existing subsidiary. The written application must be labeled ''Financial Subsidiary Certification and Application'' and must:

(i) List the bank's depository institution affiliates and certify that the bank and each depository institution affiliate of the bank is well capitalized and well managed;

(ii) Describe the activity or activities to be conducted in the financial subsidiary. To the extent the application relates to the initial affiliation of the bank with a company engaged in insurance activities, the bank should describe the type of insurance activity that the company is engaged in and has present plans to conduct. The bank must also list for each State the lines of business for which the company holds, or will hold, an insurance license, indicating the State where the company holds a resident license or charter, as applicable;

(iii) Cite the specific authority permitting the activity to be conducted by the financial subsidiary. (Where the authority relied on is an agency order or interpretation under section 4(c)(8) or 4(c)(13), respectively, of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(8) or (c)(13)), a copy of the order or interpretation should be attached);

(iv) Certify that the bank will remain well capitalized after making the adjustments required by paragraph (h)(1) of this section;

(v) Demonstrate the aggregate consolidated total assets of all financial subsidiaries of the national bank do not exceed the lesser of 45% of the bank's consolidated total assets or $50 billion (or the increased level established by the indexing mechanism); and

(vi) If applicable, certify that the bank meets the eligible debt requirement in paragraph (g)(3) of this section.

(3) *Approval.* An application is deemed approved upon filing the information required by paragraphs (i)(1) or (i)(2) of this section within the time frames provided therein.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.10, 5.11, and 5.13 do not apply to activities authorized under this section.

(5) *Community Reinvestment Act (CRA).* A national bank may not apply under this paragraph (i) to commence a new activity authorized under section 5136A(a)(2)(A)(i) of the Revised Statutes (12 U.S.C. 24a(a)(2)(A)(i)), or directly or indirectly acquire control of a company engaged in any such activity, if the bank or any of its insured depository institution affiliates received a CRA rating of less than ''satisfactory record of meeting community credit needs'' on its most recent CRA examination prior to when the bank would file an application under this section.

* * * * *

§ 5.40 [Amended]

■ 32. Amend § 5.40 by:

■ a. In paragraph (a), adding a comma after ''2901–2907'';

■ b. Removing the word ''shall'' and adding in its place the word ''must'' wherever it appears in paragraphs (b), (c)(1), (c)(2)(i), (c)(2)(ii), and (c)(3);

■ c. In paragraph (c)(2)(ii), adding the phrase ''or member'' after the word ''shareholder''; and

■ d. In paragraph (c)(4), removing the phrase ''national bank'' and adding in its place the word ''bank'', removing the phrase ''Federal savings association'' and adding in its place the phrase ''savings association'', and removing the phrase ''is not eligible for'' and adding in its place the phrase ''has been removed from''.

■ 33. Section 5.42 is amended by:

■ a. In paragraphs (d)(1) and (d)(2), removing the word ''shall'' and adding in its place the word ''must'';

■ b. Revising paragraph (d)(3);

■ c. In paragraph (d)(4), removing ''5.13(a)'' and adding in its place ''5.13'' wherever it appears and removing the word ''application'' and adding in its place the word ''notice''.

The revision reads as follows.

§ 5.42 Corporate title of a national bank or Federal savings association.

* * * * *

(d) * * *

(3) *Amendment to charter.* A Federal savings association must amend its charter in accordance with § 5.21 or § 5.22, as applicable, to change its title.

* * * * *

■ 34. Section 5.43 is added to read as follows:

§ 5.43 National bank director residency and citizenship waivers.

(a) *Authority.* 12 U.S.C. 72 and 93a.

(b) *Scope.* This section describes the procedures for the OCC to waive the residency and citizenship requirements for national bank directors set forth at 12 U.S.C. 72.

(c) *Application Procedures*—(1) *Residency.* A national bank may request a waiver of the residency requirement for any number of directors by filing a written application with the OCC. The OCC may grant a waiver on an individual basis or for any number of director positions. The waiver is valid until the OCC revokes it in accordance with paragraph (d) of this section, or, if

granted on an individual basis, until the individual no longer serves on the board.

(2) *Citizenship.* A national bank may request a waiver of the citizenship requirements for individuals who comprise up to a minority of the total number of directors by filing a written application with the OCC. The OCC may grant a waiver on an individual basis. A citizenship waiver is valid until the individual no longer serves on the board or the OCC revokes the waiver in accordance with paragraph (d) of this section.

(3) *Biographical and Financial Reports.* (i) Each subject of a citizenship waiver application must submit to the appropriate OCC licensing office the information prescribed in the Interagency Biographical and Financial Report, available at *www.occ.gov.*

(ii) The OCC may require additional information about any subject of a citizenship waiver application, including legible fingerprints, if appropriate. The OCC may waive any of the information requirements of paragraph (c)(3)(i) if the OCC determines that doing so is in the public interest.

(4) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to this section.

(d) *Revocation of waiver*—(1) *Procedure.* The OCC may revoke a residency or citizenship waiver. Before revocation, the OCC will provide written notice to the national bank and affected director(s) of its intention to revoke a residency or citizenship waiver and the basis for its intention. The bank and affected director(s) may respond in writing to the OCC within 10 calendar days, unless the OCC determines that a shorter period is appropriate in light of relevant circumstances. The OCC will consider the written responses of the bank and affected director(s), if any, prior to deciding whether or not to revoke a residency or citizenship waiver. The OCC will notify the national bank and the director of the OCC's decision to revoke a residency or citizenship waiver in writing.

(2) *Effective date.* The OCC's decision to revoke a residency or citizenship waiver is effective:

(i) If the director or national bank, or both, appeals pursuant to paragraph (e) of this section, upon the director's receipt of the decision of the Comptroller, an authorized delegate, or the appellate official, to uphold the initial decision to revoke the residency or citizenship waiver; or

(ii) If neither the director nor national bank appeals pursuant to paragraph (e) of this section, upon the expiration of the period to appeal.

(e) *Appeal.* (1) A director or national bank, or both, may seek review by appealing the OCC's decision to revoke a residency or citizenship waiver to the Comptroller, or an authorized delegate, within 15 days of the receipt of the OCC's written decision to revoke. The director or national bank, or both, may appeal on the grounds that the reasons for revocation are contrary to fact or arbitrary and capricious. The appellant must submit all documents and written arguments that the appellant wishes to be considered in support of the appeal.

(2) The Comptroller, or an authorized delegate, may designate an appellate official who was not previously involved in the decision leading to the appeal at issue. The Comptroller, an authorized delegate, or the appellate official considers all information submitted with the original application for the residency or citizenship waiver, the material before the OCC official who made the initial decision, and any information submitted by the appellant at the time of appeal.

(3) The Comptroller, an authorized delegate, or the appellate official will independently determine whether the reasons given for the initial decision to revoke are contrary to fact or arbitrary and capricious. If they determine either to be the case, the Comptroller, an authorized delegate, or the appellate official may reverse the initial decision to revoke the waiver.

(4) Upon completion of the review, the Comptroller, an authorized delegate, or the appellate official will notify the appellant in writing of the decision. If the initial decision is upheld, the decision to revoke the waiver is effective pursuant to paragraph (d)(2)(i) of this section.

(f) *Prior waivers.* Any waiver granted by the OCC before January 11, 2021 remains in effect unless revoked pursuant to paragraph (d) of this section or, for a waiver granted to an individual, until the individual no longer serves on the board.

§ 5.45 [Amended]

■ 35. Amend § 5.45 by:
■ a. In paragraphs (b), (e)(1), and (g)(5), removing the phrase ''Federal savings association'' and adding in its place ''Federal stock savings association'';
■ b. In paragraph (f)(3), removing the phrase ''savings association's'' and adding in its place ''Federal stock savings association's'';
■ c. In paragraph (g)(1) introductory text, removing the phrase ''the savings association'' and adding in its place ''the Federal stock savings association'';
■ d. In paragraphs (g)(2)(iii), (g)(4)(i) introductory text, (g)(4)(i)(C), (h), and (i), removing the phrase ''savings association'' and adding in its place ''Federal stock savings association'';
■ e. In paragraph (g)(4)(i) introductory text and paragraphs (h) and (i), removing the word ''shall'' and adding in its place the word ''must''; and
■ f. In paragraph (h), removing the number ''197'' and adding in its place ''16''.

■ 36. Amend § 5.46 by:
■ a. In paragraph (b), removing the word ''shall'' and adding in its place the word ''must'' in the first sentence and removing the word ''shall'' and adding in its place the word ''may'' in the second sentence;
■ b. Revising paragraph (g)(1)(ii);
■ c. In paragraphs (g)(2), (i)(1) introductory text, (i)(3)(i) introductory text, (i)(4), (j), and (k), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears;
■ d. In paragraph (g)(2), removing the word ''applicant'' and adding in its place the word ''filer'';
■ e. Revising paragraphs (h) and (i)(2);
■ f. In paragraph (i)(5), adding the phrase, '' unless the OCC specifies a longer period'' after the word ''approval'';
■ g. In paragraph (i)(6)(i), removing the phrase ''U.S. generally accepted accounting principles'' and adding in its place the word ''GAAP''; and
■ h. In paragraph (i)(6)(ii), removing the word ''U.S.''.

The revisions read as follows.

§ 5.46 Changes in permanent capital of a national bank.

* * * * *

(g) * * *

(1) * * *

(ii) *Prior approval required.* In addition to a notice of capital increase under paragraph (i)(3) of this section, a national bank must submit an application under paragraph (i)(1) or (i)(2) of this section and obtain prior OCC approval to increase its permanent capital if the bank is:

(A) Required to receive OCC approval pursuant to letter, order, directive, written agreement, or otherwise;

(B) Selling common or preferred stock for consideration other than cash; or

(C) Receiving a material noncash contribution to capital surplus.

* * * * *

(h) *Decreases in permanent capital.* A national bank must submit an application and obtain prior approval under paragraph (i)(1) or (i)(2) of this section for any reduction of its permanent capital. A national bank may request approval for a reduction in

capital for multiple quarters. The request need only specify a total dollar amount for the requested period and need not specify amounts for each quarter.

(i) * * *

(2) *Expedited review.* An eligible bank's application is deemed approved by the OCC 15 days after the date the OCC receives the application described in paragraph (i)(1) of this section, unless the OCC notifies the bank prior to that date that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2). An eligible bank seeking to decrease its capital may request OCC approval for up to four consecutive quarters. The request need only specify a total dollar amount for the four-quarter period and need not specify amounts for each quarter. An eligible bank may decrease its capital pursuant to such a plan only if the bank maintains its eligible bank status before and after each decrease in its capital.

* * * * *

■ 37. Amend § 5.47 by:

■ a. In paragraph (b), removing the phrase ''debt notes'' and adding in its place the word ''debt'';

■ b. Revising paragraph (c);

■ c. In paragraph (d)(1)(ii), removing the phrase ''Federal Deposit Insurance Corporation (FDIC)'' and adding in its place the word ''FDIC'';

■ d. In paragraph (d)(1)(iv)(B), removing the word ''state'' and adding in its place the word ''State'';

■ e. In paragraph (d)(1)(vi), removing the word ''shall'' and adding in its place the word ''must'' the first time it appears and removing the word ''shall'' and adding in its place the word ''may'' the second time it appears;

■ f. In paragraph (d)(vii), removing the word ''shall'' and adding in its place the word ''may'';

■ g. In paragraph (d)(2) introductory text, removing the word ''note'' and adding in its place the word ''document'';

■ h. In paragraph (d)(3)(ii)(C), adding the phrase, '' if applicable to the subordinated debt issuance'' after the word ''default'';

■ i. Adding paragraph (d)(3)(ii)(D);

■ j. In paragraph (e), removing the phrase, '' including, for an advanced approaches national bank, the disclosure requirement in 12 CFR 3.20(d)(1)(xi)''; and

■ k. Revising paragraphs (f), (g) and (h).

The addition and revisions read as follows.

§ 5.47 Subordinated debt issued by a national bank.

* * * * *

(c) *Definitions.* The following definitions apply to this section:

Capital plan means a plan describing the means and schedule by which a national bank will attain specified capital levels or ratios, including a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

Original maturity means the stated maturity of the subordinated debt note. If the subordinated debt note does not have a stated maturity, then original maturity means the earliest possible date the subordinated debt note may be redeemed, repurchased, prepaid, terminated, or otherwise retired by the national bank pursuant to the terms of the subordinated debt note.

Payment on subordinated debt means principal and interest, and premium, if any.

Subordinated debt document means any document pertaining to an issuance of subordinated debt, and any renewal, extension, amendment, modification, or replacement thereof, including the subordinated debt note and any global note, pricing supplement, note agreement, trust indenture, paying agent agreement, or underwriting agreement.

Tier 2 capital has the same meaning as set forth in 12 CFR 3.20(d).

(d) * * *

(3) * * *

(ii) * * *

(D) A statement that the obligation may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding.

* * * * *

(f) *Process and procedures*—(1) *Issuance of subordinated debt*—(i) *Approval*—(A) *Eligible bank.* An eligible bank is required to receive prior approval from the OCC to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section, if:

(*1*) The national bank will not continue to be an eligible bank after the transaction;

(*2*) The OCC has previously notified the national bank that prior approval is required; or

(*3*) Prior approval is required by law.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section.

(ii) *Application to include subordinated debt in tier 2 capital.* A national bank that intends to include subordinated debt in tier 2 capital must submit an application to the OCC for approval, in accordance with paragraph (h) of this section, before or within ten days after issuing the subordinated debt. Where a national bank's application to issue subordinated debt has been deemed to be approved, in accordance with paragraph (g)(2)(i) of this section, and the national bank does not contemporaneously receive approval from the OCC to include the subordinated debt as tier 2 capital, the national bank must submit an application for approval to include subordinated debt in tier 2 capital, pursuant to paragraph (h) of this section, after issuance of the subordinated debt. A national bank may not include subordinated debt in tier 2 capital unless the national bank has filed the application with the OCC and received approval from the OCC that the subordinated debt issued by the national bank qualifies as tier 2 capital.

(2) *Prepayment of subordinated debt*—(i) *Subordinated debt not included in tier 2 capital*—(A) *Eligible bank.* An eligible bank is required to receive prior approval from the OCC to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section, only if:

(*1*) The national bank will not be an eligible bank after the transaction;

(*2*) The OCC has previously notified the national bank that prior approval is required;

(*3*) Prior approval is required by law; or

(*4*) The amount of the proposed prepayment is equal to or greater than one percent of the national bank's total capital, as defined in 12 CFR 3.2.

(B) *National bank not an eligible bank.* A national bank that is not an eligible bank must receive prior OCC approval to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section.

(ii) *Subordinated debt included in tier 2 capital.* All national banks must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(1)(ii) of this section.

(3) *Material changes to existing subordinated debt documents.* A national bank must receive prior approval from the OCC in accordance with paragraph (g)(1)(iii) of this section prior to making a material change to an existing subordinated debt document if the bank would have been required to receive OCC approval to issue the

security under paragraph (f)(1)(i) of this section or to include it in tier 2 capital under paragraph (h) of this section.

(g) *Prior approval procedure*—(1) *Application*—(i) *Issuance of subordinated debt.* A national bank required to obtain OCC approval before issuing subordinated debt must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of the terms and amount of the proposed issuance;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the proposed subordinated note and any other subordinated debt documents; and

(D) A statement that the subordinated debt issue complies with all applicable laws and regulations.

(ii) *Prepayment of subordinated debt.* A national bank required to obtain OCC approval before prepaying subordinated debt, pursuant to paragraph (f)(2) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of the terms and amount of the proposed prepayment;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the subordinated debt note the national bank is proposing to prepay and any other subordinated debt documents; and

(D) Either:

(*1*) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or

(*2*) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(iii) *Material changes to existing subordinated debt.* A national bank required to obtain OCC approval before making a material change to an existing subordinated debt document, pursuant to paragraph (f)(3) of this section, must submit an application to the appropriate OCC licensing office. The application must include:

(A) A description of all proposed changes;

(B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;

(C) A copy of the revised subordinated debt documents reflecting all proposed changes; and

(D) A statement that the proposed changes to the subordinated debt documents complies with all applicable laws and regulations.

(iv) *Additional information.* The OCC reserves the right to request additional relevant information, as appropriate.

(2) *Approval*—(i) *General.* The application is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the national bank prior to that date that the filing presents a significant supervisory or compliance concern or raises a significant legal or policy issue.

(ii) *Prepayment.* Notwithstanding this paragraph (g)(2)(i) of this section, if the application for prior approval is for prepayment, the national bank must receive affirmative approval from the OCC. If the OCC requires the national bank to replace the subordinated debt, the national bank must receive affirmative approval that the replacement capital instrument meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20 and must issue the replacement instrument prior to prepaying the subordinated debt, or immediately thereafter.[4]

(iii) *Tier 2 capital.* Following notification to the OCC pursuant to paragraph (f)(1)(ii) of this section that the national bank has issued the subordinated debt, the OCC will notify the national bank whether the subordinated debt qualifies as tier 2 capital.

(iv) *Expiration of approval.* Approval expires if a national bank does not complete the sale of the subordinated debt within one year of approval.

(h) *Application procedure for inclusion in tier 2 capital.* (1) A national bank must submit an application to the appropriate OCC licensing office in writing before or within ten days after issuing subordinated debt that it intends to include in tier 2 capital. A national bank may not include such subordinated debt in tier 2 capital unless the national bank has received approval from the OCC that the subordinated debt qualifies as tier 2 capital.

(2) The application must include:

(i) The terms of the issuance;

(ii) The amount or projected amount and date or projected date of receipt of funds;

(iii) The interest rate or expected calculation method for the interest rate;

(iv) Copies of the final subordinated debt documents; and

(v) A statement that the issuance complies with all applicable laws and regulations.

* * * * *

§ 5.48 [Amended]

■ 38. Amend § 5.48 in paragraphs (b), (e)(1), (e)(2)(i), (e)(3)(i) introductory text, (e)(3)(ii), (e)(3)(iii), (e)(4), (e)(5), (e)(6), and (f)(2)(ii) by removing the word ''shall'' and adding in its place the word ''must'' wherever it appears.

■ 39. Section 5.50 is amended by:

■ a. In paragraphs (b), (c)(3)(v)(B), (f)(2)(i), (f)(2)(vii), (f)(3)(ii)(B), (f)(3)(ii)(C), (g)(1) introductory text, (h), (i)(1)(i), (i)(1)(ii), (i)(4)(ii), and (i)(5), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears;

■ b. In paragraph (c)(2)(iii), removing the word ''(HOLA)'';

■ c. In paragraph (d)(1)(ii), removing the phrase ''shall be'' and adding in its place the word ''is'';

■ d. In paragraph (d)(5), removing the phrase ''his or her''; and adding in its place the word ''their'';

■ e. Removing paragraph (d)(8);

■ f. Redesignating paragraphs (d)(6) through (7) as paragraphs (d)(7) through (8);

■ g. Adding new paragraph (d)(6);

■ h. In redesignated paragraph (d)(7), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act, 12 U.S.C. 1464'';

■ i. In paragraph (f)(2)(ii) introductory text, removing the phrase ''shall be'' and adding in its place the word ''are'';

■ j. In paragraph (f)(2)(ii)(D), adding the phrase ''15 U.S.C. 78m or 78n,'' after ''1934,'';

■ k. In paragraph (f)(2)(ii)(E), removing the phrase ''defined in § 192.25 of this chapter shall'' and adding in its place the phrase ''defined in 12 CFR 192.25 is'';

■ l. In paragraph (f)(2)(iii)(A), removing ''78l'' and adding in its place ''78*l*'';

■ m. In paragraph (f)(2)(viii), removing the word ''shall'' and adding in its place the word ''will'';

■ n. In paragraph (f)(3)(i)(A), removing the phrase ''on the OCC's internet web page,'' and adding in its place the word ''at'';

■ o. In paragraphs (f)(3)(ii)(A), (f)(3)(ii)(B), (f)(3)(iii) introductory text, and (g)(1) introductory text removing the word ''applicant'' and adding in its place the word ''filer'';

■ p. In paragraph (f)(3)(ii)(C), removing the phrase ''An applicant'' and adding in its place the phrase ''A filer'';

[4] A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

■ q. Removing paragraph (f)(3)(iv);
■ r. Removing the phrase ''*of notice*'' in the heading of paragraph (f)(5);
■ s. Revising paragraph (f)(6);
■ t. Revising paragraph (g)(2)(i);
■ u. In paragraph (i)(1)(iii), removing the phrase ''paragraph (h)(1)(i)'' and adding in its place the phrase ''paragraph (i)(1)(i)''; and
■ v. In paragraph (i)(3)(i), removing the phrase ''paragraph (h)(1)'' and adding in its place the phrase ''paragraph (i)(1)''.

The addition and revisions read as follows.

§ 5.50 Change in control of a national bank or Federal savings association; reporting of stock loans.

* * * * *

(d) * * *

(6) Depository institution means a depository institution as defined in section 3(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1).

* * * * *

(f) * * *

(6) *Notification of disapproval.* (i) *Written notice by OCC.* If the OCC disapproves a notice, it will notify the filer in writing within three days after the decision. The OCC's written disapproval will contain a statement of the basis for disapproval and indicate that the filer may request a hearing.

(ii) *Hearing Request.* The filer may request a hearing by the OCC within 10 days of receipt of disapproval, pursuant to the procedures in 12 CFR part 19, subpart H. Following final agency action under 12 CFR part 19, further review by the courts is available. (*See* 12 U.S.C. 1817(j)(5)).

(iii) *Failure to request a hearing.* If a filer fails to request a hearing with a timely request, the notice of disapproval constitutes a final and unappealable order.

* * * * *

(g) * * *

(2) * * *

(i) Upon the request of any person, the OCC releases the information provided in the public portion of the notice and makes it available for public inspection and copying as soon as possible after a notice has been filed. In certain circumstances the OCC may determine that the release of the information would not be in the public interest. In addition, the OCC makes the date that the notice is filed, the disposition of the notice and the date thereof, and the consummation date of the transaction, if applicable, publicly available in the OCC's ''Weekly Bulletin.''

* * * * *

■ 40. Amend § 5.51 by:
■ a. Revising paragraph (a);
■ b. In paragraph (c)(4), adding the phrase ''chief risk officer,'' after the phrase ''chief investment officer,''
■ c. In paragraph (c)(7)(ii), adding the phrase ''that requires action to improve the financial condition of the national bank or Federal savings association'' after the word ''agreement'';
■ d. In paragraph (d) introductory text, and paragraphs (e)(1), (e)(6)(i)(C), (e)(6)(1)(D)(*2*), (e)(6)(i)(E), and (f)(1), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears;
■ e. In paragraph (e)(6)(i)(E), removing the phrase ''his or her'' and adding in its place the word ''their'';
■ f. In paragraph (e)(8), adding ''5.9,'' after ''5.8,''; and
■ g. In paragraphs (e)(8), (f)(3), and (f)(4), removing the word ''shall'' and adding in its place the word ''will''.

The revision reads as follows.

§ 5.51 Changes in directors and senior executive officers of a national bank or Federal savings association.

(a) *Authority.* 12 U.S.C. 1831i, 3102(b), and 5412(b)(2)(B).

* * * * *

§ 5.52 [Amended]

■ 41. Amend § 5.52 by:
■ a. In paragraph (c)(1), removing the word ''shall'' and adding in its place the word ''must''; and
■ b. In paragraph (c)(2), removing ''§ 5.40(b)'' and adding in its place ''§ 5.40(c)(1)''.

§ 5.53 [Amended]

■ 42. Amend § 5.53 by:
■ a. In paragraph (c)(2)(ii), removing ''12 CFR 5.48'' wherever it appears and adding in its place ''§ 5.48''; and
■ b. In paragraph (d)(3)(i)(A), removing the phrase ''under paragraph (d)(1)'' and adding in its place ''filed under paragraph (d)(2)''.

■ 43. Amend § 5.55 by:
■ a. In paragraph (b), removing the phrase ''or notice'';
■ b. Removing paragraph (d)(2) and redesignating paragraph (d)(3) as paragraph (d)(2);
■ c. Adding a new paragraph (d)(3);
■ d. In paragraph (d)(4), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';
■ e. Revising paragraphs (e), (f), (g), and paragraph (h) introductory text;
■ f. Redesignating paragraphs (h)(1) through (h)(3) as paragraphs (h)(1)(i) through (h)(1)(iii);
■ g. Removing the last sentence of redesignated paragraph (h)(1)(iii); and
■ h. Adding new paragraph (h)(1) introductory text and paragraph (h)(2).

The additions and revisions read as follows.

§ 5.55 Capital distributions by Federal savings associations.

* * * * *

(d) * * *

(3) *Control* has the same meaning as in section 10(a)(2) of the Home Owners' Loan Act (12 U.S.C. 1467a(a)(2)).

* * * * *

(e) *Filing requirements*—(1) *Application required.* A Federal savings association must file an application with the OCC before making a capital distribution if:

(i) The Federal savings association would not be at least well capitalized or would not otherwise remain an eligible savings association following the distribution;

(ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years. If the capital distribution is from retained earnings, the aggregate limitation in this paragraph may be calculated in accordance with § 5.64(c)(2), substituting ''capital distributions'' for ''dividends'' in that section;

(iii) The Federal savings association's proposed capital distribution would reduce the amount of or retire any part of its common or preferred stock or retire any part of debt instruments such as notes or debentures included in capital under 12 CFR part 3 (other than regular payments required under a debt instrument approved under § 5.56);

(iv) The Federal savings association's proposed capital distribution is payable in property other than cash;

(v) The Federal savings association is directly or indirectly controlled by a mutual savings and loan holding company or by a company that is not a savings and loan holding company; or

(vi) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the Federal savings association and the OCC or the OTS, or violate a condition imposed on the Federal savings association in an application or notice approved by the OCC or the OTS.

(2) *No application required.* A Federal savings association may make a capital distribution without filing an application with the OCC if it does not meet the filing requirements in paragraph (e)(1) of this section.

(3) *Informational copy of Federal Reserve System notice required.* If the

Federal savings association is a subsidiary of a savings and loan holding company that is filing a notice with the Board of Governors of the Federal Reserve System (Board) for a dividend solely under 12 U.S.C. 1467a(f) and not also under 12 U.S.C. 1467a(o)(11), and no application under paragraph (e)(1) of this section is required, then the savings association must provide an informational copy to the OCC of the notice filed with the Board, at the same time the notice is filed with the Board.

(f) *Application format*—(1) *Contents.* The application must:

(i) Be in narrative form;

(ii) Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution; and

(iii) Demonstrate compliance with paragraph (h) of this section.

(2) *Schedules.* The application may include a schedule proposing capital distributions over a specified period.

(3) *Combined filings.* A Federal savings association may combine the application required under paragraph (e)(1) of this section with any other notice or application, if the capital distribution is a part of, or is proposed in connection with, another transaction requiring a notice or application under this chapter. If submitting a combined filing, the Federal savings association must state that the related notice or application is intended to serve as an application under this section.

(g) *Filing procedures*—(1) *Application.* When a Federal savings association is required to file an application under paragraph (e)(1) of this section, it must file the application at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by its board of directors. Except as provided in paragraph (g)(2) of this section, the OCC is deemed to have approved an application from an eligible savings association upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(i) Additional information is required to supplement the application;

(ii) The application has been removed from expedited review, or the expedited review process is extended, under 5.13(a)(2); or

(iii) The application is denied.

(2) *Applications not subject to expedited review.* An application is not subject to expedited review if:

(i) The Federal savings association is not an eligible savings association;

(ii) The total amount of all of the Federal savings association's capital distributions (including the proposed capital distribution) for the applicable calendar year exceeds its net income for that year to date plus retained net income for the preceding two years;

(iii) The Federal savings association would not be at least adequately capitalized, as set forth in 12 CFR 6.4, following the distribution; or

(iv) The Federal savings association's proposed capital distribution would violate a prohibition contained in any applicable statute, regulation, or agreement between the savings association and the OCC or the OTS, or violate a condition imposed on the savings association in an application or notice approved by the OCC or the OTS.

(3) *OCC filing office*—(i) *Appropriate licensing office.* Except as provided in paragraph (g)(3)(ii) of this section, a Federal savings association that is required to file an application under paragraph (e)(1) of this section or an informational copy of a notice under paragraph (e)(3) of this section must submit the application or notice to the appropriate OCC licensing office.

(ii) *Appropriate supervisory office.* A Federal savings association that is required to file an application under paragraph (e)(1) of this section for capital distributions involving solely a cash dividend from retained earnings or involving a cash dividend from retained earnings and a concurrent cash distribution from permanent capital must submit the application to the appropriate OCC supervisory office.

(h) *OCC review of capital distributions.* After review of an application submitted pursuant to paragraph (e)(1) of this section:

(1) The OCC may deny the application in whole or in part, if it makes any of the following determinations:

* * * * *

(2) The OCC may approve the application in whole or in part. Notwithstanding paragraph (h)(1)(iii) of this section, the OCC may waive any waivable prohibition or condition to permit a distribution.

* * * * *

■ 44. Amend § 5.56 by:

■ a. Revising paragraph (b);

■ b. In paragraph (d)(1)(i)(F), removing the word ''and'';

■ c. In paragraph (d)(1)(i)(G), removing the period and adding in its place ''; and'';

■ d. Adding new paragraph (d)(1)(i)(H);

■ e. In paragraph (d)(2)(i), removing ''12 CFR 197.4'' and adding in its place ''12 CFR 16.7'' and removing the word ''shall'' and adding in its place the word ''may'';

■ f. In paragraph (d)(2)(ii), removing ''15 U.S.C. 77d(6)'' and adding in its place ''15 U.S.C. 77b(a)(15);

■ g. In paragraph (e)(1) introductory text, removing the phrase ''notices and'';

■ h. In paragraphs (e)(2) and (i), removing the phrase ''or notice'' wherever it appears; and

■ i. Revising paragraph (h).

The addition and revisions read as follows.

§ 5.56 Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital.

* * * * *

(b) *Application procedures*—(1) *Application to include covered securities in tier 2 capital*—(i) *Application required.* A Federal savings association must file an application seeking the OCC's approval of the inclusion of covered securities in tier 2 capital. The savings association may file its application before or after it issues covered securities, but may not include covered securities in tier 2 capital until the OCC approves the application and the securities are issued.

(ii) *Expedited review.* The OCC is deemed to have approved an application from an eligible savings association to include covered securities in tier 2 capital upon the expiration of 30 days after the filing date of the application unless, before the expiration of that time period, the OCC notifies the Federal savings association that:

(A) Additional information is required to supplement the application;

(B) The application has been removed from expedited review or the expedited review process is extended under § 5.13(a)(2); or

(C) The OCC denies the application.

(iii) *Securities offering rules.* A Federal savings association also must comply with the securities offering rules at 12 CFR part 16 by filing an offering circular for a proposed issuance of covered securities, unless the offering qualifies for an exemption under that part.

(2) *Application required to prepay covered securities included in tier 2 capital*—(i) *In general.* A Federal savings association must file an application to, and receive prior approval from, the OCC before prepaying covered securities included in tier 2 capital. The application must include:

(A) A statement explaining why the Federal savings association believes that following the proposed prepayment the savings association would continue to hold an amount of capital commensurate with its risk; or

(B) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument and the time frame for issuance.

(ii) *Replacement covered security.* If the OCC conditions approval of prepayment on a requirement that a Federal savings association must replace the covered security with a covered security of an equivalent amount that satisfies the requirements for tier 1 or tier 2 capital, the savings association must file an application to issue the replacement covered security and must receive prior OCC approval.

* * * * *

(d) * * *

(1) * * *

(i) * * *

(H) State that the security may be fully subordinated to interests held by the U.S. government in the event that the savings association enters into a receivership, insolvency, liquidation, or similar proceeding;

* * * * *

(h) *Issuance of a replacement regulatory capital instrument in connection with prepaying a covered security.* The OCC may require a Federal savings association seeking prior approval to prepay a covered security included in tier 2 capital to issue a replacement covered security of an equivalent amount that qualifies as tier 1 or tier 2 capital under 12 CFR 3.20. If the OCC imposes such a requirement, the savings association must complete the sale of such covered security prior to, or immediately after, the prepayment.[5]

* * * * *

■ 45. Amend § 5.58 by:

■ a. In paragraph (a), adding ''and'' before ''5412(b)(2)(B)'';

■ b. Revising paragraph (d)(2) and removing paragraph (d)(3);

■ c. Revising paragraph (e) introductory text;

■ d. In paragraph (e)(1), removing the word ''state'' wherever it appears and adding in its place the word ''State'';

■ e. Revising paragraphs (e)(2) through (4);

■ f. Revising paragraph (f)(1);

■ g. Redesignating paragraph (f)(2) as paragraph (f)(3) and revising newly redesignated paragraph (f)(3);

■ h. Adding a new paragraph (f)(2);

■ i. Redesignating paragraphs (g) through (i) as paragraphs (h) through (j), respectively and adding new paragraph (g);

■ j. In the heading of redesignated paragraph (h), removing the word ''*entities*'' and adding in its place the word ''*enterprises*'';

■ k. In redesignated paragraph (h) introductory text, removing the word ''entity'' and adding in its place the word ''enterprise'';

■ l. In redesignated paragraph (h)(1), removing the phrase ''paragraph (g)(1)(i)'' wherever it appears and adding in its place the phrase ''paragraph (h)(1)'';

■ m. In redesignated paragraph (i)(3), removing the word ''non-controlling'' and adding in its place the word ''pass-through''; and

■ n. Revising redesignated paragraph (j).

The additions and revisions read as follows.

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

* * * * *

(d) * * *

(2) *Pass-through investment* means an investment authorized under 12 CFR 160.32(a). A *pass-through investment* does not include a Federal savings association holding interests in a trust formed for the purposes of securitizing assets held by the savings association as part of its business or for the purposes of holding multiple legal titles of motor vehicles or equipment in conjunction with lease financing transactions.

(e) *Pass-through investments; notice procedure.* Except as provided in paragraphs (f) through (i) of this section, a Federal savings association may make a pass-through investment, directly or through its operating subsidiary, in an enterprise that engages in an activity described in § 5.38(f)(5) or in an activity that is substantively the same as a previously approved activity by filing a written notice. The Federal savings association must file this written notice with the appropriate OCC licensing office no later than 10 days after making the investment. The written notice must:

* * * * *

(2) State:

(i) Which paragraphs of § 5.38(f)(5) describe the activity; or

(ii) If the activity is substantively the same as a previously approved activity:

(A) How, the activity is substantively the same as a previously approved activity;

(B) The citation to the applicable precedent; and

(C) That the activity will be conducted in accordance with the same terms and conditions applicable to the previously approved activity;

(3) Certify that the Federal savings association is well capitalized and well managed at the time of the investment;

(4) Describe how the Federal savings association has the ability to prevent the enterprise from engaging in an activity that is not set forth in § 5.38(f)(5) or not contained in published OCC (including published former OTS) precedent for previously approved activities, or how the savings association otherwise has the ability to withdraw its investment;

* * * * *

(f) * * * (1) *In general.* A Federal savings association must file an application and obtain prior approval before making or acquiring, either directly or through an operating subsidiary, a pass-through investment in an enterprise if the pass-through investment does not qualify for the notice procedure set forth in paragraph (e) of this section because the savings association is unable to make the representation required by paragraph (e)(2) or the certification required by paragraphs (e)(3) or (e)(7) of this section. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and, if possible, paragraphs (e)(2), (e)(3), and (e)(7) of this section. If the Federal savings association is unable to make the representation set forth in paragraph (e)(2) of this section, the savings association's application must explain why the activity in which the enterprise engages is a permissible activity for a Federal savings association and why the filer should be permitted to hold a pass-through investment in an enterprise engaged in that activity. A Federal savings association may not make a pass-through investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(2) *Expedited review.* An application submitted by a Federal savings association is deemed approved by the OCC as of the 10th day after the application is received by the OCC if:

(A) The Federal savings association makes the representation required by paragraph (e)(2) and the certification required by paragraph (e)(3) of this section;

(B) The book value of the Federal savings association's pass-through investment for which the application is being submitted is no more than 1% of the savings association's capital and surplus;

(C) No more than 50% of the enterprise is owned or controlled by banks or savings associations subject to examination by an appropriate Federal banking agency or credit unions insured by the National Credit Union Association; and

[5] A Federal savings association may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

(D) The OCC has not notified the Federal savings association that the application has been removed from expedited review, or the expedited review process is extended, under § 5.13(a)(2).

(3) *Investments requiring a filing under 12 U.S.C. 1828(m).* Notwithstanding any other provision in this section, if an enterprise in which a Federal savings association proposes to invest would be a subsidiary of the Federal savings association for purposes of 12 U.S.C. 1828(m) and the enterprise would not be an operating subsidiary or a service corporation, the Federal savings association must file an application with the OCC under paragraph (f)(3) of this section at least 30 days prior to making the investment and obtain prior approval from the OCC before making the investment. The application must include the information required in paragraphs (e)(1) and (e)(4) through (e)(6) of this section and, if possible, paragraphs (e)(2), (e)(3), and (e)(7) of this section. If the Federal savings association is unable to make the representation set forth in paragraph (e)(2) of this section, the savings association's application must explain why the activity in which the enterprise engages is a permissible activity for a Federal savings association and why the filer should be permitted to hold a pass-through investment in an enterprise engaged in that activity. A Federal savings association may not make a pass-through investment if it is unable to make the representations and certifications specified in paragraphs (e)(1) and (e)(4) through (e)(6) of this section.

(g) *Pass-through investments; no application or notice required.* A Federal savings association may make or acquire, either directly or through an operating subsidiary, a pass-through investment in an enterprise, without an application or notice to the OCC, if:

(i) The activities of the enterprise are limited to those to activities previously reported by the savings association in connection with the making or acquiring of a pass-through investment;

(ii) The activities in the enterprise continue to be legally permissible for a Federal savings association;

(iii) The savings association's pass-through investment will be made in accordance with any conditions imposed by the OCC or OTS in approving any prior pass-through investment conducting these activities;

(iv) The savings association is able to make the representations and certifications specified in paragraphs (e)(3) through (e)(7) of this section; and

(v) The enterprise will not be a subsidiary for purposes of 12 U.S.C. 1828(m).

* * * * *

(j) *Exceptions to rules of general applicability.* Sections 5.8, 5.9, 5.10, and 5.11 do not apply to this section. However, if the OCC concludes that an application presents significant or novel policy, supervisory, or legal issues, the OCC may determine that some or all provisions in §§ 5.8, 5.9, 5.10, and 5.11 apply.

* * * * *

■ 46. Amend § 5.59 by:

■ a. In paragraph (a), removing ''1464'' and adding in its place ''1464(c)(4)(B)'' and adding ''and'' before ''5412(b)(2)(B);

■ b. In paragraph (b) introductory text, adding ''(12 U.S.C. 1828(m))'' after the phrase ''Insurance Act'';

■ c. In paragraph (d)(2), removing the phrase ''generally accepted accounting principles (GAAP)'' and adding in its place the word ''GAAP'';

■ d. In paragraphs (e)(1), (e)(2), (f)(6)(i), and (h)(1)(ii), removing the word ''state'' and adding the word ''State'' wherever it appears;

■ e. In paragraph (e)(1), removing the phrase ''state-chartered'' and adding in its place the phrase ''State-chartered'';

■ f. In paragraph (e)(4), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act, 12 U.S.C. 1464(c)'';

■ g. In paragraph (e)(9), removing the word ''shall'' and adding in its place the word ''must'' wherever it appears;

■ h. In paragraph (g)(1), removing the word ''HOLA'' and adding in its place the phrase ''Home Owners' Loan Act (12 U.S.C. 1464(c)(4)(B))'';

■ i. In paragraph (g)(1), removing ''§ 24.6 of this chapter'' and adding in its place ''12 CFR part 24'';

■ j. In paragraph (g)(2), removing the phrase ''HOLA and parts 5 and 160 of this chapter'' and adding in its place the phrase ''Home Owners' Loan Act (12 U.S.C. 1464(c)), this part 5, and 12 CFR part 160'';

■ k. In paragraph (g)(3), removing the word ''paragraph,'' and adding in its place the phrase ''paragraph (g),'';

■ l. In paragraph (h)(1)(i) introductory text, adding the phrase ''(12 U.S.C. 1828(m))'' after the word ''Act'';

■ m. In paragraph (h)(1)(ii), removing the phrase ''an applicant'' and adding in its place the phrase ''a filer'', and removing the word ''applicants'' and adding in its place the word ''filers'';

■ n. In paragraphs (h)(2)(i) and (h)(3), removing the word ''applicant'' and adding in its place the word ''filer'';

■ o. In paragraph (h)(2), removing the phrase ''is not eligible for expedited review under 5.13(a)(2)'' and adding in its place the phrase ''has been removed from expedited review, or the expedited review period is extended, under § 5.13(a)(2)''

■ p. Revising paragraph (h)(2)(ii)(A); and

■ q. In paragraph (h)(2)(ii)(B), removing ''§ 5.59(f).'' and adding in its place the phrase ''paragraph (f) of this section.''.

The revision reads as follows:

§ 5.59 Service corporations of Federal savings associations.

* * * * *

(h) * * *

(2) * * *

(ii) * * *

(A) The savings association is well capitalized and well managed; and

* * * * *

§ 5.62 [Amended]

■ 47. Section 5.62 is amended by removing the word ''shall'' and adding in its place the word ''must''.

§ 5.64 [Amended]

■ 48. Section 5.64 is amended by:

■ a. In paragraph (c)(2)(i), removing the word ''shall'' and adding in its place the word ''does'';

■ b. In paragraph (c)(2)(iii), removing the phrase ''paragraph (c)(2)'' and adding in its place the phrase ''paragraphs (c)(2)(i) and (c)(2)(ii)'' and removing the phrase ''shall apply'' and adding in its place the word ''applies'';

■ c. In paragraph (c)(3), removing the phrase ''paragraph (c)'' and adding in its place the phrase ''paragraphs (c)(1) and (c)(2)'' and removing the word ''shall'' and adding in its place the word ''must''; and

■ d. Removing paragraph (d).

■ 49. Revise § 5.66 to read as follows.

§ 5.66 Dividends payable in property other than cash.

In addition to cash dividends, directors of a national bank may declare dividends payable in property, with the approval of the OCC. A national bank must submit a request for prior approval of a noncash dividend to the appropriate OCC licensing office. The dividend is equivalent to a cash dividend in an amount equal to the actual current value of the property, regardless of whether the book value is higher or lower under GAAP. Before the dividend is declared, the bank should show the difference between actual value and book value on the books of the national bank as a gain or loss, as applicable, and the dividend should then be declared in the amount of the actual current value of the property being distributed.

■ 50. Revise § 5.67 to read as follows.

§ 5.67 Fractional shares.

A national bank issuing additional stock may adopt arrangements to preclude the issuance of fractional shares. The bank may remit the cash equivalent of the fraction not being issued to those to whom fractional shares would otherwise be issued. The cash equivalent is based on the market value of the stock, if there is an established and active market in the national bank's stock. In the absence of such a market, the cash equivalent is based on a reliable and disinterested determination as to the fair market value of the stock if such stock is available. The bank may propose an alternate method in the application for the stock issuance filed with the OCC.

■ 51. Amend § 5.70 by:

■ a. In paragraphs (c)(1)(iv) and (c)(1)(v), removing the word ''state'' and adding in its place the word ''State'' wherever it appears;

■ b. In paragraph (d)(1) and paragraph (d)(2) introductory text, removing the word ''shall'' and adding in its place the word ''must'' wherever it appears; and

■ c. Adding new paragraph (d)(3).

The addition reads as follows.

§ 5.70 Federal branches and agencies.

* * * * *

(d) * * *

(3) *Biographical and Financial Reports.* The OCC may require any senior executive officer of a Federal branch or agency submitting a filing to submit an Interagency Biographical and Financial Report, available at *www.occ.gov,* and legible fingerprints.

PART 7—ACTIVITIES AND OPERATIONS

■ 52. The authority citation for part 7 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 29, 71, 71a, 92, 92a, 93, 93a, 95(b)(1), 371, 371d, 481, 484, 1463, 1464, 1465, 1818, 1828(m) and 5412(b)(2)(B).

§ 7.2008 [Amended]

■ 53. Amend § 7.2008(c) by removing the phrase ''12 CFR 5.3(c)'' and adding in its place the phrase ''12 CFR 5.3''.

Brian P. Brooks,

Acting Comptroller of the Currency.

[FR Doc. 2020–25595 Filed 12–10–20; 8:45 am]

BILLING CODE 4810–33–P

FEDERAL REGISTER

Vol. 85 Friday,
No. 239 December 11, 2020

Part V

Securities and Exchange Commission

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Adopt Listing Rules Related to Board Diversity; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90574; File No. SR–NASDAQ–2020–081]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Adopt Listing Rules Related to Board Diversity

December 4, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt listing rules related to board diversity, as described in more detail below:

(i) To adopt Rule 5605(f) (Diverse Board Representation), which would require Nasdaq-listed companies, subject to certain exceptions, (A) to have at least one director who self-identifies as a female, and (B) to have at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+, or (C) to explain why the company does not have at least two directors on its board who self-identify in the categories listed above;

(ii) to adopt Rule 5606 (Board Diversity Disclosure), which would require Nasdaq-listed companies, subject to certain exceptions, to provide statistical information in a proposed uniform format on the company's board of directors related to a director's self-identified gender, race, and self-identification as LGBTQ+; and

(iii) to update Rule 5615 and IM–5615–3 (Foreign Private Issuers) and Rule 5810(c) (Types of Deficiencies and Notifications) to incorporate references to proposed Rule 5605(f) and Rule 5606; and

(iv) to make certain other non-substantive conforming changes.

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

I. The Diversity Imperative for Corporate Boards

Over the past year, the social justice movement has brought heightened attention to the commitment of public companies to diversity and inclusion. Controversies arising from corporate culture and human capital management challenges, as well as technology-driven changes to the business landscape, already underscored the need for enhanced board diversity—diversity in the boardroom is good corporate governance. The benefits to stakeholders of increased diversity are becoming more apparent and include an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls. Nasdaq believes that the heightened focus on corporate board diversity by companies,[3] investors,[4] corporate governance organizations,[5] and legislators[6] demonstrates that investor confidence is enhanced when boardrooms are comprised of more than one demographic group. Nasdaq has also observed recent calls from SEC commissioners[7] and investors[8] for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Deloitte and the Society for Corporate Governance, *Board Practices Quarterly: Diversity, equity, and inclusion* (Sept. 2020), available at: *https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/diversity-equity-and-inclusion.html* (finding, in a survey of over 200 companies, that ''most companies and/or their boards have taken, or intend to take, actions in response to recent events surrounding racial inequality and inequity; 71% of public companies and 65% of private companies answered this question affirmatively'').

[4] *See* ISS Governance, *2020 Global Benchmark Policy Survey, Summary of Results* 6 (Sept. 24, 2020), available at: *https://www.issgovernance.com/wp-content/uploads/publications/2020-iss-policy-survey-results-report-1.pdf* (finding that ''a significant majority of investors (61 percent) indicated that boards should aim to reflect the company's customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups'').

[5] *See* International Corporate Governance Network, *ICGN Guidance on Diversity on Boards* 5 (2016), available at: *https://www.icgn.org/sites/default/files/ICGN%20Guidance%20on%20Diversity%20on%20Boards%20-%20Final.pdf* (''The ICGN believes that diversity is a core attribute of a well-functioning board which supports greater long-term value for shareholders and companies.'').

[6] *See, e.g.,* John J. Cannon et al., Sherman & Sterling LLP, *Washington State Becomes Next to Mandate Gender Diversity on Boards* (May 28, 2020), available at: *https://www.shearman.com/perspectives/2020/05/washington-state-becomes-next-to-mandate-gender-diversity-on-boards;* Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020) (California legislation requiring companies headquartered in the state to have at least one director who self-identifies as a Female and one from an Underrepresented Community).

[7] *See* Commissioner Allison Herren Lee, *Regulation S–K and ESG Disclosures: An Unsustainable Silence* (Aug. 26, 2020), available at: *https://www.sec.gov/news/public-statement/lee-regulation-s-k-2020-08-26#_ftnref15* (''There is ever-growing recognition of the importance of diversity from all types of investors . . . [a]nd large numbers of commenters on this [SEC] rule proposal emphasized the need for specific diversity disclosure requirements.''); *see also* Commissioner Caroline Crenshaw, *Statement on the ''Modernization'' of Regulation S–K Items 101, 103, and 105* (August 26, 2020), available at: *https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k* (''As Commissioner Lee noted in her statement, the final [SEC] rule is also silent on diversity, an issue that is extremely important to investors and to the national conversation. The failure to grapple with these issues is, quite simply, a failure to modernize.''); Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), available at: *https://www.sec.gov/news/speech/chair-white-icgn-speech.html* (''Companies' disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted . . . Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.'').

[8] *See* Vanguard, *Investment Stewardship 2019 Annual Report* (2019), available at: *https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf* (''We want companies to disclose the diversity makeup of their boards on dimensions such as gender, age, race, ethnicity, and national origin, at least on an aggregate basis.''); *see also* State Street Global Advisors, *Diversity Strategy, Goals & Disclosure: Our Expectations for Public Companies* (Aug. 27, 2020) *https://www.ssga.com/us/en/individual/etfs/insights/diversity-strategy-goals-disclosure-our-expectations-for-public-companies* (announcing expectation that State Street's portfolio companies (including US companies ''and, to the greatest extent possible, non-US companies'') provide board level ''[d]iversity characteristics, including racial and ethnic makeup, of the board of directors'').

companies to provide more transparency regarding board diversity.

Nasdaq conducted an internal study of the current state of board diversity among Nasdaq-listed companies based on public disclosures, and found that while some companies already have made laudable progress in diversifying their boardrooms, the national market system and the public interest would best be served by an additional regulatory impetus for companies to embrace meaningful and multi-dimensional diversification of their boards. It also found that current reporting of board diversity data was not provided in a consistent manner or on a sufficiently widespread basis. As such, investors are not able to readily compare board diversity statistics across companies.

Accordingly, Nasdaq is proposing to require each of its listed companies, subject to certain exceptions, to: (i) Provide statistical information regarding diversity among the members of the company's board of directors under proposed Rule 5606; and (ii) have, or explain why it does not have, at least two ''Diverse'' directors on its board under proposed rule 5605(f)(2). ''Diverse'' means a director who self-identifies as: (i) Female, (ii) an Underrepresented Minority, or (iii) LGBTQ+. Each listed company must have, or explain why it does not have, at least one Female director and at least one director who is either an Underrepresented Minority or LGBTQ+. Foreign Issuers (including Foreign Private Issuers) and Smaller Reporting Companies, by contrast, have more flexibility and may satisfy the requirement by having two Female directors. ''Female'' means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth. ''Underrepresented Minority'' means, consistent with the categories reported to the Equal Employment Opportunity Commission (''EEOC'') through the Employer Information Report EEO–1 Form (''EEO–1 Report''), an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities. ''LGBTQ+'' means an individual who self-identifies as any of the following: Lesbian, gay, bisexual, transgender or a member of the queer community.

Under proposed Rule 5606, Nasdaq proposes to provide each company with one calendar year from the date that the Commission approves this proposal (the ''Approval Date'') to comply with the requirement for statistical information regarding diversity. Under proposed Rule 5605(f)(2), no later than two calendar years after the Approval Date, each company must have, or explain why it does not have, one Diverse director. Further, each company must have, or explain why it does not have, two Diverse directors no later than: (i) Four calendar years after the Approval Date for companies listed on the Nasdaq Global Select or Global Market tiers; or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market tier.

Nasdaq undertook extensive research and analysis and has concluded that the proposal will fulfill the objectives of the Act in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. In addition to conducting its own internal analysis as described above, Nasdaq reviewed a substantial body of third-party research and interviewed leaders representing a broad spectrum of market participants and other stakeholders to:

- Determine whether empirical evidence demonstrates an association between board diversity, shareholder value, investor protection and board decision-making;
- understand investors' interest in, and impediments to obtaining, information regarding the state of board diversity at public companies;
- review the current state of board diversity and disclosure, both among Nasdaq-listed companies and more broadly within the U.S.;
- gain a better understanding of the causes of underrepresentation on boards;
- obtain the views of leaders representing public companies, investment banks, corporate governance organizations, investors, regulators and civil rights groups on the value of more diverse corporate boards, and on various approaches to encouraging more diversity on corporate boards; and
- evaluate the success of approaches taken by exchanges, regulators, and governments in both the U.S. and foreign jurisdictions to remedy underrepresentation on boards.

While gender diversity has improved among U.S. company boards in recent years, the pace of change has been gradual, and the U.S. still lags behind other jurisdictions that have imposed requirements related to board diversity. Moreover, progress toward bringing underrepresented racial and ethnic groups into the boardroom has been even slower. Nasdaq is unable to provide definitive estimates regarding the number of listed companies that will be affected by the proposal due to the inconsistent disclosures and definitions of diversity across companies and the extremely limited disclosure of race and ethnicity information—an information gap the proposed rule addresses. Based on the limited information that is available, Nasdaq believes a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the board. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. While studies suggest that current candidate selection processes may result in diverse candidates being overlooked, Nasdaq also believes that the lack of reliable and consistent data creates a barrier to measuring and improving diversity in the boardroom.

Nasdaq reviewed dozens of empirical studies and found that an extensive body of academic research demonstrates that diverse boards are positively associated with improved corporate governance and financial performance. For example, as discussed in detail below in *Section II, Academic Research: The Relationship between Diversity and Shareholder Value, Investor Protection and Decision Making,* studies have found that companies with gender-diverse boards or audit committees are associated with: More transparent public disclosures and less information asymmetry; better reporting discipline by management; a lower likelihood of manipulated earnings through earnings management; an increased likelihood of voluntarily disclosing forward-looking information; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a lower likelihood of securities fraud. In addition, studies found that having at least one woman on the board is associated with a lower likelihood of material weaknesses in internal control over financial reporting and a lower likelihood of material financial restatements. Studies also identified positive relationships between board diversity and commonly used financial metrics, including higher returns on invested capital, returns on equity, earnings per share, earnings before interest and taxation margin, asset valuation multiples and credit ratings.

Nasdaq believes there are additional compelling reasons to support the diversification of company boards beyond a link to improved corporate governance and financial performance:

• Investors are calling in greater numbers for diversification of boardrooms. Vanguard, State Street Advisors, BlackRock, and the NYC Comptroller's Office include board diversity expectations in their engagement and proxy voting guidelines.[9] The heightened investor focus on corporate diversity and inclusion efforts demonstrates that investor confidence is undermined when a company's boardroom is homogenous and when transparency about such efforts is lacking. Investors frequently lack access to information about corporate board diversity that could be material to their decision making, and they might divest from companies that fail to take into consideration the demographics of their corporate stakeholders when they refresh their boards. Nasdaq explores these investor sentiments in *Section III, Current State of Board Diversity and Causes of Underrepresentation on Boards.*

• Nasdaq believes, consistent with SEC disclosure requirements in other contexts,[10] that management's vision on key issues impacting the company should be communicated with investors in a clear and straightforward manner. Indeed, transparency is the bedrock of federal securities laws regarding disclosure, and this sentiment is reflected in the broad-based support for uniform disclosure requirements regarding board diversity that Nasdaq observed during the course of its outreach to the industry. In addition, organizational leaders representing every category of corporate stakeholders Nasdaq spoke with (including business, investor, governance, regulatory and civil rights communities) were overwhelmingly in favor of diversifying boardrooms. Nasdaq summarizes the findings of its stakeholder outreach in *Section IV, Stakeholder Perspectives.*

• Legislators at the federal and state level increasingly are taking action to encourage or mandate corporations to diversify their boards and improve diversity disclosures. Congress currently is considering legislation requiring each SEC-registered company to provide board diversity statistics and disclose whether it has a board diversity policy. To date, eleven states have passed or proposed legislation related to board diversity.[11] SEC regulations require companies to disclose whether diversity is considered when identifying director nominees and, if so, how. Nasdaq explores various state and federal initiatives in *Section V, U.S. Regulatory Framework and Section VI, Nasdaq Proposal.*

In considering the merits and shaping the substance of the proposed listing rule, Nasdaq also sought and received valuable input from corporate stakeholders. During those discussions, Nasdaq found consensus across every constituency in the inherent value of board diversity. Business leaders also expressed concern that companies—and particularly smaller companies—would prefer an approach that allows flexibility to comply in a manner that fits their unique circumstances and stakeholders. Nasdaq recognizes that the operations, size, and current board composition of each Nasdaq-listed company are unique, and Nasdaq therefore endeavored to provide a regulatory impetus to enhance board diversity that balances the need for flexibility with each company's particular circumstances.

The Exchange also considered the experience of its parent company, Nasdaq, Inc., as a public company.[12] In 2002, Nasdaq, Inc. met the milestone of welcoming its first woman, Mary Jo White, who later served as SEC Chair, to its board of directors. In her own words, ''I was the first and only woman to serve on the board when I started, but, happily, I was joined by another woman during my tenure . . . And then there were two. Not enough, but better than one.'' [13] In 2019, Nasdaq, Inc. also welcomed its first Black director. As a Charter Pledge Partner of The Board Challenge, Nasdaq supports The Board Challenge's goal of ''true and full representation on all boards of directors.'' [14]

As a self-regulatory organization, Nasdaq also is cognizant of its role in advancing diversity within the financial industry, as outlined in the Commission's diversity standards issued pursuant to Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Standards'').[15] Authored jointly by the Commission and five other financial regulators, the Standards seek to provide a framework for exchanges and financial services organizations ''to create and strengthen

[9] Vanguard announced in 2020 it would begin asking companies about the race and ethnicity of directors. *See* Vanguard, *Investment Stewardship 2020 Annual Report* (2020), available at: *https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2020_investment_stewardship_annual_report.pdf.* Starting in 2020, State Street Global Advisors will vote against the entire nominating committee of companies that do not have at least one woman on their boards and have not addressed questions on gender diversity within the last three years. *See* State Street Global Advisors, *Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines* (2020), available at: *https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf.* Beginning in 2018, BlackRock stated in proxy voting guidelines they ''would normally expect to see at least 2 women directors on every board.'' *See* BlackRock Investment Stewardship, *Corporate governance and proxy voting guidelines for U.S. securities* (Jan. 2020), available at: *https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.* The NYC Comptroller's Office in 2019 asked companies to adopt policies to ensure women and people of color are on the initial list for every open board seat. *See* Scott M. Stringer, *Remarks at the Bureau of Asset Management 'Emerging Managers and MWBE Managers Conference* (Oct. 11, 2019), available at: *https://comptroller.nyc.gov/wp-content/uploads/2019/10/10.11.19-SMS-BAM-remarks_distro.pdf.*

[10] *See* Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, 68 FR 75,056 (Dec. 29, 2003) (''We believe that management's most important responsibilities include communicating with investors in a clear and straightforward manner. MD&A is a critical component of that communication. The Commission has long sought through its rules, enforcement actions and interpretive processes to elicit MD&A that not only meets technical disclosure requirements but generally is informative and transparent.''); *see also* Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33–10890 (Nov. 19, 2020) (citing the 2003 MD&A Interpretative Release and stating that the purpose of the MD&A section is to enable investors to see a company ''through the eyes of management'').

[11] *See* Michael Hatcher and Weldon Latham, *States are Leading the Charge to Corporate Boards: Diversify!,* Harv. L. Sch. Forum on Corp. Governance (May 12, 2020), available at: *https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/.*

[12] While the Exchange recognizes that it is only one part of an ecosystem in which multiple stakeholders are advocating for board diversity, that part is meaningful: The United Nations Sustainable Stock Exchanges Initiative, of which Nasdaq, Inc., is an official supporter, recognized that ''[s]tock exchanges are uniquely positioned to influence their market in a way few other actors can.'' *See* United Nations Sustainable Stock Exchanges Initiative, *How Stock Exchanges Can Advance Gender Equality* 2 (2017), available at: *https://sseinitiative.org/wp-content/uploads/2019/12/How-stock-exchanges-can-advance-gender-equality.pdf.*

[13] *See* Mary Jo White, Completing the Journey: Women as Directors of Public Companies (Sept. 16, 2014), available at: *https://www.sec.gov/news/speech/2014-spch091614-mjw#.VBiLMhaaXDo.*

[14] *See* The Board Challenge, *https://theboardchallenge.org/. See also* Nasdaq, Inc., *Notice of 2020 Annual Meeting of Shareholders and Proxy Statement* 52 (Mar. 31, 2020), available at: *https://ir.nasdaq.com/static-files/ce5519d4-3a0b-48ac-8441-5376ccbad4e5* (Nasdaq, Inc. believes that ''[d]iverse backgrounds lead to diverse perspectives. We are committed to ensuring diverse backgrounds are represented on our board and throughout our organization to further the success of our business and best serve the diverse communities in which we operate.'').

[15] *See* Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 FR 33,016 (June 10, 2015).

[their] diversity policies and practices.'' Through these voluntary Standards, the Commission and other regulators ''encourage each entity to use the[ ] Standards in a manner appropriate to its unique characteristics.'' [16] To that end, the proposed rule leverages the Exchange's unique ability to influence corporate governance in furtherance of the goal of Section 342, which is to address the lack of diversity in the financial services industry.[17] Finally, while the Exchange recognizes the importance of maximizing shareholder value, its role as a listing venue is to establish and enforce substantive standards that promote investor protection. As a self-regulatory organization, the Exchange must demonstrate to the Commission that any proposed rule is consistent with Section 6(b) of the Act because, among other things, it is designed to protect investors, promote the public interest, prevent fraudulent and manipulative acts and practices, and remove impediments to the mechanism of a free and open market. The Exchange must also balance promoting capital formation, efficiency, and competition, among other things, alongside enhancing investor confidence.

With these objectives in mind, Nasdaq believes that a listing rule designed to enhance transparency related to board diversity will increase consistency and comparability of information across Nasdaq-listed companies, thereby increasing transparency and decreasing information collection costs. Nasdaq further believes that a listing rule designed to encourage listed companies to increase diverse representation on their boards will result in improved corporate governance, thus strengthening the integrity of the market, enhancing capital formation, efficiency, and competition, and building investor confidence. To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional transparency through disclosure explaining the company's reasons for not doing so. For example, the company may choose to disclose that it does not meet the diversity objectives of Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to meet that standard instead, or has a board philosophy regarding diversity that differs from the diversity objectives set forth in Rule 5605(f)(2). Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency.

Nasdaq observed that studies suggest that certain groups may be underrepresented on boards because the traditional director nomination process is limited by directors looking within their own social networks for candidates with previous C-suite experience.[18] Leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, they will find there is more than enough diverse talent to satisfy demand. In order to assist companies that strive to meet the diversity objectives of Rule 5605(f)(2), Nasdaq is proposing to provide listed companies that have not yet met its diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment. Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of such services. Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

II. Academic Research: The Relationship Between Diversity and Shareholder Value, Investor Protection and Decision Making

A company's board of directors plays a critical role in formulating company strategy; appointing, advising and overseeing management; and protecting investors. Nasdaq has recognized the importance of varied perspectives on boards since 2003, when the Exchange adopted a listing rule intended to enhance investor confidence by requiring listed companies, subject to certain exceptions and cure periods, to have a majority independent board.[19] Accompanying the rule are interpretive materials recognizing that independent directors ''play an important role in assuring investor confidence. Through the exercise of independent judgment, they act on behalf of investors to *maximize shareholder value* in the Companies they oversee and guard against conflicts of interest.'' [20]

a. Diversity and Shareholder Value

There is a significant body of research suggesting a positive association between diversity and shareholder value.[21] In the words of SEC Commissioner Allison Herren Lee: ''to the extent one seeks economic support for diversity and inclusion (instead of requiring economic support for the lack of diversity and exclusion), the evidence is in.'' [22]

The Carlyle Group (2020) found that its portfolio companies with two or more diverse directors had average earnings growth of 12.3% over the previous three years, compared to 0.5% among portfolio companies with no diverse directors, where diverse directors were defined as female, Black, Hispanic or Asian.[23] ''After controlling for industry, fund, and vintage year, companies with diverse boards generate earnings growth that's five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth.'' [24]

Several other studies also found a positive association between diverse boards and company performance. FCLTGlobal (2019) found that ''the most diverse boards (top 20 percent) added 3.3 percentage points to [return on invested capital], as compared to their least diverse peers (bottom 20 percent).'' [25] McKinsey (2015) found

[16] *Id.* at 33,023.

[17] 156 Cong. Rec. H5233–61 (June 30, 2010).

[18] *See infra* Section III.

[19] *See* Nasdaq Stock Market Rulebook, Rules 5605(b), 5615(a), and 5605(b)(1)(A).

[20] *Id.,* IM–5605–1 (emphasis added).

[21] Some companies recently have expressed the belief that a company must consider the impact of its activities on a broader group of stakeholders beyond shareholders. *See* Business Roundtable, *Statement on the Purpose of a Corporation* (Aug. 19, 2019), available at: *https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf.* Commentators articulated this view as early as 1932. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?,* 45 Harv. L. Rev. 1145, 1153 (1932).

[22] *See* Commissioner Allison Herren Lee, *Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference* (September 22, 2020), available at: *https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922.*

[23] *See* Jason M. Thomas and Megan Starr, The Carlyle Group, *Global Insights: From Impact Investing to Investing for Impact* 5 (Feb. 24, 2020), available at: *https://www.carlyle.com/sites/default/files2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf* (analyzing Carlyle U.S. portfolio company data, February 2020).

[24] *Id.*

[25] *See* FCLTGlobal, *The Long-term Habits of a Highly Effective Corporate Board* 11 (March 2019), available at: *https://www.fcltglobal.org/wp-content/uploads/long-term-habits-of-highly-effective-*

Continued

that ''companies in the top quartile for racial/ethnic diversity were 35 percent more likely to have financial returns above their national industry median.'' [26] Carter, Simkins and Simpson (2003) found among Fortune 1000 companies ''statistically significant positive relationships between the presence of women or minorities on the board and firm value.'' [27] Bernile, Bhagwat and Yonker (2017) found that greater diversity on boards—including gender, ethnicity, educational background, age, financial expertise and board experience—is associated with increased operating performance, higher asset valuation multiples, lower stock return volatility, reduced financial leverage, increased dividend payouts to shareholders, higher investment in R&D and better innovation.[28] The authors observed that ''[t]his is in line with the results in Carter, Simkins, and Simpson (2003), which show a positive association between local demographic diversity and firm value.'' [29]

Several studies have found a positive association between gender diversity and financial performance. Credit Suisse (2014) found companies with at least one woman on the board had an average sector-adjusted return on equity (''ROE'') of 12.2%, compared to 10.1% for companies with no female directors, and average sector-adjusted ROEs of 14.1% and 11.2%, respectively, for the previous nine years.[30] MSCI (2016) found that U.S. companies with at least three women on the board in 2011 experienced median gains in ROE of 10% and earnings per share (''EPS'') of 37% over a five year period, whereas companies that had no female directors in 2011 showed median changes of −1% in ROE and −8% in EPS over the same five-year period.[31] Catalyst (2011) found that the ROE of Fortune 500 companies with at least three women on the board (in at least four of five years) was 46% higher than companies with no women on the board, and return on sales and return on invested capital was 84% and 60% higher, respectively.[32]

Credit Suisse (2016) found an association between LGBTQ+ diversity and stock performance, finding that a basket of 270 companies ''supporting and embracing LGBT employees'' outperformed the MSCI ACWI index by an average of 3.0% per year over the past 6 years.[33] Further, ''[a]gainst a custom basket of companies in North America, Europe and Australia, the LGBT 270 has outperformed by 140 bps annually.'' [34] Nasdaq acknowledges that this study focused on LGBTQ+ employees as opposed to directors, and that there is a lack of published research on the issue of LGBTQ+ representation on boards. However, Out Leadership (2019) suggests that the relationship between board gender diversity and corporate performance may extend to LGBTQ+ diversity:

While the precise reason for the positive correlation between gender diversity and better corporate performance is unknown, many of the reasons that gender diversity is considered beneficial are also applicable to LGBT+ diversity. LGBT+ diversity in the boardroom may create a dynamic that enables better decisionmaking, and it brings to the boardroom the perspective of a community that is a critical component of the company's consumer population and organizational talent.[35]

McKinsey (2020) found ''a positive, statistically significant correlation between company financial outperformance and [board] diversity, on the dimensions of both gender and ethnicity,'' with companies in the top quartile for board gender diversity ''28 percent more likely than their peers to outperform financially,'' and a statistically significant correlation between board gender diversity and outperformance on earnings before interest and taxation margin.[36] Moody's (2019) found that greater board gender diversity is associated with higher credit ratings, with women accounting for an average of 28% of board seats at Aaa-rated companies but less than 5% of board seats at Ca-rated companies.[37]

While the overwhelming majority of studies on the association between economic performance and board diversity, including gender diversity, present a compelling case that board diversity is positively associated with financial performance, the results of some other studies on gender diversity are mixed. For example, Pletzer et al. (2015) found that board gender diversity alone has a ''small and non-significant'' relationship with a company's financial performance.[38] Post and Byron (2014) found a ''near zero'' relationship with a company's market performance, but a positive relationship with a company's

corporate-boards.pdf (analyzing 2017 MSCI ACWI constituents from 2010 to 2017 using Bloomberg data).

[26] *See* Vivian Hunt et al., McKinsey & Company, *Diversity Matters* (February 2, 2015), available at: *https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/why%20diversity%20matters/diversity%20matters.pdf* (analyzing 366 public companies in the United Kingdom, Canada, the United States, and Latin America in industries for the years 2010 to 2013, using the ethnic and racial categories African ancestry, European ancestry, Near Eastern, East Asian, South Asian, Latino, Native American, and other).

[27] *See* David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value.* 38(1) Fin. Rev. 33 (analyzing 638 Fortune 1000 firms in 1997, measuring firm value by Tobin's Q, with board diversity defined as the percentage of women, African Americans, Asians and Hispanics on the board of directors).

[28] *See* Gennaro Bernile et al., *Board Diversity, Firm Risk, and Corporate Policies* (March 6, 2017), available at: *https://ssrn.com/abstract=2733394* (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat and CRSP databases).

[29] *Id.* at 32.

[30] *See* Credit Suisse, *The CS Gender 3000: Women in Senior Management* 16 (Sept. 2014), available at: *https://www.credit-suisse.com/media/assets/corporate/docs/about-us/research/publications/the-cs-gender-3000-women-in-senior-management.pdf* (analyzing 3,000 companies across 40 countries from the period from 2005 to 2013).

[31] *See* Meggin Thwing Eastman et al., MSCI, *The tipping point: Women on boards and financial performance* 3 (December 2016), available at: *https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb* (analyzing of U.S. companies that were constituents of the MSCI World Index for the entire period from July 1, 2011 to June 30, 2016).

[32] *See* Harvey M. Wagner, Catalyst, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)* (March 1, 2011), available at: *https://www.catalyst.org/research/the-bottom-line-corporate-performance-and-womens-representation-on-boards-2004-2008/* (analyzing gender diversity data from Catalyst's annual Fortune 500 Census of Women Board Directors report series for the years 2005 to 2009, and corresponding financial data from S&P's Compustat database for the years 2004 to 2008).

[33] *See* Credit Suisse ESG Research, *LGBT: The value of diversity* 1 (April 15, 2016), available at: *https://research-doc.credit-suisse.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=807075590&extdocid=807075590_1_eng_pdf&serialid=evu4wXNcHexx7kusNLaZQphUkT9naxi1PvptZQvPjr1k%3d.*

[34] *Id.*

[35] *See* Quorum, *Out Leadership's LGBT+ Board Diversity and Disclosure Guidelines* 3 (2019), available at: *https://outleadership.com/content/uploads/2019/01/OL-LGBT-Board-Diversity-Guidelines.pdf.*

[36] *See* McKinsey & Company, *Diversity wins: How inclusion matters* 13 (May 2020), available at: *https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Diversity%20and%20Inclusion/Diversity%20wins%20How%20inclusion%20matters/Diversity-wins-How-inclusion-matters-vF.pdf* (analyzing 1,039 companies across 15 countries for the period from December 2018 to November 2019).

[37] *See* Moody's Investors Service, *Gender diversity is correlated with higher ratings, but mandates pose short-term risk* 2 (Sept. 11, 2019), available at: *https://www.moodys.com/research/Moodys-Corporate-board-gender-diversity-associated-with-higher-credit-ratingsPBC_1193768* (analyzing 1,109 publicly traded North American companies rated by Moody's).

[38] *See* Jan Luca Pletzer et al., *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance—A Meta-Analysis* 1, PLOS One (June 18, 2015); *see also* Alice H. Eagly (2016), *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?,* 72 J. Social Issues 199 (2016), available at *https://doi.org/10.1111/josi.12163* (concluding that the ''research findings are mixed, and repeated meta-analyses have yielded average correlational findings that are null or extremely small'' with respect to board gender diversity and company performance).

accounting returns.[39] Carter, D'Souza, Simkins and Simpson (2010) found that ''[w]hen Tobin's Q is used as the measure of financial performance, we find no relationship to gender diversity or ethnic minority diversity, neither positive nor negative.'' [40] A study conducted by Campbell and Minguez-Vera (2007) ''suggests, at a minimum, that increased gender diversity can be achieved without destroying shareholder value.'' [41] Adams and Ferreira (2009) found that ''gender diversity has beneficial effects in companies with weak shareholder rights, where additional board monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights.'' [42] Carter et al. (2010) [43] and the U.S. Government Accountability Office (''GAO'') (2015) [44] concluded that the mixed nature of various academic studies may be due to differences in methodologies, data samples and time periods.

While there are studies drawing different conclusions, Nasdaq believes that there is a compelling body of credible research on the association between economic performance and board diversity. At a minimum, Nasdaq believes that the academic studies support the conclusion that board diversity does not have adverse effects on company financial performance. This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are a sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the varying findings of studies at the time regarding the relationship between company performance and board independence,[45] Nasdaq adopted listing rules requiring a majority independent board that were ''intended to enhance investor confidence in the companies that list on Nasdaq.'' [46] In its Approval Order, the SEC stated that ''[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets.'' [47]

Along the same lines, even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards. Therefore, Nasdaq believes that the proposal will enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two Diverse directors on their boards or by explaining their rationale for not meeting that objective. Further, Nasdaq believes that the proposal is consistent with the Act because it will not negatively impact capital formation, competition or efficiency among its public companies, and will promote investor protection and the public interest.[48]

b. Diversity and Investor Protection

There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures and management oversight. In reaching this conclusion, Nasdaq evaluated the results of more than a dozen studies spanning more than two decades that found a positive association between gender diversity and important investor protections, and the assertions by some academics that such findings may extend to other forms of diversity, including racial and ethnic diversity. The findings of the studies reviewed by Nasdaq are summarized below.

Adams and Ferreira (2009) found that women are ''more likely to sit on'' the audit committee,[49] and a subsequent study by Srinidhi, Gul and Tsui (2011) found that companies with women on the audit committee are associated with ''higher earnings quality'' and ''better reporting discipline by managers,'' [50] leading the authors to conclude that ''including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing

[39] *See* Corinne Post and Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis* 1 (2014). In 2016, the same authors, based on a review of the results for 87 studies, ''found that board gender diversity is weakly but significantly positively correlated with [corporate social responsibility],'' although they noted that ''a significant correlational relationship does not prove causality.'' *See* Corinne Post and Kris Byron, *Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis,* 24(4) Corp. Governance: An Int'l Rev. 428 (July 2016), available at *http://dx.doi.org/10.1111/corg.12165*.

[40] *See* David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance,* 18(5) Corp. Governance 396, 410 (2010) (analysis of 541 S&P 500 companies for the years 1998–2002).

[41] *See* Kevin Campbell and Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance,* 83(3) J. Bus. Ethics 13 (Feb. 2008) (analyzing 68 non-financial companies listed on the continuous market in Madrid during the period from January 1995 to December 2000, measuring firm value by an approximation of Tobin's Q defined as the sum of the market value of stock and the book value of debt divided by the book value of total assets).

[42] *See* Renee B. Adams and Daniel Ferreira, *Women in the boardroom and their impact on governance and performance,* 94 J. Fin. Econ. 291 (2009) (analyzing 1,939 S&P 500, S&P MidCaps, and S&P SmallCap companies for the period 1996 to 2003, measuring company performance by a proxy for Tobin's Q (the ratio of market value to book value) and return on assets).

[43] *See* Carter et al., *supra* note 40, at 400 (observing that the different ''statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.'').

[44] *See* United States Government Accountability Office, Report to the Ranking Member, Subcommittee on Capital Markets and Government Sponsored Enterprises, Committee on Financial Services, House of Representatives, *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements* 5 (Dec. 2015) (the ''GAO Report''), available at: *https://www.gao.gov/assets/680/674008.pdf* (''Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used'').

[45] *See, e.g.,* Benjamin E. Hermalin and Michael S. Weisbach, *The Effects of Board Composition and Direct Incentives on Firm Performance,* 20 Fin. Mgmt. 101, 111 (1991) (finding that ''there appears to be no relation between board composition and performance''); Sanjai Bhagat and Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance,* 54(3) Bus. Law. 921, 950 (1999) (''At the very least, there is no convincing evidence that increasing board independence, relative to the norms that currently prevail among large American firms, will improve firm performance. And there is some evidence suggesting the opposite—that firms with supermajority-independent boards perform worse than other firms, and that firms with more inside than independent directors perform about as well as firms with majority- (but not supermajority-) independent boards.'').

[46] *See* Order Approving Proposed Rule Changes, 68 FR 64,154, 64,161 (Nov. 12, 2003) (approving SR–NASD–2002–77, SR–NASD–2002–80, SR–NASD–2002–138, SR–NASD–2002–139, and SR–NASD–2002–141).

[47] *Id.* at 64,176.

[48] *See also* Lee, *supra* note 22 (''I could never quite buy in to the view that some 40 percent of the population in our country (if we're talking about minorities) or over half the country (if we're talking about women) must rationalize their inclusion in corporate boardrooms and elsewhere in economic terms instead of the reverse. How can one possibly justify—in economic terms—the systematic exclusion of a major portion of our talent base from the corporate pool?'').

[49] *See* Adams and Ferreira, *supra* note 42, at 292.

[50] *See* Bin Srinidhi et al., *Female Directors and Earnings Quality,* 28(5) Contemporary Accounting Research 1610, 1612–16 (Winter 2011) (analyzing 3,132 firm years during the period from 2001 to 2007 based on S&P COMPUSTAT, Corporate Library's Board Analyst, and IRRC databases; ''choos[ing] the accruals quality as the metric that best reflects the ability of current earnings to reflect future cash flows'' (noting that it ''best predicts the incidence and magnitude of fraud relative to other commonly used measures of earnings quality'') and analyzing surprise earnings results that exceeded previous earnings or analyst forecasts, because ''managers of firms whose unmanaged earnings fall marginally below the benchmarks have [an] incentive to manage earnings upwards so as to meet or beat previous earnings'').

investor confidence in financial statements.'' [51]

A study conducted in 2016 by Pucheta-Martínez et al. concluded that gender diversity on the audit committee ''improves the quality of financial information.'' [52] They found that ''the percentage of females on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,'' [53] and found a positive association between gender diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender diverse audit committees ''ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion'' when any uncertainties or scope limitations are identified.[54]

More recently, a study by Gull in 2018 found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management,[55] and a study conducted in 2019 by Bravo and Alcaide-Ruiz found a positive association between women on the audit committee with financial or accounting expertise and the voluntary disclosure of forward-looking information.[56] Bravo and Alcaide-Ruiz concluded that ''female [audit committee] members with financial expertise play an important role in influencing disclosure strategies that provide forward-looking information containing projections and financial data useful for investors.'' [57]

While the above studies demonstrate a positive association between gender diverse audit committees and the quality of a company's earnings, financial information and public disclosures, other studies found a positive association between board gender diversity and important investor protections regardless of whether or not women are on the audit committee.

Abbott, Parker & Persley (2012) found, within a sample of non-Fortune 1000 companies, ''a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement.'' [58] Their findings are consistent with a subsequent study by Wahid (2017), which concluded that ''gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud.'' [59] Specifically, companies with female directors have ''fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation.'' [60] Wahid suggested that the implications of her study extend beyond gender diversity:

> If you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds . . . [and] [i]f we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.[61]

Cumming, Leung and Rui (2015) also examined the relationship between gender diversity and fraud, and found that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found ''strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample.'' [62] The authors suggested that ''other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud.'' [63]

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced weaknesses in internal control over financial reporting, noting that ''prior literature has established a negative relationship between internal control weaknesses and earnings quality.'' [64] The authors found that having at least one woman on the board (regardless of whether or not she is on the audit committee) ''may lead to [a] reduced likelihood of material weaknesses [in internal control over financial reporting].'' [65]

Board gender diversity also was found to be positively associated with more transparent public disclosures. Gul, Srinidhi & Ng (2011) concluded that ''gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms.'' [66] Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with ''reducing the risk of

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[51] *Id.* at 1612.

[52] *See* Maria Consuelo Pucheta-Martínez et al., *Corporate governance, female directors and quality of financial information.* 25(4) Bus. Ethics: A European Rev. 363, 378 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004–2011).

[53] *Id.* at 363.

[54] *Id.* at 368.

[55] *See* Ammar Gull et al., *Beyond gender diversity: How specific attributes of female directors affect earnings management,* 50(3) British Acct. Rev. 255 (Sept. 2017), available at: *https://ideas.repec.org/a/eee/bracre/v50y2018i3p255-274.html* (analyzing 394 French companies belonging to the CAC All-Shares index listed on Euronext Paris from 2001 to 2010, prior to the implementation of France's gender mandate law that required women to comprise 20% of a company's board of directors by 2014 and 40% by 2016).

[56] *See* Francisco Bravo and Maria Dolores Alcaide-Ruiz, *The disclosure of financial forward-looking information,* 34(2) Gender in Mgmt. 140, 142–44 (2019) (analyzing companies included in the S&P 100 Index in 2016, ''focus[ing] on the disclosure of financial forward-looking information (which is likely to require financial expertise), such as earnings forecasts, expected revenues, anticipated cash flows or any other financial indicator'').

[57] *Id.* at 150.

[58] *See* Lawrence J. Abbott et al., *Female Board Presence and the Likelihood of Financial Restatement,* 26(4) Accounting Horizons 607, 626 (2012) (analyzing a sample of 278 pre-SOX annual financial restatements and 187 pre-SOX quarterly financial restatements of U.S. companies from January 1, 1997 through June 30, 2002 identified by the U.S. General Accounting Office restatement report 03–138 (which only included ''material misstatements of financial results''), and 75 post-SOX annual financial restatements from July 1, 2002, to September 30, 2005 identified by U.S. General Accounting Office restatement report 06–678 (which only included ''restatements that were being made to correct material misstatements of previously reported financial information''), consisting almost exclusively of non-Fortune 1000 companies).

[59] *See* Aida Sijamic Wahid, The *Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation,* J. Bus. Ethics (forthcoming) (Dec. 2017) Rotman School of Management Working Paper No. 2930132 at 1, available at: *https://ssrn.com/abstract=2930132* (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations).

[60] *Id.* at 23.

[61] *See* Barbara Shecter, *Diverse boards tied to fewer financial 'irregularities,' Canadian study finds.* Financial Post (Feb. 5, 2020), *https://business.financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds* (last accessed Nov. 27, 2020).

[62] *See* Douglas J. Cumming et al., *Gender Diversity and Securities Fraud,* Academy of Management Journal 34 (forthcoming) (Feb. 2, 2015), available at *https://ssrn.com/abstract=2562399* (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud, and 742 non-fraudulent companies for a control group).

[63] *Id.* at 33.

[64] *See* Yu Chen et al., *Board Gender Diversity and Internal Control Weaknesses,* 33 Advances in Acct. 11 (2016) (analyzing a sample of 4267 firm-year observations during the period from 2004 to 2013, beginning ''the first year internal control weaknesses were required to be disclosed under section 404 of SOX'').

[65] *Id.* at 18.

[66] *See* Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?,* 51(3) J. Acct. & Econ. 314 (April 2011) (analyzing 4,084 firm years during the period from 2002 to 2007, excluding companies in the utilities and financial industries, measuring public information disclosure using ''voluntary continuous disclosure of 'other' events in 8K reports'' and measuring stock price informativeness by ''idiosyncratic volatility,'' or volatility that cannot be explained to systematic factors and can be diversified away).

informed trading and enhancing stock liquidity.'' [67]

Other studies have found that diverse boards are better at overseeing management. Adams and Ferreira (2009) found ''direct evidence that more diverse boards are more likely to hold CEOs accountable for poor stock price performance; CEO turnover is more sensitive to stock return performance in firms with relatively more women on boards.'' [68] Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,[69] which may be an effective mechanism to deter opportunistic behavior by management and align their interests with shareholders.[70] A lack of diversity has been found to have the opposite effect. Westphal and Zajac (1995) found that ''increased demographic similarity between CEOs and the board is likely to result in more generous CEO compensation contracts.'' [71]

c. Diversity and Decision Making

Wahid (2017) suggests that ''at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards' ability to monitor firm management.'' [72] Nasdaq reviewed studies suggesting that board diversity can indeed enhance a company's ability to monitor management by reducing ''groupthink'' and improving decision making.

In 2009, the Commission, in adopting rules requiring proxy disclosure describing whether a company considers diversity in identifying director nominees, recognized the impact of diversity on decision making and corporate governance:

> A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board's decision making process by encouraging consideration of a broader range of views.[73]

Nasdaq agrees with the Commission's suggestion that board diversity improves board quality, governance and decision making. Nasdaq is concerned that boards lacking diversity can inadvertently suffer from ''groupthink,'' which is ''a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members.'' [74] The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis, after which the IMF's Independent Evaluation Office concluded that ''[t]he IMF's ability to correctly identify the mounting risks [as the crisis developed] was hindered by a high degree of groupthink.'' [75]

Other studies suggest that increased diversity reduces groupthink and leads to robust dialogue and better decision making. Dallas (2002) observed that ''heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.'' [76] Bernile et al. (2017) found that ''diversity in the board of directors reduces stock return volatility, which is consistent with diverse backgrounds working as a governance mechanism, moderating decisions, and alleviating problems associated with 'groupthink.''' [77] Dhir (2015) concluded that gender diversity may ''promote cognitive diversity and constructive conflict in the boardroom.'' [78] After interviewing 23 directors about their experience with Norway's board gender mandate, he observed:

> First, many respondents contended that gender diversity promotes enhanced dialogue. Interviewees frequently spoke of their belief that heterogeneity has resulted in: (1) Higher quality boardroom discussions; (2) broader discussions that consider a wide range of angles or viewpoints; (3) deeper or more thorough discussions; (4) more frequent and lengthier discussions; (5) better informed discussions; (6) discussions that are more frequently brought inside the boardroom (as opposed to being held in spaces outside the boardroom, either exclusively or in addition to inside the boardroom); or (7) discussions in which items that directors previously took for granted are drawn out and addressed—where the implicit becomes explicit. Second, and intimately related, many interviewees indicated that diversification has led to (or has the potential to lead to) better decision making processes and/or final decisions.[79]

Investors also have emphasized the importance of diversity in decision making. A group of institutional investors charged with overseeing state investments and the retirement savings of public employees asserted that ''board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity.'' [80]

Nasdaq believes that cognitive diversity is particularly important on boards because in their advisory role, especially related to corporate strategy, ''the 'output' that boards produce is entirely cognitive in nature.'' [81] While in 1999, Forbes and Milliken characterized boards as ''large, elite, and episodic decision making groups that face complex tasks pertaining to strategic-issue processing,'' [82] over the past two decades, their role has evolved; boards are now more active, frequent advisors on areas such as cybersecurity, social media, and environmental, social and governance (''ESG'') issues such as climate change and racial and gender

[67] *See* David Abad et al., *Does Gender Diversity on Corporate Boards Reduce Information Asymmetry in Equity Markets?* 20(3) BRQ Business Research Quarterly 192, 202 (July 2017) (analyzing 531 company-year observations from 2004 to 2009 of non-financial companies traded on the electronic trading platform of the Spanish Stock Exchange (SIBE)).

[68] *See* Adams and Ferreira, *supra* note 42, at 292.

[69] *See* Maria Encarnacion Lucas-Perez et al., *Women on the Board and Managers' Pay: Evidence from Spain,* 129 J. Bus. Ethics 285 (April 2014).

[70] *Id.*

[71] *See* James D. Westphal and Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection,* 40(1) Admin. Sci. Q. 60, 77 (March 1995).

[72] *See* Wahid, *supra* note 59, at 5.

[73] *See* Proxy Disclosure Enhancements, 74 FR 68,334, 68,355 (Dec. 23, 2009).

[74] *See* Daniel P. Forbes and Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups,* 24(3) Acad. Mgmt. Rev. 489, 496 (Jul. 1999).

[75] *See* International Monetary Fund, *IMF Performance in the Run-Up to the Financial and Economic Crisis* (August 2011), available at: *https://www.elibrary.imf.org/view/IMF017/11570-9781616350789/11570-9781616350789/ch04.xml?language=en&redirect=true* (''The evaluation found that incentives were not well aligned to foster the candid exchange of ideas that is needed for good surveillance—many staff reported concerns about the consequences of expressing views contrary to those of supervisors, [m]anagement, and country authorities.'').

[76] *See* Lynne L. Dallas, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders?: The New Managerialism and Diversity on Corporate Boards of Directors,* 76 Tul. L. Rev. 1363, 1391 (June 2002).

[77] *See* Bernile et al., *supra* note 28, at 38.

[78] *See* Aaron A. Dhir, Challenging Boardroom Diversity: Corporate Law, Governance, and Diversity 150 (2015) (emphasis removed) (sample included 23 directors of Norwegian corporate boards, representing an aggregate of 95 board appointments at more than 70 corporations).

[79] *Id.* at 124 (emphasis removed).

[80] *See* Petition for Amendment of Proxy Rule (March 31, 2015), available at: *https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.*

[81] *See* Forbes and Milliken, *supra* note 74, at 492.

[82] *Id.*

inequality. Nasdaq believes that boards comprised of directors from diverse backgrounds enhance investor confidence by ensuring that board deliberations include the perspectives of more than one demographic group, leading to more robust dialogue and better decision making.

III. Current State of Board Diversity and Causes of Underrepresentation on Boards

While the above studies suggest a positive association between board diversity, company performance, investor protections, and decision making, there is a noticeable lack of diversity among U.S. public companies. Nasdaq is a global organization and operates in many countries around the world that already have implemented diversity-focused directives. In fact, Nasdaq-listed companies in Europe already are subject to diversity requirements.[83] This first-hand experience provides Nasdaq with a unique perspective to incorporate global best practices into its proposal to advance diversity on U.S. corporate boards. Given that the U.S. ranks 53rd in board gender diversity, according to the World Economic Forum in its 2020 Global Gender Gap Report, Nasdaq believes advancing board diversity in the U.S. is a critical business and market imperative. This same report also found that ''American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women.'' [84] As of 2019, women directors held 19% of Russell 3000 seats (up from 16% in 2018).[85] In comparison, women hold more than 30% of board seats in Norway, France, Sweden and Finland.[86] At the current pace, the U.S. GAO estimates that it could take up to 34 years for U.S. companies to achieve gender parity on their boards.[87]

Progress toward greater racial and ethnic diversity in U.S. company boardrooms has been even slower. Over the past ten years, the percentage of African American/Black directors at Fortune 500 companies has remained between 7 and 9%, while the percentage of women directors has grown from 16 to 23%.[88] In 2019, only 10% of board seats at Russell 3000 companies were held by racial minorities, reflecting an incremental increase from 8% in 2008.[89] Among Fortune 500 companies in 2018, there were fewer than 20 directors who publicly self-identified as LGBT+, and only nine companies reported considering sexual orientation and/or gender identity when identifying director nominees.[90]

Women and minority directors combined accounted for 34% of Fortune 500 board seats in 2018.[91] While women of color represent 18% of the U.S. population, they held only 4.6% of Fortune 500 board seats in 2018.[92] Male underrepresented minorities held 11.5% of board seats at Fortune 500 companies in 2018, compared to 66% of board seats held by Caucasian/White men. Overall in 2018, 83.9% of board seats among Fortune 500 companies were held by Caucasian/White individuals (who represent 60.1% of the U.S. population), 8.6% by African American/Black individuals (who represent 13% of the U.S. population), 3.8% by Hispanic/Latino(a) individuals (who represent 19% of the U.S. population) and 3.7% by Asian/Pacific Islander individuals (who represent 6% of the U.S. population).[93] In its analysis of Russell 3000 companies, 2020 Women on Boards concluded that ''larger companies do better with their diversity efforts than smaller companies.'' [94]

Based on the limited information that is available, Nasdaq believes a supermajority of listed companies have made notable strides to improve gender diversity in the boardroom and have at least one woman on the board. Nasdaq also believes that listed companies are diligently working to add directors with other diverse attributes, although consistent with other studies of U.S. companies, Nasdaq believes the pace of progress, in this regard, is happening more gradually. Thus, and for the reasons discussed in this Section II.A.1.III, Nasdaq has concluded that a regulatory approach to encouraging greater diversity and data transparency would be beneficial.

Nasdaq reviewed academic studies on the causes of underrepresentation on boards and the approaches taken by other jurisdictions to remedy underrepresentation. Those studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions. Dhir (2015) explains that ''[t]he presence of unconscious bias in the board appointment process, coupled with closed social networks, generates a complex set of barriers for diverse directors; these are the 'phantoms' that prevent entry.'' [95] In 2011, the Davies Review found that ''informal networks influential in board appointments'' contribute to the underrepresentation of women in the boardrooms of U.K. listed companies.[96] In 2017, the Parker Review acknowledged that ''as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom.'' [97] In 2020, the United Kingdom Financial Reporting Council commissioned a report to analyze barriers to LGBTQ+ inclusion and promotion in the workplace. Leaders who self-identified as LGBTQ+ expressed concerns about the current

[83] On Nasdaq's Nordic and Baltic exchanges, large companies must comply with EU Directive 2014/95/EU (the ''EU Directive''), as implemented by each member state, which requires companies to disclose a board diversity policy with measurable objectives (including gender), or explain why they do not have such a policy. On Nasdaq Vilnius, companies are also required to comply with the Nasdaq Corporate Governance Code for Listed Companies or explain why they do not, which requires companies to consider diversity and seek gender equality on the board. Similarly, on Nasdaq Copenhagen, companies are required to comply with the Danish Corporate Governance Recommendations or explain why they do not, which requires companies to adopt and disclose a diversity policy that considers gender, age and international experience. On Nasdaq Iceland, listed companies must have at least 40% women on their board (a government requirement) and comply with the EU Directive.

[84] *See* World Economic Forum, *Global Gender Gap Report 2020* 33 (2019), available at: *http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.*

[85] *See* Kosmas Papadopoulos, ISS Analytics, *U.S. Board Diversity Trends in 2019* 4–5 (May 31, 2019), available at: *https://www.issgovernance.com/file/publications/ISS_US-Board-Diversity-Trends-2019.pdf.*

[86] *See* Deloitte, *Women in the Boardroom: A global perspective* (6th ed. 2019), available at: *https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-the-boardroom-sixth-edition.pdf.*

[87] *See* GAO Report, *supra* note 44.

[88] *See* Russell Reynolds, *Ethnic & Gender Diversity on US Public Company Boards* 6 (September 8, 2020).

[89] *See* Papadopoulous, *supra* note 85, at 5.

[90] *See* Out Leadership, *supra* note 35.

[91] *See* Deloitte, *Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards* 9 (2018), available at: *https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf.*

[92] *See* Catalyst, *Too Few Women of Color on Boards: Statistics and Solutions* (Jan. 31, 2020), *https://www.catalyst.org/research/women-minorities-corporate-boards/.*

[93] *See* Deloitte, *Missing Pieces Report, supra* note 91; United States Census Bureau, *QuickFacts,* available at: *https://www.census.gov/quickfacts/fact/table/US/PST045219.*

[94] *See 2020 Women On Boards Gender Diversity Index* 4 (2019), available at: *https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf.*

[95] *See* Dhir, *supra* note 78, at 47.

[96] *See Women on Boards* 17 (Feb. 2011), available at: *https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf.*

[97] *See* Sir John Parker, *A Report into the Ethnic Diversity of UK Boards* 38 (Oct. 12, 2017), available at: *https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf.*

board nomination process, which includes ''relying on personal recommendations without transparent competition or due process [and] informal 'interviewing' outside the selection process.'' [98]

These concerns are not unique to the United Kingdom. The U.S. GAO (2015) found that women's representation on corporate boards may be hindered by directors' tendencies to ''rely on their personal networks to identify new board candidates.'' [99] Vell (2017) found that ''92% of board seats [of public U.S. and Canadian technology companies] are filled through networking, and women have less access to these networks.'' [100] Deloitte and the Society for Corporate Governance (2019) found that this is also common in other industries including media, communications, energy, consumer products, financial services and life sciences.[101] They observed that although 94% of companies surveyed were looking to increase diversity among their boards, 77% of those boards looked to referrals from current directors when identifying diverse director candidates, suggesting that ''networking is still key to board succession.'' [102] Dhir (2015), in a qualitative study of Norwegian directors, observed that ''[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background.'' [103]

Another contributing factor may be the traditional experience sought in director nominees. Rhode & Packel (2014) observed that:

> One of the most common reasons for the underrepresentation of women and minorities on corporate boards is their underrepresentation in the traditional pipeline to board service. The primary route to board directorship has long been through experience as a CEO of a public corporation. . . . Given the low representation of women and minorities in top executive positions, their talents are likely to be underutilized if selection criteria are not broadened.[104]

Hillman et al. (2002) found that while white male directors of public companies were more likely to have current or former experience as a CEO, senior manager or director, African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy.[105] Dhir (2015) suggests that ''[c]onsidering persons from other, non-management pools, such as academia, legal and accounting practice, the not-for-profit sector and politics, may help create a broader pool of diverse candidates.'' [106] Directors surveyed by the U.S. GAO also ''suggested, for example, that boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and government sectors. . . . [I]f boards were to expand their director searches beyond CEOs more women might be included in the candidate pool.'' [107]

Investors have begun calling for greater transparency surrounding ethnic diversity on company boards, and in the past several months as the U.S. has seen an uprising in the racial justice movement, there has been an increase in the number of African Americans appointed to Russell 3000 corporate boards.[108] In a five-month span, 130 directors appointed were African American, in comparison to the 38 African American directors who were appointed in the preceding five months.[109] Although tracking the acceleration in board diversity is feasible for some Russell 3000 companies, many of the companies do not disclose the racial makeup of the board, making it impossible to more broadly assess the impact of recent events on board diversity.

IV. Stakeholder Perspectives

To gain a better understanding of the current state of board diversity, benefits of diversity, causes of underrepresentation on boards and potential remedies to address underrepresentation, Nasdaq spoke with leaders representing a broad spectrum of market participants and other stakeholders. Nasdaq sought their perspectives to inform its analysis of whether the proposed rule changes would promote the public interest and protection of investors without unduly burdening competition or conflicting with existing securities laws. The group included representatives from the investor, regulatory, investment banking, venture capital and legal communities. Nasdaq also spoke with leaders of civil rights and corporate governance organizations, and organizations representing the interests of private and public companies, including Nasdaq-listed companies. Specifically, Nasdaq obtained their views on:

- The current state of board diversity in the U.S.;
- the inherent value of board diversity;
- increasing pressure from legislators and investors to improve diverse representation on boards and board diversity disclosure;
- whether a listing rule related to board diversity is in the public interest;
- how to define a ''diverse'' director; and
- the benefits and challenges of various approaches to improving board diversity disclosures and increasing diverse representation on boards, including mandates and disclosure-based models.

The discussions revealed strong support for disclosure requirements that would standardize the reporting of board diversity statistics. The majority of organizations also were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can accelerate the rate of change, they expressed that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Business leaders also

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[98] *See* Catriona Hay et al., The Financial Reporting Council, *Building more open business* 25 (2020), available at: *https://www.frc.org.uk/getattachment/19f3b216-bd45-4d46-af2f-f191f5bf4a07/The-Good-Side-x-Financial-Reporting-Council-1811-AMENDED.pdf.*

[99] *See* GAO Report, *supra* note 44, at 15.

[100] *See* Vell Executive Search, *Women Board Members in Tech Companies: Strategies for Building High Performing Diverse Boards* 6 (2017), available at: *https://www.vell.com/images/pdf/VELL%20Report%20Women%20Board%20Members%20on%20Tech%20Boards%202017%203%2029.pdf.*

[101] *See* Deloitte and the Society of Corporate Governance, *Board Practices Report: Common threads across boardrooms* 5 (2019), available at: *https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/1202241_2018_Board_Practices_Report_FINAL.pdf.*

[102] *Id.* at 6.

[103] *See* Dhir, *supra* note 78, at 52.

[104] *See* Deborah Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?,* 39(2) Del. J. Corp. L. 377, 402–403 (2014); *see also* Dhir, *supra* note 78, at 39 (''[T]here is an apparent preference for either CEOs (whether current or retired) or senior management who have experience at the helm of a particular business stream or unit. . . . The fact that far fewer women than men have been CEOs has a potentially devastating effect on access to the boardroom, which in turn can have an effect on the number of women who rise to the level of CEO and to the executive suite.'').

[105] *See* Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?,* 28(6) J. Mgmt. 747, 749, 754 (2002).

[106] *See* Dhir, *supra* note 78, at 42.

[107] *See* GAO Report *supra* note 44, at 18.

[108] *See* Leslie P. Norton, *The Number of Black Board Members Surged After George Floyd's Death, Barron's,* Oct. 27, 2020, available at: *https://www.barrons.com/articles/after-george-floyds-death-the-number-of-black-board-members-surges-51603809011.*

[109] *Id.*

expressed concern that smaller companies would require flexibility and support to comply with any time-sensitive requirements to add diverse directors. Some stakeholders highlighted additional challenges that smaller companies, and companies in certain industries, may face finding diverse board members. Leaders from across the spectrum of stakeholders that Nasdaq surveyed reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand. Leaders from the legal community emphasized that any proposed rule that imposed additional burdens beyond, or is inconsistent with, existing securities laws—by, for example, requiring companies to adopt a diversity policy or include disclosure solely in their proxy statements—would present an additional burden and potentially more legal liability for listed companies.

V. U.S. Regulatory Framework

As detailed above, diversity has been the topic of a growing number of studies over the past decade and, in recent years, some investors have been increasingly advocating for greater diversity among directors of public companies.[110] Over the past year, the social justice movement has underscored the importance of having diverse perspectives and representation at all levels of decision-making, including on public company boards. In recent years, diversity has become increasingly important to the public, including institutional investors, pension funds and other stakeholders who believe that board diversity enhances board performance and is an important factor in the voting decisions of some investors.[111] Legislators increasingly are taking action to encourage corporations to diversify their boards and improve diversity disclosures.[112]

a. SEC Diversity Disclosure Requirements—Background

In 2009, the Commission sought comment on whether to amend Item 407(c)(2)(vi) of Regulation S–K to require disclosure of whether a nominating committee considers diversity when selecting a director for a position on the board.[113] The Commission received more than 130 comment letters on its proposal. According to a University of Dayton Law Review analysis of those comment letters, most were submitted by groups with a specific interest in diversity, or by institutional investors, including mutual funds, pension funds, and socially responsible investment funds.[114] Further, the analysis showed that 56 commenters addressed the issue of diversity disclosures, and only 5 of those 56 commenters did not favor such disclosure.[115] Twenty-seven of the 56 mentioned gender diversity, 18 mentioned racial diversity, and 13 mentioned ethnic diversity. However, neither the proposed rule nor the final rule defined diversity.[116]

Ten years after its adoption of board diversity disclosure rules, the Commission revisited the rules by establishing new Compliance and Disclosure Interpretations (''C&DI''). However, the Commission did not provide a definition of diversity, and therefore issuers currently are not required to disclose the race, ethnicity or gender of their directors or nominees.

Currently, Item 401(e)(1) of Regulation S–K requires a company to ''briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director.'' [117] The C&DI clarifies that if a board considered a director's self-identified diversity characteristics (*e.g.,* race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background) during the nomination process, and the individual consents to disclose those diverse characteristics, the Commission ''would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered.'' [118]

Rather than providing a specific definition of diversity, the C&DI provides a non-exhaustive list of examples of diverse characteristics that a company could consider for purposes of Item 401(e)(1), including ''race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background.'' [119] Additionally, the Commission stated that any description of a company's diversity policy would be expected to include ''a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.'' [120]

Item 407(c)(2)(vi) of Regulation S–K requires proxy disclosure regarding whether diversity is considered when identifying director nominees and, if so, how. In addition, if the board or nominations committee has adopted a diversity policy, the company must describe how the policy is implemented and its effectiveness is assessed.[121] When adopting Item 407(c)(2)(vi), the Commission explained:

We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to

[110] In 2009, when the Commission proposed enhancements to proxy disclosures, including addressing board diversity disclosures, the Commission received over 130 comment letters related to its proposal, including from corporations, pension funds, professional associations, trade unions, accounting firms, law firms, consultants, academics, individual investors and other interested parties. *See* Proxy Disclosure Enhancements, 74 FR at 68,335; *see also* David A. Katz and Laura McIntosh, *Raising the Stakes for Board Diversity,* Law.com (July 22, 2020), available at: *https://www.law.com/newyorklawjournal/2020/07/22/raising-the-stakes-for-board-diversity/?slreturn=20201017021522*; Office of the Illinois State Treasurer, *The Investment Case For Board Diversity: A Review of the Academic and Practitioner Research on the Value of Gender and Racial/Ethnic Board Diversity for Investors* 7 (Oct. 2020), available at: *https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/il%20treasurer%20white%20paper%20-%20the%20investment%20case%20for%20board%20diversity%20(oct%202020).pdf.*

[111] *See* Comments on Proposed Rule: Proxy Disclosure and Solicitation Enhancements, available at: *https://www.sec.gov/comments/s7-13-09/s71309.shtml. See also* CGLytics, *Diversity on the Board? Metrics Used by Fortune 100 Companies* (June 29, 2020), available at: *https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/*; Office of the Illinois State Treasurer, *supra* note 110.

[112] For example, California requires companies headquartered in the state to have at least one director who self-identifies as a Female and one director from an Underrepresented Community. *See* Cal. S.B. 826 (Sept. 30, 2018); Cal. A.B. 979 (Sept. 30, 2020). Washington requires companies headquartered in the state to have at least 25% women on the board by 2022 or provide certain disclosures. *See* Wash. Subst. S.B. 6037 (June 11, 2020). At least eleven states have proposed diversity-related requirements. *See* Hatcher and Latham, *supra* note 11.

[113] *See* Proxy Disclosure and Solicitation Enhancements, 74 FR 35,076, 35,084 (July 17, 2009) (proposed rule).

[114] *See* Thomas Lee Hazen and Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure,* 37:1 Univ. Dayton L. Review 41, 51, n. 82 (citing the comment letters).

[115] In the five comments that opposed diversity disclosure, three stated that diversity was an important value. *See* Comments on Proposed Rule, *supra* note 111; *see also* Hazen and Broome, *supra* note 114, at 54 n.88 (citing the 56 comment letters).

[116] *See* Hazen and Broome, *supra* note 114, at 53 n. 84–86.

[117] *See* 17 CFR 229.401(e)(1).

[118] *See* Securities and Exchange Commission, Regulation S–K Compliance & Disclosure Interpretations (Sept. 21, 2020), available at: *https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.*

[119] *Id.*

[120] *Id.*

[121] *See* 17 CFR 229.407(c)(2)(vi).

include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.[122]

Moreover, Item 407(c)(2)(vi) does not require companies to adopt a formal policy and does not require them to explain why they have not. It also does not require public disclosure of board-level diversity statistics.

b. Complaints Surrounding Current Diversity Disclosure Requirements

Given the broad latitude afforded to companies by the Commission's rules related to board diversity and proxy disclosure, current reporting of board-level diversity statistics has been significantly unreliable and unusable to investors. This has been due to myriad data collection challenges, including the scarcity of reported information, the lack of uniformity in the information that is disclosed and inconsistencies in the definitions of diversity characteristics across companies.[123] The heightened national discourse around diversity and mounting grievances from investors surrounding transparency on board diversity prompted Nasdaq to examine the state of board diversity among its listed companies. While conducting that research, Nasdaq identified a number of key challenges, such as: (1) Inconsistent disclosure and definitions of diversity across companies; (2) limited data on diverse characteristics outside of gender; (3) inconsistent or no disclosure of a director's race, ethnicity, or other diversity attributes (*e.g.,* nationality); (4) difficult-to-extract data because statistics are often embedded in graphics; and (5) aggregation of information, making it difficult to separate gender from other categories of diversity. Investors and data analysts have raised similar criticisms.

As the Illinois Treasurer observed, the paucity of data on race and ethnicity creates barriers to investment analysis, due diligence and academic study.[124] For example, the scarcity of such data is an impediment to academics who want to study the performance impact of racially diverse boards.[125] Nasdaq is concerned that investors also face the many data collection challenges Nasdaq encountered, rendering current diversity disclosures unreliable, unusable, and insufficient to inform investment and voting decisions. Commissioner Allison Herren Lee expressed similar concerns, stating that the current SEC disclosure requirements have ''led to spotty information that is not standardized, not consistent period to period, not comparable across companies, and not necessarily reliable. . . . And the current state of disclosure reveals the shortcomings of a principles-based materiality regime in this area.'' [126]

Some stakeholders believe there is a correlation between companies that disclose the gender, racial and ethnic composition of their board and the number of diverse directors on those companies' boards.[127] Currently, the lack of reliable and consistent data makes it difficult to measure diversity in the boardroom, and a common set of standards for diversity definitions and disclosure format is greatly needed. At present, U.S. companies must navigate a complex patchwork of federal and state regulations and disclosure requirements. The limited disclosure currently provided voluntarily, which is primarily focused on gender (due in part to that data being the most readily available), fails to provide the full scope of a board's diverse characteristics.[128] It is difficult to improve what one cannot accurately measure. This lack of transparency is impacting investors who are increasingly basing public advocacy, proxy voting and direct shareholder-company engagement decisions on board diversity considerations.[129]

c. Support for Updating Diversity Disclosure Requirements

Nasdaq's surveys of investors and reviews of their disclosed policies and actions show that board diversity is a priority when assessing companies, and investors report, in some cases, relying on intuition when there is a lack of empirical, evidenced-based data. Furthermore, the continued growth of ESG investing raises the importance of quality data, given the data-driven nature of investment products such as diversity-specific indices and broader ESG funds.

Investors have a unique platform from which to engage and influence a company's position on important topics like diversity. Similarly, Nasdaq, like other self-regulatory organizations, is uniquely positioned to establish practices that will assist in carrying out Nasdaq's mandate to protect investors and remove impediments from the market. Various stakeholders, including Nasdaq, believe that clear and concise annual disclosure of board diversity information that disaggregates the data by race, ethnicity, gender identity and sexual orientation will provide the public, including key stakeholders, with a better sense of a company's approach to improving corporate diversity and the support needed to effectuate any changes. Required disclosures also would eliminate the number of shareholder proposals asking for these key metrics and the need for companies to respond to multiple investor requests for information.[130] Moreover, companies manage issues more closely and demonstrate greater progress when data is available.[131]

In 2015, nine large public pension funds who collectively supervised $1.12 trillion in assets at the time petitioned the Commission to require registrants to disclose information related to, among other things, the gender, racial, and ethnic diversity of the registrant's board nominees.[132] In 2017, Human Capital Management Coalition, which described itself as a group of institutional investors with $2.8 trillion in assets at the time, made a similar petition to the Commission.[133] More recently, in October 2020, the Illinois Treasurer spearheaded an initiative along with twenty other investor organizations, asking for all companies in the Russell

[122] *See* Proxy Disclosure Enhancements, 74 FR at 68,344.

[123] *See* Petition for Rulemaking (July 6, 2017), available at: *https://www.sec.gov/rules/petitions/2017/petn4-711.pdf.*

[124] *See* Press Release, *Illinois State Treasurer Frerichs Calls on Russell 3000 Companies to Disclose Diversity Data* (Oct. 28, 2020), available at *https://illinoistreasurer govprod.blob.core.usgovcloudapi.net/twocms/media/doc/october2020_russell3000.pdf.*

[125] *See* Office of Illinois State Treasurer, *supra* note 110, at 3–4.

[126] *See* Lee, *supra* note 22.

[127] *See* Proxy Disclosure Enhancements, 74 FR at 68,355 (''Although the[se] amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition. A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity.''); *see also* Office of Illinois State Treasurer, *supra* note 110, at 3.

[128] *See, e.g.,* CGLytics, *supra* note 111, at *https://www.cglytics.com/diversity-on-the-board-metrics-of-fortune-100-companies/;* Petition for Amendment of Proxy Rule, *supra* note 80; Office of Illinois State Treasurer, *supra* note 110.

[129] *See* Office of the Illinois State Treasurer, *Russell 3000 Board Diversity Disclosure Initiative, https://www.illinoistreasurer.gov/Financial_Institutions/Equity,_Diversity__Inclusion/Russell_3000_Board_Diversity_Disclosure_Initiative* (last accessed Nov. 25, 2020).

[130] *See* Petition for Rulemaking, *supra* note 123, at 2.

[131] *See, e.g.,* Gwen Le Berre, Parametric, *Investors Need Data to Make Diversity a Reality* (Aug. 24, 2020), *https://www.parametricportfolio.com/blog/investors-need-data-to-make-diversity-a-reality.*

[132] *See* Petition for Amendment of Proxy Rule, *supra* note 80.

[133] *See* Petition for Rulemaking, *supra* note 123.

3000 Index to disclose the composition of their board, including each board member's gender, race and ethnicity.[134]

The largest proxy advisory firms have aligned their voting policies to encourage increased board diversity disclosure. Institutional Shareholder Services (''ISS''), recently adopted a new voting policy under which it will identify boards of companies in the Russell 3000 or S&P 1500 that ''lack racial and ethnic diversity (or lack disclosure of such)'' in 2021 and, beginning in 2022, will recommend voting against the chair of the nominating committee of such companies. The stated goal of the policy is ''helping investors identify companies with which they may wish to engage and to foster dialogue between investors and companies on this topic.'' [135] In 2017, proxy advisory firm Glass Lewis announced a policy regarding board gender diversity that took effect in 2019. Glass Lewis generally recommends voting against the nominating committee chair of a board that has no female members, and when making such a recommendation, the firm closely examines the company's disclosure of its board diversity considerations and other relevant contextual factors.[136] On November 24, 2020, Glass Lewis announced the publication of its 2021 Proxy Voting Policy Guidelines, which expand its board gender diversity policy to vote against nominating chairs if there are fewer than two female directors, beginning in 2022.[137] Most notably, beginning with the 2021 proxy season, the company will include an assessment report of company proxy disclosures relating to board diversity, skills and the director nomination process for companies in the S&P 500 index. According to Glass Lewis, it ''will reflect how a company's proxy statement presents: (i) The board's current percentage of racial/ethnic diversity; (ii) whether the board's definition of diversity explicitly includes gender and/or race/ethnicity; (iii) whether the board has adopted a policy requiring women and minorities to be included in the initial pool of candidates when selecting new director nominees (aka 'Rooney Rule'); and (iv) board skills disclosure.'' [138]

Congress and members of the Commission also have weighed in on the importance of improving board transparency. In 2017, Representative Carolyn Maloney introduced the ''Gender Diversity in Corporate Leadership Act of 2017,'' which proposed requiring public companies to provide proxy disclosure regarding the gender diversity of the board of directors and nominees.[139] In November 2019, the U.S. House of Representatives, with bipartisan support, passed the ''Corporate Governance Through Diversity Act of 2019,'' which requires certain registrants annually to disclose the racial, ethnic, and gender composition of their boards and executive officers, as well as the veteran status of any of those directors and officers, in their proxy statements.[140] The bill also requires the disclosure of any policy, plan or strategy to promote racial, ethnic, and gender diversity among these groups. Legislators have proposed a companion bill in the U.S. Senate.[141]

The Council of Institutional Investors (''CII''), U.S. Chamber of Commerce,[142] National Urban League, Office of New York State Comptroller and the National Association for the Advancement of Colored People praised the House of Representatives' for passing the 2019 legislation. According to the U.S. Chamber of Commerce's members and associations, it has become increasingly important to see improvements in board diversity.[143] Additionally, CII's General Counsel stated that the proxy statement disclosure requirement in the legislation ''could contribute to enhancing U.S. public company board consideration of diversity.'' [144]

More recently, SEC Commissioners have called for greater transparency surrounding ethnic diversity on company boards. In a September 2020 speech titled ''Diversity Matters, Disclosure Works, and the SEC Can Do More'' given at the CII Fall Conference, Commissioner Lee advocated advancing corporate diversity and for various approaches by which the Commission could promote diversity, including among other things, strengthening the C&DI's guidance related to disclosure of board candidate diversity characteristics.[145] Commissioner Lee stated:

> [The SEC has] largely declined to require diversity-related disclosure. In 2009, we adopted a requirement for companies to disclose if and how diversity is considered as a factor in the process for considering candidates for board positions, including any policies related to the consideration of diversity. In 2018, we issued guidance encouraging the disclosure of self-identified characteristics of board candidates. While I appreciate these measures, given that women of color hold just 4.6% of Fortune 500 board seats and less than one percent of Fortune 500 CEOs are Black, it's time to consider how to get investors the diversity information they need to allocate their capital wisely.[146]

VI. Nasdaq Proposal

a. Overview of Disclosure Requirements

Disclosure of information material to an investor's voting and investment decision is the bedrock of federal securities laws. The Exchange's listing rules require companies to comply with federal securities laws, including the registration requirements under the Securities Act of 1933. Once listed, companies are obligated to solicit proxies and file all annual and periodic reports with the Commission under the Act at the prescribed times.[147] In discharging its obligation to protect investors, Nasdaq monitors listed companies for compliance with those disclosure obligations, and the failure to do so results in a notice of deficiency or delisting.

Nasdaq believes it is well within the Exchange's delegated regulatory authority to propose listing rules designed to enhance transparency so long as they do not conflict with existing federal securities laws. For example, Nasdaq requires listed companies to publicly disclose compensation or other payments by third parties to a company's directors or

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[134] *See* Press Release, *supra* note 124.

[135] *See* ISS Governance, *ISS Announces 2021 Benchmark Policy Updates* (November 12, 2020), available at: *https://www.issgovernance.com/iss-announces-2021-benchmark-policy-updates/*.

[136] *See* Glass Lewis, *2019 Policy Guideline Updates* (Oct. 24, 2018), available at: *https://www.glasslewis.com/2019-policy-guideline-updates-united-states-canada-shareholder-initiatives-israel/*.

[137] *See* Glass Lewis, *2021 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice—United States* (2020), available at: *https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b*.

[138] *Id.*

[139] Gender Diversity in Corporate Leadership Act of 2017, H.R. 1611, 115th Cong. (2017).

[140] Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019).

[141] Improving Corporate Governance Through Diversity Act of 2019, S. 360, 116th Cong. (2019).

[142] *See* Letter from Various U.S. Chamber of Commerce Associations and Members to Chairman Mike Crapo and Ranking Member Sherrod Brown, U.S. House Committee on Banking, Housing, and Urban Affairs (July 27, 2020), available at: *https://www.uschamber.com/sites/default/files/200727_coalition_h.r._5084_senatesmallbusiness.pdf*.

[143] *Id.*

[144] *See* Joe Mont, *SEC, Congress seek better diversity disclosures,* Compliance Week (Feb. 20, 2019), *https://www.complianceweek.com/sec-congress-seek-better-diversity-disclosures/24802.article*.

[145] *See* Lee, *supra* note 22.

[146] *Id.* Commissioner Crenshaw also expressed disappointment with the Commission's silence on diversity. *See* Crenshaw, *supra* note 7.

[147] *See* Nasdaq Stock Market Rulebook, Rules 5250(c) and (d).

nominees, notwithstanding that such disclosure is not required by federal securities laws. In approving that proposed rule, the Commission noted:

> To the extent there are certain factual scenarios that would require disclosure not otherwise required under Commission rules, we believe that it is within the purview of a national securities exchange to impose heightened governance requirements, consistent with the Act, that are designed to improve transparency and accountability into corporate decision making and promote investor confidence in the integrity of the securities markets.[148]

Nasdaq is concerned that while investors have increasingly emphasized that they consider board diversity information to be material, the current lack of transparency and consistency makes it difficult for Nasdaq and investors to determine the state of diversity among listed companies as well as each board's philosophy regarding diversity. Investors also have voiced dissatisfaction about having to independently collect board-level data about race, ethnicity and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.[149] Moreover, in some instances, based on Nasdaq's own investigation, such information is either unavailable, or, if available, not comparable across companies. To the extent investors must obtain this information on their own through an imperfect process, Nasdaq is concerned that it increases information asymmetries between larger stakeholders, who are able to collect this data directly from companies, and smaller investors, who must rely on incomplete public disclosures. For all investors who take on the burden of independently obtaining the current information, there is a cost and time burden related to the data collection.

Nasdaq believes that additional disclosure regarding a board's composition and philosophy related to board diversity will improve transparency and accountability into corporate decision making. Nasdaq proposes to improve transparency regarding board diversity by requiring all listed companies to publicly disclose unbundled, consistent data utilizing a uniform, transparent framework on their website or in their proxy statement under Rule 5606. Similarly, Nasdaq proposes to promote accountability in corporate decision-making by requiring companies who do not have at least two Diverse directors on their board to provide investors with a public explanation of the board's reasons for not doing so under Rule 5605(f)(3). Nasdaq designed the proposal to avoid a conflict with existing disclosure requirements under Regulation S–K and to mitigate additional burdens for companies by providing them with flexibility to provide such disclosure on their website or in their proxy statement, and not requiring them to adopt a formal diversity policy.

Nasdaq proposes to foster consistency in board diversity data disclosure by defining ''Diverse'' under Rule 5605(f)(1) as ''an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+,'' and by adopting the following definitions under Rule 5605(f)(1):

- ''Female'' means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.
- ''LGBTQ+'' means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.
- ''Underrepresented Minority'' means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities.

The terms in the proposed definition of ''Underrepresented Minority'' reflect the EEOC's categories and are construed in accordance with the EEOC's definitions.[150] The terms in the proposed definition of LGBTQ+ are similar to the identities defined in California's A.B. 979, described below, but have been expanded to include the queer community based on Nasdaq's consultation with stakeholders, including human rights organizations.[151]

In constructing its proposed definition of ''Diverse,'' Nasdaq considered various state and federal legislation, stakeholder sentiments and academic studies. For example, California requires public companies headquartered in the state to have at least one individual who self-identifies as a female on the board by 2019 under S.B. 826 [152] and at least one director who is a member of an ''underrepresented community'' by 2021 under A.B. 979.[153] S.B. 826 defines ''Female'' as ''an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth,'' consistent with legislation proposed by New Jersey, Michigan and Hawaii related to board gender diversity.[154] A.B. 979 considers directors from underrepresented communities to be individuals who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or as gay, lesbian, bisexual or transgender. Since S.B. 826 was passed, 669 women have joined public company boards in the state and the number of public companies with all male boards has declined from 30% in 2018 to 3% in 2020.[155]

The state of Washington requires public companies whose boards are not comprised of at least 25% directors who self-identify as women by January 1, 2022 to provide public disclosures related to the board's consideration of ''diverse groups'' during the director nomination process. The state considers ''diverse groups'' to include ''women, racial minorities, and historically underrepresented groups.'' [156]

As discussed above, Congress has proposed legislation relating to disclosure of racial, ethnic, gender and veteran status among the company's directors. Section 342 of the Dodd-Frank Act defines ''minority'' as ''Black American, Native American, Hispanic American, and Asian American,'' [157] and the Diversity Assessment Report for Entities Regulated by the SEC requires the Exchange to report workforce composition data to the SEC based on

[148] *See* Order Granting Accelerated Approval of a Proposed Rule Change, 81 FR 44,400, 44,403 (July 7, 2016).

[149] *See* Petition for Amendment of Proxy Rule, *supra* note 80, at 2.

[150] While the EEO–1 report refers to ''Hispanic or Latino'' rather than Latinx, Nasdaq proposes to use the term Latinx to apply broadly to all gendered and gender-neutral forms that may be used by individuals of Latin American heritage, including individuals who self-identify as Latino/a/e.

[151] Further, Nasdaq agrees with the United Kingdom Financial Reporting Council that the acronym LGBTQ+ ''does not attempt to exclude other groups, nor does it imply that the experiences of people under its umbrella are the same.'' *See* Hay et al., *supra* note 98, at 14.

[152] *See* Cal. S.B. 826, *supra* note 112.

[153] *See* Cal. A.B. 979, *supra* note 112.

[154] *See* Cal. S.B. 826, *supra* note 112. *See also* N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414–1(b)(2) (2020).

[155] *See* California Partners Project, *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards* 4 (2020), available at: *https://www.calpartnersproject.org/claimyourseat*.

[156] *See* Wash. Subst. S.B. 6037, *supra* note 112. At least 11 states have proposed diversity-related requirements. *See* Hatcher and Latham, *supra* note 11.

[157] *See* 12 U.S.C. 5452(g)(3) and Public Law 101–73 § 1204(c)(3).

the EEOC's categories.[158] Most companies are required by law to provide similar workforce data to the EEOC through the EEO–1 Report, which requires employers to report statistical data related to race, ethnicity and gender to the EEOC.[159]

Nasdaq has designed the proposed rule to require all companies to provide consistent, comparable data under Rule 5606 by utilizing the existing EEO–1 reporting categories that companies are already familiar with, and by requiring companies to have, or publicly explain why they do not have, at least two directors who are diverse in terms of race, ethnicity, sexual orientation or gender identity under Rule 5605(f)(2). While the EEO–1 report does not currently include sexual orientation or gender identity, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ status in recognition of the U.S. Supreme Court's recent decision in *Bostock* v. *Clayton County* that sexual orientation and gender identity are ''inextricably'' intertwined with sex.[160]

The proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, the company would still have to provide the required disclosure under Rule 5605(f)(3) if the company does not also have at least two directors who are otherwise considered Diverse under Rule 5605(f)(1). Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

Overall, Nasdaq believes the proposal will enhance investor confidence that all listed companies are considering diversity of race, ethnicity, sexual orientation and gender identity in the context of selecting directors. Investors will be confident that board discussions at listed companies with at least two Diverse directors include the perspectives of more than one demographic group. They will also be confident that boardrooms without at least two Diverse directors are having a thoughtful discussion about their reasons for not doing so and publicly explaining those reasons. On balance, the proposal will advance the public interest and enhance investor confidence in the integrity of the securities markets by ensuring investors that Nasdaq is monitoring all listed companies to verify that they have at least two Diverse directors or explain why they do not, and by requiring all listed companies to provide consistent, comparable diversity disclosures.

b. Board Statistical Disclosure

Given the increased interest in, and advocacy for, improvements in board transparency related to diversity disclosure information, the Exchange is proposing to adopt new Rule 5606(a), which would require each company to publicly disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified gender and racial characteristics and LGBTQ+ status.

All Nasdaq-listed companies that are subject to proposed Rule 5605(f), whether they choose to meet the diversity objectives of proposed Rule 5605(f)(2) or to explain why they do not, would be required to make the proposed Rule 5606 disclosure. This proposed rule also will assist the Exchange in assessing whether companies meet the diversity objectives of proposed Rule 5605(f). Under Rule 5606(e), Nasdaq proposes to make proposed Rule 5606 operative for listed companies one year after the SEC Approval Date of this proposal.

Pursuant to proposed Rule 5606(a), each company would be instructed to annually provide its board-level diversity data in a format substantially similar to the Board Diversity Matrix in proposed Rule 5606(a) and attached [sic] as *Exhibit 3.* The company would be required to provide the total number of directors on its board. If a director voluntarily self-identifies, each company, other than a Foreign Issuer (as defined under Rule 5605(f)(1)), would include the following in a table titled ''Board Diversity Matrix,'' in accordance with the instructions accompanying the proposed disclosure format: (1) the number of directors based on gender identity (male, female or non-binary[161]); (2) the number of directors based on race and ethnicity (African American or Black, Alaskan Native or American Indian, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, or Two or More Races or Ethnicities); and (3) the number of directors who self-identify as LGBTQ+.

Any director who chooses not to disclose a gender would be included under ''Gender Undisclosed'' and any director who chooses not to identify as any race or not to identify as LGBTQ+ would be included in the ''Undisclosed'' category at the bottom of the table. The defined terms for the race and ethnicity categories in the instructions to the Board Diversity Matrix disclosure format are substantially similar to the terms and definitions used in the EEO–1 Report.[162] LGTBQ+ is defined similarly to proposed Rule 5605(f)(1) as a person who identifies as any of the following: lesbian, gay, bisexual, transgender or a member of the queer community.

Below is an example of a Board Diversity Matrix that companies may use, which is also attached [sic] as *Exhibit 3:*

[158] *See* Securities and Exchange Commission, Diversity Assessment Report for Entities Regulated by the SEC, available at: *https://www.sec.gov/files/OMWI-DAR-FORM.pdf.*

[159] All companies with 100 or more employees are required to complete the EEO–1 Report. *See* U.S. Equal Employment Opportunity Commission, EEO–1: Who Must File, *https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-who-must-file* (last accessed Nov. 27, 2020).

[160] *See Bostock* v. *Clayton Cty.,* 140 S. Ct. 1731, 1742 (2020) (''But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.'').

[161] Although non-binary is included as a category in the proposed Board Diversity Matrix, a company would not satisfy the diversity requirement proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

[162] *See supra* note 159. Additionally, the EEOC does not categorize LGBTQ+ or any other sexual orientation identifier on its EEO–1 Report. The definitions of the EEO–1 race and ethnicity categories may be found in the appendix to the EEO–1 Report instructional booklet, available at *https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-instruction-booklet.*

BOARD DIVERSITY MATRIX

[As of [DATE]]

Board Size:				
Total Number of Directors	#			
Gender:	Male	Female	Non-Binary	Gender undisclosed
Number of directors based on gender identity	#	#	#	#
Number of directors who identify in any of the categories below:				
African American or Black	#	#	#	#
Alaskan Native or American Indian	#	#	#	#
Asian	#	#	#	#
Hispanic or Latinx	#	#	#	#
Native Hawaiian or Pacific Islander	#	#	#	#
White	#	#	#	#
Two or More Races or Ethnicities	#	#	#	#
LGBTQ+	#			
Undisclosed	#			

Nasdaq recognizes that some Foreign Issuers, including Foreign Private Issuers as defined by the Act,[163] may have their principal executive offices located outside of the United States and in jurisdictions that may impose laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race, ethnicity or LGBTQ+ status. In such countries, a Foreign Issuer may be precluded by law from requesting diversity data from its directors. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Board Matrix data less relevant for such companies and not useful for investors.

As a result of these limitations, Nasdaq is proposing the option of a separate Board Diversity Matrix for Foreign Issuers. Similar to other companies, a Foreign Issuer would be required to provide the total number of directors on its board. If a director voluntarily self-identifies, the company would include the following in a table titled ''Board Diversity Matrix'': (1) The number of directors based on gender identity (male, female or non-binary [164]); (2) the number of directors who are considered underrepresented in the company's home country jurisdiction;[165] and (3) the number of directors who self-identify as LGBTQ+. An ''Underrepresented Individual in Home Country Jurisdiction'' is defined in the instructions to the Board Diversity Matrix as a person who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in a Foreign Issuer's home country jurisdiction. Rule 5605(f)(2)(B)(i) also proposes the same definition for Diverse directors of Foreign Issuers.

Nasdaq is also proposing new Rule 5606(b), which would require each company to provide the disclosure required under Rule 5606(a) in either the company's proxy statement or information statement for its annual meeting for shareholders, or on the company's website. If the company elects to disclose the information on its website, the company must also submit such disclosure along with a URL link to the information through the Nasdaq Listing Center within 15 calendar days of the company's annual shareholder meeting. The proposed time period to submit the information to the Nasdaq Listing Center is aligned with the time period provided in proposed Rule 5605(f)(3) for a company to submit its explanation for why it does not have at least two Diverse directors. Disclosure of the statistical data is not in lieu of any SEC requirements for a company to disclose any required information pursuant to Regulation S–K or any other federal, state or foreign laws or regulations. As described in the instructions to the Board Diversity Matrix and Rule 5606(a), each year following the first year that a company publishes its annual Board Diversity Matrix, the company would be required to publish its data for the current and immediately prior years.

Additionally, Nasdaq is proposing Rule 5606(c), which exempts the following types of companies from proposed Rule 5606(a): acquisition companies listed under IM–5101–2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. The exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition.

Nasdaq is also proposing Rule 5606(d) to allow for a company newly listing on Nasdaq, including a company listing in connection with a business combination under IM–5101–2, to satisfy the requirement of Rule 5606 within one year of listing on Nasdaq. The disclosure required by proposed Rule 5606(d) would be required to be included in the company's annual proxy statement or information statement for its annual meeting of shareholders or on the company's website. If the company provides such disclosure on its website, the company must also submit the disclosure and a URL link to the disclosure through the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholder meeting.

When a company does not timely provide the required disclosure, Nasdaq will notify the company that it is not in compliance with a listing requirement

[163] *See* 17 CFR 240.3b–4.

[164] Although non-binary is included as a category in the proposed Board Diversity Matrix, a company would not satisfy any aspect of the diversity requirement proposed by Rule 5605(f)(2) if a director self-identifies solely as non-binary.

[165] To clarify, although a Foreign Issuer may disclose directors that meet the requirement of Underrepresented Minority pursuant to new Rule 5605(f)(1), such disclosure may not meet the diversity objectives of new Rule 5605(f)(2)(B)(ii).

and allow the company to provide a plan to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,[166] Nasdaq proposes to allow companies deficient under proposed Rule 5606 45 calendar days to submit a plan in accordance with Rule 5810(c)(2) to regain compliance and, based on that plan, Nasdaq can provide the company with up to 180 days to regain compliance. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 5815. Although proposed Rule 5606 is not identical to the current Commission requirements, it is similar to, and does not deviate from, the Commission's CD&I related to Items 401(e)(1) and 407(c)(2)(vi) of Regulation S–K. Moreover, the proposed rule strengthens the Commission's requirements by providing clarity to the definition of diversity and streamlining investors' desire for clear, complete and consistent disclosures. Nasdaq believes that the format of the Board Diversity Matrix and the information that it will provide offers greater transparency into a company's board composition and will enable the data to be easily aggregated across issuers.[167] Nasdaq also believes that requiring annual disclosure of the data will ensure that the information remains current and easy for investors, data analysts and other parties to track.

c. Diverse Board Representation or Explanation

Nasdaq is proposing to adopt new Rule 5605(f)(2) to require each listed company to have, or explain why it does not have, at least two members of its board of directors who are Diverse, including at least one who self-identifies as Female and one who self-identifies as an Underrepresented Minority or LGBTQ+.[168] A company does not need to provide additional public disclosures if the company discloses under Rule 5606 that it has at least two Diverse directors satisfying this requirement. The terms in the proposed definition of ''Underrepresented Minority'' reflect the EEOC's categories and are construed in accordance with the EEOC's definitions. Nasdaq has provided additional flexibility for Smaller Reporting Companies and Foreign Issuers (including Foreign Private Issuers).

Under proposed Rule 5605(f)(3), if a company satisfies the requirements of Rule 5605(f)(2) by explaining why it does not have two Diverse directors, the company must: (i) Specify the requirements of Rule 5605(f)(2) that are applicable (*e.g.,* the applicable subparagraph, the applicable diversity objectives, and the timeframe applicable to the company's market tier); and (ii) explain the reasons why it does not have two Diverse directors. Such disclosure must be provided: (i) In the company's proxy statement or information statement for its annual meeting of shareholders; or (ii) on the company's website. If the company provides such disclosure on its website, the company must also notify Nasdaq of the location where the information is available by submitting the URL link through the Nasdaq Listing Center no later than 15 calendar days after the company's annual shareholder meeting.

Nasdaq would not assess the substance of the company's explanation, but would verify that the company has provided one. If the company has not provided any explanation, or has provided an explanation that does not satisfy subparagraphs (i) and (ii) of Rule 5605(f)(3), the explanation will not satisfy the requirements of Rule 5605(f)(3). For example, it would not satisfy Rule 5605(f)(3) merely to state that ''the Company does not comply with Nasdaq's diversity rule.'' As described above, the company must specify the requirements of Rule 5605(f)(2) that are applicable and explain the reasons why it does not have two Diverse directors. For example, a company could disclose the following to satisfy subparagraph (i) of Rule 5605(f)(3): ''As a Smaller Reporting Company listed on the Nasdaq Capital Market tier, the Company is subject to Nasdaq Rule 5605(f)(2)(C), which requires the company to have, or explain why it does not have, at least two Diverse directors, including at least one director who self-identifies as Female. Under Rule 5605(f)(7), the Company is required to have at least one Diverse director by March 10, 2023, and a second Diverse director by March 10, 2026. The Company has chosen to satisfy Rule 5605(f)(2)(C) by explaining its reasons for not meeting the diversity objectives of Rule 5605(f)(2)(C), which the Company has set forth below.''

i. Effective Dates and Phase-in Period

Proposed Rule 5605(f)(7) provides a transition period before companies must fully satisfy the requirement to have two Diverse directors or explain why they do not upon the initial implementation of the rule. Under this transition rule, each company must have, or explain why it does not have, one Diverse director no later than two calendar years after SEC approval of the proposed rule (the ''Approval Date''), and two Diverse directors no later than (i) four calendar years after the Approval Date for companies listed on the Nasdaq Global Select (''NGS'') or Global Market (''NGM'') tiers, or (ii) five calendar years after the Approval Date for companies listed on the Nasdaq Capital Market (''NCM'') tier. For example, if the Approval Date is March 10, 2021, all companies would be required to have, or explain why they do not have, one Diverse director by March 10, 2023 and two Diverse directors by March 10, 2025 (for NGS/NGM companies) or March 10, 2026 (for NCM companies).

Under proposed Rule 5605(f)(5)(A), a newly listed company that was not previously subject to a substantially similar requirement of another national securities exchange will be allowed one year from the date of listing to satisfy the requirement described above. This ''phase-in'' period applies to companies listing in connection with an initial public offering, a direct listing, a transfer from another exchange or the over-the-counter market, or through a business combination with an acquisition company listed under IM–5101–2, such that the company is no longer subject to IM–5101–2 after the combination. This phase-in period will apply after the end of the transition period provided in Rule 5605(f)(7). As a result, companies listing after the expiration of the phase-in periods provided by Rule 5605(f)(7) would be provided with one year from the date of listing to satisfy the applicable requirement of Rule 5605(f)(2) to have, or explain why they do not have, at least two Diverse directors. Companies listing after the Approval Date, but prior to the expiration of the phase-in periods provided by Rule 5605(f)(7), would be

[166] Pursuant to Nasdaq Rule 5810(c)(2)(A)(iii), a company is provided 45 days to submit a plan to regain compliance with Rules 5620(a) (Meetings of Shareholders), 5620(c) (Quorum), 5630 (Review of Related Party Transactions), 5635 (Shareholder Approval), 5250(c)(3) (Auditor Registration), 5255(a) (Direct Registration Program), 5610 (Code of Conduct), 5615(a)(4)(D) (Partner Meetings of Limited Partnerships), 5615(a)(4)(E) (Quorum of Limited Partnerships), 5615(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 5640 (Voting Rights). Pursuant to Nasdaq Rule 5810(c)(2)(A)(iv), a company is also provided 45 days to submit a plan to regain compliance with Rule 5250(b)(3)(Disclosure of Third Party Director and Nominee Compensation). A company is generally provided 60 days to submit a plan to regain compliance with the requirement to timely file periodic reports contained in Rule 5250(c)(1).

[167] Various stakeholders have requested easier aggregation. *See* Petition for Amendment of Proxy Rule, *supra* note 80, at 1.

[168] Nasdaq plans to publish an FAQ on the Listing Center clarifying that ''two members of its board of directors who are Diverse'' would exclude emeritus directors, retired directors and members of an advisory board.

provided with the latter of the periods set forth in Rule5605(f)(7) or one year from the date of listing.

Nasdaq believes this proposed period is consistent with the phase-in periods granted to companies for Nasdaq's other board composition requirements. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and with the majority independent board requirement of Rule 5605(b). Similarly, SEC Rule 10A–3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

ii. Foreign Issuers

Nasdaq recognizes that the EEOC categories of race and ethnicity may not extend to all countries globally because each country has its own unique demographic composition. However, Nasdaq observed that on average, women tend to be underrepresented in boardrooms across the globe, holding an estimated 16.9% of board seats in 2018.[169] As an official supporter of the United Nations Sustainable Stock Exchanges Initiative, Nasdaq recognizes that ensuring women have equal opportunities for leadership in economic decision making is one of the United Nations Sustainable Development Goals to be accomplished by 2030.[170] However, studies estimate that at current rates, it could take 18 [171] to 34 years [172] for U.S. companies to achieve gender parity on their boards.

Accordingly, under proposed Rule 5605(f)(2)(B), each Foreign Issuer must have, or explain why it does not have, at least two Diverse directors on its board, including at least one Female. Nasdaq proposes to provide Foreign Issuers with additional flexibility in that Foreign Issuers may satisfy the diversity requirement by having two Female directors. In addition, Foreign Issuers may also satisfy the diversity requirement by having one Female director, and an individual who self identifies as (i) LGBTQ+ or (ii) an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Alternatively, a company could satisfy Rule 5605(f)(2)(B) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule.

Nasdaq proposes to define a Foreign Issuer under Rule 5605(f)(1) as (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that: (i) Is considered a ''foreign issuer'' under Rule 3b–4(b) under the Act; [173] and (ii) has its principal executive offices located outside of the United States. This definition will include all Foreign Private Issuers (as defined in Rule 5005(a)(19)),[174] and any foreign issuers that are not foreign private issuers so long as they are also headquartered outside of the United States. This is designed to recognize that companies that are not Foreign Private Issuers but are headquartered outside of the United States are foreign companies notwithstanding the fact that they file domestic SEC reports. It is also designed to exclude companies that are domiciled in a foreign jurisdiction without having a physical presence in that country. Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be a Foreign Issuer one year from the date that the company no longer qualifies as a Foreign Issuer to satisfy the requirements of Rule 5605(f).

Nasdaq also proposes to revise Rule 5615 and IM–5615–3, which currently permit a Foreign Private Issuer to follow home country practices in lieu of the requirements set forth in the Rule 5600 Series, subject to several exclusions. Nasdaq proposes to revise Rule 5615 and IM–5615–3 to add Rules 5605(f) and 5606 to the list of excluded corporate governance rules. As a result, Foreign Private Issuers must satisfy the requirements of Rule 5605(f) and 5606 and may not follow home country practices in lieu of such requirements. However, Foreign Private Issuers that elect to follow an alternative diversity objective in accordance with home country practices, or are located in jurisdictions that restrict the collection of personal data, may satisfy the requirements of Rule 5605(f) by explaining their reasons for doing so instead of meeting the diversity objectives of the rule.

iii. Smaller Reporting Companies

Nasdaq also recognizes that smaller companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources necessary to compensate an additional director or engage a search firm to search outside of directors' networks. In recognition of the resource constraints faced by smaller companies, Nasdaq proposes to provide each Smaller Reporting Company with additional flexibility. Specifically, these companies could satisfy the two Diverse directors objective under Rule 5605(f)(2)(C) by having two Female directors.

Like other companies, Smaller Reporting Companies could also satisfy the two Diverse directors by having one Female director and one director who self-identifies as either (i) an Underrepresented Minority, or (ii) a member of the LGBTQ+ community. Alternatively, a company could satisfy Rule 5605(f)(2)(C) by publicly explaining the company's reasons for not meeting the diversity objectives of the rule. Under Rule 5605(f)(1), Nasdaq proposes to define a Smaller Reporting Company as set forth in Rule 12b–2 under the Act.[175] Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be a Smaller Reporting Company one year from the date that the company no longer qualifies as a Smaller Reporting Company to satisfy the requirements of Rule 5605(f).

iv. Cure Period

Nasdaq proposes to adopt Rule 5605(f)(6) and a new Rule 5810(c)(3)(F) to specify what happens if a company does not have at least two Diverse directors as set forth under Rule 5605(f)(2) and fails to provide the disclosure required by Rule

[169] *See* Deloitte, *Women in the Boardroom, supra* note 86.

[170] *See* United Nations Sustainable Stock Exchanges Initiative, *Gender Equality, https://www.un.org/sustainabledevelopment/gender-equality/* (last accessed Nov. 24, 2020).

[171] *See* McKinsey & Company, *supra* note 36, at 17.

[172] *See* GAO Report, *supra* note 44, at 9 (estimating ''it could take about 10 years from 2014 for women to comprise 30 percent of board directors and more than 40 years for the representation of women on boards to match that of men'').

[173] *See* 17 CFR 240.3b–4(b) (''The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.'').

[174] Under Nasdaq Rule 5005(a)(19), the term Foreign Private Issuer has ''the same meaning as under Rule 3b–4 under the Act.''

[175] Under 12b–2 of the Act, a Smaller Reporting Company ''means an issuer that is not an investment company, an asset-backed issuer (as defined in § 229.1101 of this chapter), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) Had a public float of less than $250 million; or (2) Had annual revenues of less than $100 million and either: (i) No public float; or (ii) A public float of less than $700 million.'' *See* 17 CFR 240.12b–2.

5605(f)(3).[176] Under those provisions, the Listing Qualifications Department will promptly notify the company that it has until the latter of its next annual shareholders meeting, or 180 days from the event that caused the deficiency, to cure the deficiency. The company can cure the deficiency either by nominating additional directors so that it satisfies the Diversity requirement of Rule 5605(f)(2) or by providing the disclosure required by Rule 5605(f)(3). If a company does not regain compliance within the applicable cure period, the Listings Qualifications Department would issue a Staff Delisting Determination Letter. A company that receives a Staff Delisting Determination can appeal the determination to the Hearings Panel through the process set forth in Rule 5815. Nasdaq also proposes revising Rule 5810(c)(2)(A)(iv) to make a non-substantive change clarifying that Rule 5250(b)(3) is related to ''Disclosure of Third Party Director and Nominee Compensation.''

v. Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of Rule 5605(f) (''Exempt Companies''): acquisition companies listed under IM–5101–2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. Proposed Rule 5605(f)(5)(B) will allow any company that ceases to be an Exempt Company one year from the date that the company no longer qualifies as an Exempt Company to satisfy the requirements of Rule 5605(f).

Nasdaq believes it is appropriate to exempt these types of companies from the proposed rule because such companies do not have boards, do not list equity securities, or are not operating companies. These companies are already exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615.

d. Alternatives Considered

Nasdaq considered whether requiring listed companies to have, or explain why they do not have, two Diverse directors would better promote the public interest than an alternative threshold or approach. Nasdaq's reasoned decision-making process included considering: (i) Mandate and disclosure-based approaches; (ii) higher and lower diversity objectives; (iii) longer and shorter timeframes; and (iv) broader and narrower definitions of ''Diverse.''

i. Mandate vs. Disclosure Based Approach

Globally, gender mandates range from requiring at least one woman on the board,[177] requiring two or more women based on board size,[178] or requiring 30 to 50% women on the board.[179] Some mandates vary by board size—for example, Norway imposes different standards for boards of two to three directors, four to five directors, six to eight directors, nine directors and ten or more directors.[180] California imposes a higher standard for gender diversity that boards with five directors or six or more directors must satisfy by the end of 2021 under S.B. 826, and a higher standard for underrepresented communities that boards with five to eight directors and nine or more directors must satisfy by the end of 2022 under A.B. 979. Nasdaq did not observe a common denominator among the mandates applicable to varying board sizes. However, Nasdaq considered criticism that a model based on various board sizes could subject companies to a higher threshold by virtue of adding directors.[181] Based on Nasdaq data, the average board size of its listed companies is eight directors.

Soft targets ranging from 25% to 40% women on boards have been suggested by various corporate governance codes and corporate governance organizations. For example, Rule 4.1 of the Swedish Corporate Governance Code (the ''Code'') provides that listed companies are to ''strive for gender balance on the board.'' [182] Each company's nominations committee is to publish a statement on its website at the time it issues notice of its shareholders meeting ''with regard to the requirement in rule 4.1, that the proposed composition of the board is appropriate according to the criteria set out in the Code and that the company is to strive for gender balance.'' [183] Companies are not

[176] Nasdaq proposes that existing Rules 5810(c)(3)(F) and (G) be renumbered as Rules 5810(c)(3)(G) and (H) respectively.

[177] For example, the Securities and Exchange Board of India requires public companies to have at least one woman on the board. *See* Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, Regulation 17(1)(a) (2015), available at: *https://www.sebi.gov.in/legal/regulations/jan-2020/securities-and-exchange-board-of-india-listing-obligations-and-disclosure-requirements-regulations-2015-last-amended-on-january-10-2020-_37269.html.* Similarly, the Israeli Companies Law requires public companies to have at least one woman on the board. *See* Paul Hastings, *Breaking the Glass Ceiling: Women in the Boardroom* 139 (2018), available at: *https://www.paulhastings.com/genderparity/.* In the United States, California's S.B. 826 requires public companies headquartered in California to have at least one woman on the board. *See* Cal. S.B. 826, *supra* note 112, at § 301.3(b)(3).

[178] For example, California's S.B. 826 requires public companies headquartered in California to have at least two women on the board if their board is comprised of five directors, and at least three women on the board if their board is comprised of six or more directors. *See* Cal. S.B. 826, *supra* note 112, at § 301.3(b)(1) and (2). Similar legislation has been proposed in New Jersey, Michigan and Hawaii. *See* N.J. Senate No. 3469, § 3(b)(2) (2019); Mich. S.B. 115, § 505a(2)(b) (2019); Haw. H.B. 2720, § 414–1(b)(2) (2020).

[179] For example, Norway imposes a gender quota ranging from 33%–50% depending on board size. *See* Paul Hastings, *supra* note 177, at 103. Portugal requires listed companies to have at least 33.3% women on boards by 2020. *See* Deloitte, *Women in the Boardroom, supra* note 86, at 143. Germany requires public companies with co-determined boards (at least 50% employee representation) to have at least 30% women, and all other listed companies to establish a company-defined target. *See* Ulrike Binder and Guido Zeppenfeld, Mayer Brown, *Germany Introduces Rules on Female Quota for Supervisory Boards and Leadership Positions* (March 13, 2015), available at *https://www.mayerbrown.com/en/perspectives-events/publications/2015/03/germany-introduces-rules-on-female-quota-for-super.* Belgium requires listed companies to have at least 33% women on the board. *See* Deloitte, *Women in the Boardroom, supra* note 86, at 85. Austria requires listed companies with more than 1,000 employees to have at least 30% women on the board. *See id.* at 81. Iceland requires public companies with more than 50 employees to have at least 40% women on the board. *See* Act respecting Public Limited Companies No. 2/199, Article 63, available at: *https://www.government.is/publications/legislation/lex/2018/02/06/TRANSLATION-OF-RECENT-AMENDMENTS-OF-ICELANDIC-PUBLIC-AND-PRIVATE-LIMITED-COMPANIES-LEGISLATION-2008-2010-including-Acts-13-2010-sex-ratios-and-68-2010-minority-protection-remuneration/.* France and Italy both require public companies to have at least 40% women on their boards. *See* Paul Hastings, *supra* note 177, at 91; White & Case, *Italy increases gender quotas in corporate boards of listed companies* (Jan. 29, 2020), available at: *https://www.whitecase.com/publications/alert/italy-increases-gender-quotas-corporate-boards-listed-companies*).

[180] *See* Paul Hastings, *supra* note 177, at 103.

[181] *See* David A. Katz and Laura A. McIntosh, Wachtell, Lipton, Rosen & Katz, *Gender Diversity and Board Quotas,* New York Law Journal (July 25, 2018), available at: *https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26150.18.pdf* (''California legislators dispute that the bill requires men to be displaced by women, noting that boards can simply increase their size. This may be easier said than done, however: Because the required quota increases with board size, a company with a four-man board that did not wish to force out a current director would need to add three women to accommodate the requirements of the law by 2021.'').

[182] *See* Swedish Corporate Governance Board, *The Swedish Corporate Governance Code* § 4.1 17 (eff. Jan. 1, 2020), available at: *http://www.bolagsstyrning.se/UserFiles/Koden/The_Swedish_Corporate_Governance_Code_1_January_2020.pdf.*

[183] *See* Swedish Corporate Governance Board, *Annual Report 2020* 22 (August 2020), available at:

required to comply with the Code, ''but are allowed the freedom to choose alternative solutions which they feel are better suited to their particular circumstances, as long as they openly report every deviation, describe the alternative solution they have chosen and explain their reasons for doing so.'' [184] Signifying progress, in 2019, 7% of nominations committees did not issue a statement on board gender balance, compared to 58% in 2013.[185]

In 2015, the Swedish Corporate Governance Board, which is responsible for administering the Code, established a goal to achieve representation of women on boards of small/mid cap (and Swedish companies listed on NGM Equity) and large cap companies of 30% and 35%, respectively, by 2017. Further, the Board aimed to achieve 40% representation of women on boards of all listed Swedish companies by 2020.[186] Based on data as of June 30, 2020, among listed companies, women accounted for 32.7% of board seats on small/mid cap companies and NGM Equity, 38.6% of large cap companies and 34.7% of all listed companies.[187]

In the United Kingdom, the Financial Conduct Authority requires companies with a premium listing on the London Stock Exchange to publicly disclose whether or not they comply with the Financial Reporting Council's U.K. Corporate Governance Code (the ''U.K. Code''), and if not, to explain their reasons for non-compliance.[188] Provision 23 of the U.K. Code requires each company to publicly describe ''the work of the nomination committee, including . . . the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives,'' [189] and Principle J states that board appointments and succession planning should, among other things, ''promote diversity of gender, social and ethnic backgrounds.'' [190] In addition, the Companies Act requires companies to disclose gender diversity statistics among the board, management and employees.[191] In 2018, the Financial Reporting Council reported that 83% of FTSE 100 and 74% of FTSE 250 companies had established a board diversity policy specifying gender, with approximately ⅓ specifying ethnicity.[192] More recently, a report commissioned by the Financial Reporting Council concluded that there is a lack of public disclosure regarding the LGBTQ+ status among directors and executives of public companies. While the report did not recommend amending Principle J of the U.K. Code to consider sexual orientation or gender identity, it emphasized that the U.K. Code ''seeks to promote diversity and inclusion of all minority groups within business'' [193] and suggested that the government ''update corporate reporting requirements to require companies to demonstrate how they intend to capture data on the sexual orientation and gender identity of staff.'' [194]

In 2011, the Davies Review called on FTSE 100 boards to achieve 25% women on boards by 2015.[195] After that milestone was achieved, the Hampton Alexander Review encouraged FTSE 350 boards to have ⅓ women by 2020, and it has been achieved by FTSE 100 companies.[196] In 2017, the Parker Review called on FTSE 100 and 250 companies to have at least one director of color by 2021 and 2024, respectively.[197] As of February 2020, approximately 37% of FTSE 100 companies surveyed and 59% of FTSE 350 companies surveyed did not have one director of color on their board.[198]

Australian Securities Exchange (''ASX'')-listed companies must comply with the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (the ''ASX Recommendations'') or explain why they do not. The ASX Recommendations require companies to have and disclose a diversity policy with measurable objectives and report on progress towards meeting those objectives. If the company is in the ASX/S&P 300, its objective for achieving gender diversity should be at least 30%.[199] The Australian government also requires companies with 100 or more employees to provide an annual report about gender equality indicators, including the gender composition of the board and the rest of the workforce.[200] In 2015, the ASX and KPMG found that 99% of S&P/ASX 200 companies and 88% of ASX 201–500 companies disclosed establishing a diversity policy rather than explaining why they do not have one.[201] As of July 2020, women account for 28.4% and 31.8% of board seats among ASX 300 and ASX 100 companies, respectively.[202]

Nasdaq observed that women account for at least 30% of the boards of the largest companies in Australia, Sweden and the United Kingdom, and in three other countries that have implemented disclosure requirements or suggested milestones on a comply-or-explain

http://www.bolagsstyrning.se/userfiles/archive/3930/kodkoll_arsrapport-2020_eng.pdf.

[184] *See* Swedish Corporate Governance Board, *Gender balance on boards of listed companies: The Swedish Corporate Governance Board assesses the situation ahead of this year's AGMs* (February 3, 2015), available at: *http://www.bolagsstyrning.se/userfiles/archive/3856/pressrelease_gender_2014-02-03.pdf.*

[185] *See* Swedish Corporate Governance Board, *Annual Report 2020, supra* note 183, at 22.

[186] *See* Swedish Corporate Governance Board, *Gender balance, supra* note 184.

[187] *See* Swedish Corporate Governance Board, *Statistics regarding gender balance* (July 15, 2020), available at: *http://www.bolagsstyrning.se/userfiles/archive/3922/200715_gender_balance_on_boards.pdf; see also Sammanfattning,* available at *http://www.bolagsstyrning.se/userfiles/archive/3922/statistik_konsfordelning_2020.pdf.*

[188] *See* Financial Conduct Authority, LR 9.8.6(6), available at: *https://www.handbook.fca.org.uk/handbook/LR/9/8.html; see also* Financial Reporting Council, *The UK Corporate Governance Code* 3 (July 2018), available at *https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF.* In addition, ''[i]n 2016, the [UK] Government also implemented the relevant provision of the EU Non-Financial Reporting Directive with a new reporting requirement in the FCA's Disclosure and Transparency Rules. This requires issuers (excluding [small and medium-sized enterprises]) admitted to trading on an EU regulated market to disclose their diversity policy in the corporate governance statement.'' *See* Financial Reporting Council, *Board Diversity Reporting* 5 (September 2018), available at: *https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf.*

[189] *See* Financial Reporting Council, *The UK Corporate Governance Code, supra* note 188, at 9.

[190] *Id.* at 8.

[191] *See* UK Companies Act 2006, § 414C.

[192] *See* Financial Reporting Council, Board Diversity Reporting, *supra* note 188, at 9.

[193] *See* Hay et al., *supra* note 98, at 37.

[194] *Id.*

[195] *See Women on boards, supra* note 96.

[196] *See Hampton-Alexander Review: FTSE Women Leaders* (November 2016), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613085/ftse-women-leaders-hampton-alexander-review.pdf.*

[197] *See* Parker, *supra* note 97.

[198] *See* Sir John Parker, *Ethnic Diversity Enriching Business Leadership* 19 (Feb. 5, 2020), available at: *https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2020-report-final.pdf.*

[199] *See* ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* 9 (4th ed. Feb. 2019), available at: *https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf.*

[200] Workplace Gender Equality Act 2012, Part IV § 13 (March 25, 2015), available at: *https://www.legislation.gov.au/Details/C2015C00088.*

[201] *See* KPMG and ASX, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended 1 January 2015 and 31 December 2015* 4 (2016) available at: *https://www.asx.com.au/documents/asx-compliance/asx-corp-governance-kpmg-diversity-report.pdf.*

[202] *See* KPMG and 30% Club, *Building Gender Diversity on ASX 300 Boards: Seven Learnings from the ASX 200* 4 (July 2020), available at: https://assets.kpmg/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf. The report also noted that diversity counteracts groupthink and that ASX 201–299 companies with at least 30% female directors ''are more likely than not to [have seen] market capitalisation increases over the past 12 months.'' *Id.* at 6.

basis: Finland, New Zealand, and Canada.[203] Nasdaq considered that countries that have implemented mandates have also seen progress in women's representation on boards, including, for example, Austria, Iceland, Belgium, France, Germany, Italy and Portugal.[204] On average, women account for 31% of board seats in countries with gender mandates.[205]

Nasdaq discussed the benefits and challenges of mandate and comply-or-explain models with over a dozen stakeholders, and while the majority of organizations were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, the majority also stated that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. Most organizations Nasdaq spoke with expressed general discomfort with mandates, although they acknowledged that opposition is lessening in the wake of California's S.B. 826 [206] and A.B. 979.[207] While many recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. In contrast, a disclosure-based framework that provides companies with flexibility would empower companies to maintain decision-making authority over their board's composition while providing stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity. This approach would better inform the investment community and enable more informed analysis of, and conversations with, companies. Nasdaq believes that these goals will be achieved through the disclosure of consistent, comparable data across companies, as would be required by the Exchange's proposed definition of Diverse.

For example, if, under Israeli law regarding board diversity, an Israeli company is required only to have a minimum of one woman on the board and such Israeli company chooses to comply with Israeli home country law in lieu of meeting the diversity objectives of Rule 5605(f)(2)(B), it may choose to disclose that ''the Company is incorporated in Israel and required by Israeli law to have a minimum of one woman on the board, and satisfies home country requirements in lieu of Nasdaq Rule 5605(f)(2)(B), which requires each Foreign Issuer to have at least two Diverse directors.'' If a U.S. company had two Diverse directors but one resigned due to unforeseen circumstances, it could disclose, for example: ''Due to the unexpected resignation of Ms. Smith this year, the Company does not have at least one director who self-identifies as Female and one director who self-identifies as an Underrepresented Minority or LGBTQ+. We intend to undertake reasonable efforts to meet the diversity objectives of Rule 5605(f)(2)(A) prior to our next annual shareholder meeting and have engaged a search firm to identify qualified Diverse candidates. However, due to unforeseen circumstances, we may not achieve this goal.'' Or a U.S. company may disclose that it chooses to define diversity more broadly than Nasdaq's definition by considering national origin, veteran status or individuals with disabilities when identifying nominees for director because it believes such diversity brings a wide range of perspectives and experiences to the board. In each case, investors will have a better understanding of the company's reasons for not having at least two Diverse directors and can use that information to make an informed investment or voting decision.

ii. Higher vs. Lower Diversity Objectives

Nasdaq observed that existing empirical research spanned companies across several countries, including the United States, Spain, China, Canada, France and Norway. Nasdaq considered that the studies related to company performance and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board,[208] two or more diverse directors (with diverse considered female, Black, Hispanic or Asian),[209] at least three women on the board [210] and being in the top quartile for gender and ethnic diversity.[211]

Nasdaq considered that the academic studies related to investor protection and board diversity found positive associations at various levels and measures of board diversity, including having at least one woman on the board [212] or up to 50% women on the board, and the assertions of certain academics that their findings may extend to other forms of diversity, including racial and ethnic diversity.[213] Nasdaq also reviewed academic research suggesting that ''critical mass'' is achieved by having three or more women on the board, and that having only one diverse director on the board risks ''tokenism.'' [214] Nasdaq considered that although the legislation enacted by Norway and California, and proposed by several other states, varies based on board size, the academic research considered companies across a spectrum of sizes and board sizes, including Fortune 100, S&P 500, Fortune 1000 and smaller (non-Fortune 1000) companies.

Nasdaq concluded that there is no ''one-size fits all'' approach to promoting board diversity and that the academic literature regarding the relationship between board diversity, company performance and investor protections is continuing to evolve. However, in Nasdaq's survey of academic studies described above—and of the targets or mandates promulgated by regulatory bodies and organizations worldwide—Nasdaq observed a common denominator of having at least one woman on the board. Similarly, Nasdaq observed a common denominator of having at least one director who is diverse in terms of race, ethnicity or sexual orientation among

[203] *See* The Conference Board of Canada, *Data Dashboard* (Sept. 23, 2020), available at: *https://www.conferenceboard.ca/focus-areas/inclusion/2020/aob-comparisons-around-the-world-table?AspxAutoDetectCookieSupport=1;* Andrew MacDougall et al., Osler, *Diversity Disclosure Practices* 4 (2020), available at *https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-and-Leadership-in-Corporate-Canada-2020.pdf. But see* Heike Mensi-Klarbach et al., *The Carrot or the Stick: Self-Regulation for Gender-Diverse Boards via Codes of Good Governance,* J. Bus. Ethics 11 (2019), available at: *https://doi.org/10.1007/s10551-019-04336-z* (reviewing longitudinal data from 2006 to 2016 on listed and state-owned companies in Austria and concluding that ''self-regulation of gender diversity on boards is ineffective if merely based on recommendations in codes of good governance''). Mensi-Klarbach recommends setting concrete targets and providing public monitoring to improve the effectiveness of comply-or-explain frameworks.

[204] *See* Paul Hastings, *supra* note 177; *see also* Deloitte, *Women in the Boardroom, supra* note 86.

[205] *See* Paul Hastings, *supra* note 177; The Conference Board of Canada, *supra* note 203.

[206] *See* Cal. S.B. 826, *supra* note 112.

[207] *See* Cal. A.B. 979, *supra* note 112.

[208] *See* Credit Suisse, *supra* note 30, at 16.

[209] *See* Thomas and Starr, *supra* note 23, at 5.

[210] *See* Eastman et al., *supra* note 31, at 3; Wagner, *supra* note 32.

[211] *See* McKinsey, *supra* note 36.

[212] *See* Abbott et al., *supra* note 58; Chen et al., *supra* note 64.

[213] *See* Wahid, *supra* note 59; Cumming et al., *supra* note 62, at 34.

[214] *See* Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards,* 37(2) Org. Dynamics 145 (April 2008); Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass,* 52(2) J. Fin. & Quant. Analysis 751 (April 2017); Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass,* 102(2) J. Bus. Ethics. 299 (Feb. 25, 2011), available at *https://ssrn.com/abstract=1858347.*

the requirements related to, and academic research considering, board diversity beyond gender identity. Nasdaq therefore believes that a diversity objective of at least two Diverse directors provides a reasonable baseline for comparison across companies. Companies are not precluded from meeting a higher or lower alternative measurable objective. For example, a company may choose to disclose that it does not meet the diversity objectives under Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in Nasdaq's proposed rule. Nasdaq believes that providing flexibility and clear disclosure when the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions.

iii. Longer vs. Shorter Timeframes

Nasdaq considered whether an alternative timeframe for satisfying the diversity objectives of Rule 5605(f)(2) would better promote the public interest than the timeframe Nasdaq has proposed under Rule 5605(f)(7). While companies are not precluded from adding additional directors to their boards to satisfy Rule 5605(f)(2) by having two Diverse directors sooner than contemplated by the proposed rule, Nasdaq understands that some companies may need to obtain shareholder approval to amend their governing documents to allow for board expansion. Other companies may choose to replace an existing director on the board with a Diverse director, and board turnover may be low.[215] Nasdaq recognizes that it also takes substantial lead time to identify, interview and select board nominees. To provide companies with sufficient time to satisfy Rule 5605(f) by having two Diverse directors, while recognizing that investors are calling for expedient change, Nasdaq has structured its proposal similarly to the approach taken by California, where companies must achieve one target by an earlier date and satisfy the entire diversity objective at a later date. Nasdaq also considered the approaches taken by foreign jurisdictions to implement diversity objectives. For example, Belgium and France implemented diversity objectives under a phased approach that provided companies with at least five years to fully satisfy the objectives,[216] whereas Iceland and Portugal provided companies with three years or less.[217]

While companies may choose to satisfy Rule 5605(f)(2) on an alternative timeframe, a company that chooses a timeframe that is longer than the timeframes set forth in Rule 5605(f)(7) also must publicly explain its reasons for doing so. For example, an NGM-listed company that, while not technically a Smaller Reporting Company, views itself as similarly situated to a NCM-listed Smaller Reporting Company may disclose the following: ''While the Company is listed on NGM and technically qualifies as a Smaller Reporting Company, it does not file its SEC reports utilizing the Smaller Reporting Company designation. However, the Company believes that it is similarly situated to other Smaller Reporting Companies listed on NCM in terms of its annual revenues and public float, and therefore has chosen to satisfy Rule 5605(f)(2)(C) in lieu of Rule 5605(f)(2)(A) and has satisfied this requirement by having at least two Diverse directors on the board who self-identify as Female within the timeframe provided under Rule 5605(f)(7) applicable to NCM-listed companies.''

iv. Broader vs. Narrower Definition of Diverse

Nasdaq considered whether the definition of Diverse should include broader characteristics than those reported on the EEO–1 report, such as the examples provided by the Commission's CD&I, including LGBTQ+, nationality, veteran status, and individuals with disabilities. During its stakeholder outreach, Nasdaq inquired whether a broad definition of Diversity would promote the public interest. While recognizing the diverse perspectives that different backgrounds can provide, most stakeholders supported a narrower definition of Diversity focused on gender, race and ethnicity, with several supporting broadening the definition to include the LGBTQ+ community.

As discussed above, companies currently are permitted to define diversity ''in ways they consider appropriate'' under federal securities laws. One of the challenges of this principles-based approach has been the disclosure of inconsistent and noncomparable data across companies. However, most companies are required by law to report data on race, ethnicity and gender to the EEOC through the EEO–1 Report. Nasdaq believes that adopting a broad definition of Diverse would maintain the status quo of inconsistent, noncomparable disclosures, whereas a narrower definition of Diverse focused on race, ethnicity, sexual orientation and gender identity will promote the public interest by improving transparency and comparability. Nasdaq also is concerned that the broader definitions of diversity utilized by some companies may result in Diverse candidates being overlooked, and may be hindering meaningful progress on improving diversity related to race, ethnicity, sexual orientation and gender identity. For example, a company may consider diversity to include age, education and board tenure. While such characteristics may provide laudable cognitive diversity, this focus may result in a homogenous board with respect to race, ethnicity, sexual orientation and gender identity that, by extension, does not reflect the diversity of a company's communities, employees, investors or other stakeholders.

Nasdaq also believes that a transparent, consistent definition of Diverse would provide stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity if it does not have two Diverse directors. This would enable the investment community to conduct more informed analysis of, and have more informed conversations with, companies. To the extent a company chooses to satisfy the requirement of Rule 5605(f)(2) by having at least two Diverse directors on its board, it will have the ancillary benefit of making meaningful progress in improving board diversity related to race, ethnicity, sexual orientation and gender identity.

Nasdaq's review of academic research on board diversity revealed a dearth of empirical analysis on the relationship between investor protection or company performance and broader diversity characteristics such as veteran status or individuals with disabilities.[218] Nasdaq

[215] *See* Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500,* Harv. L. Sch. Forum on Corp. Governance (Oct. 18, 2020), *https://corpgov.law.harvard.edu/2020/10/18/corporate-board-practices-in-the-russell-3000-and-sp-500/* (last accessed Nov. 24, 2020).

[216] *See* Paul Hastings, *supra* note 177, at 79 and 90; *see also supra* note 179.

[217] *See* Deloitte, Women in the Boardroom, *supra* note 86, at 115 and 143; *see also supra* note 179.

[218] KPMG (2020) states that veterans are underrepresented in boardrooms, with retired General and Flag Officers (''GFOs'') occupying less than 1% of Fortune 500 board seats. *See* KPMG, *The value of veterans in the boardroom* 1 (2020), available at: *https://boardleadership.kpmg.us/content/dam/boardleadership/en/pdf/2020/the-value-of-veterans-in-the-boardroom.pdf* (noting that

Continued

acknowledges that there also is a lack of published research on the issue of LGBTQ+ representation on boards.[219] This may be due to a lack of consistent, transparent data on broader diverse attributes, or because there is no voluntary self-disclosure workforce reporting requirements for LGBTQ+ status, such as the EEO–1 reporting framework for race, ethnicity, and gender. In any event, it is evident that while ''[b]oardroom diversity is a topic that has gained significant traction . . . LGBT+ diversity, however, has largely been left out of the conversation.'' [220]

Nonetheless, Nasdaq believes it is reasonable and in the public interest to include a reporting category for LGBTQ+ in recognition of the U.S. Supreme Court's recent affirmation that sexual orientation and gender identity are ''inextricably'' intertwined with sex,[221] and based on studies demonstrating a positive association between board diversity and decision making, company performance and investor protections. Nasdaq also believes that the proposed rule would foster the development of data to conduct meaningful assessments of the association between LGBTQ+ board diversity, company performance and investor protections.

As noted above, the proposal does not preclude companies from considering additional diverse attributes, such as nationality, disability, or veteran status in selecting board members; however, company would still have to provide the required disclosure under Rule 5605(f)(3) if the company does not also have at least two directors who are Diverse. Nor would the proposal prevent companies from disclosing information related to other diverse attributes of board members beyond those highlighted in the rule if they felt such disclosure would benefit investors. Nasdaq believes such disclosure would help inform the evolving body of research on the relationship between broader diverse attributes, company performance and investor protection and provide investors with additional information about the company's philosophy regarding broader diversity characteristics.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[222] in general, and furthers the objectives of Section 6(b)(5) of the Act,[223] in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and, in general, to protect investors and the public interest, for the reasons set forth below. Further, Nasdaq believes the proposal is not designed to permit unfair discrimination between issuers or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange, for the reasons set forth below.

I. Board Statistical Disclosure

Nasdaq has proposed what it believes to be a straightforward and clear approach for companies to publish their statistical data pursuant to proposed Rule 5606. The disclosure will assist investors in making more informed decisions by making meaningful, consistent, and reliable data readily available and in a clear and comprehensive format prescribed by the proposed rule. Nasdaq also believes that the disclosure format required by proposed Rule 5606 protects investors by eliminating data collection inaccuracies and decreasing costs, while enhancing investors' ability to utilize the information.

As a threshold matter, as discussed above, diversity has become an increasingly important subject and, in recent years, investors increasingly have been advocating for greater board diversity and for the disclosure of board diversity statistics. The current board diversity disclosure regime is lacking in several respects, and Nasdaq believes that its proposed Rule 5606 addresses many of the current concerns and responds to investors' demands for greater transparency into the diversity characteristics of a company's board composition by mandating disclosure and curing certain deficiencies that exist within the current SEC disclosure requirements.

Investors have expressed their dissatisfaction with having to independently collect board-level data about race, ethnicity and gender identity because such investigations can be time consuming, expensive, and fraught with inaccuracies.[224] The lack of consistency and specificity in Regulation S–K has been a major impediment for many investors and data collectors. As a general matter, the Commission's requirements have not addressed the concerns expressed by commenters that ''disclosure about board diversity was important information to investors.'' [225] Nasdaq believes that its proposed Rule 5606 addresses many of the concerns that have been raised.

Nasdaq believes that requiring the annual disclosure of a company's board diversity, as proposed in Rule 5606(a), will provide consistent information to the public and will enable investors to continually review the board composition of a company to track trends and simplify or eliminate the need for a company to respond to multiple investor requests for information about the diverse characteristics of the company's board. Requiring annual disclosures also would make information available to investors who otherwise would not be able to obtain individualized disclosures.[226] Moreover, consistent disclosures may encourage boards to consider a wider range of board candidates in the nomination process, including candidates with fewer ties to the current board.[227]

The Commission's 2009 amendments to Regulation S–K provide no definition for diversity and do not explicitly require disclosures specifically related to details about the board's gender, racial, ethnic and LGBTQ+ composition. Additionally, the Commission's CD&I does not address the definition of diversity, and it requires a registrant to disclose diversity information only in certain limited circumstances. Investors have expressed that current regulations and accompanying interpretations impair their ability to obtain clear and consistent data.[228] As a result, Nasdaq believes that proposed Rule 5606(a) protects investors and the public

''[r]etired GFOs who have honed their leadership and critical decision-making skills in a high-threat environment can bring extensive risk oversight experience to the board, which may be especially valuable in the context of today's risk landscape''). Accenture (2018) observed that companies that offered inclusive working environments for employees with disabilities achieved an average of 28% higher revenue, 30% higher economic profit margins, and 2x net income than their industry peers. *See* Accenture, *Getting to Equal: The Disability Inclusion Advantage* (2018), available at: *https://www.accenture.com/_acnmedia/PDF-89/Accenture-Disability-Inclusion-Research-Report.pdf.*

[219] *See* Credit Suisse ESG Research, *supra* note 33, at 1; *see also* Out Leadership, *supra* note 35.

[220] *See* Out Leadership, *supra* note 35, at 3.

[221] *See Bostock* v. *Clayton Cnty., supra* note 160.

[222] *See* 15 U.S.C. 78f(b).

[223] *Id.* § 78f(b)(5).

[224] *See* Petition for Amendment of Proxy Rule, *supra* note 80, at 2.

[225] *See* Proxy Disclosure Enhancements, 74 FR at 68,343–44 (amending Item 407(c)(2)(vi) of Regulation S–K, codified at 17 CFR 229.407(c)(2)(vi)).

[226] *See* Petition for Rulemaking, *supra* note 123.

[227] *See* Proxy Disclosure Enhancements, 74 FR at 68,355 (''To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent.''); Hazen and Broome, *supra* note 114, at 57–58.

[228] *See* Petition for Amendment of Proxy Rule, *supra* note 80, at 2; Petition for Rulemaking, *supra* note 123, at 7.

interest by making clear that a company's annual diversity data disclosure must include information related to gender identity, race, ethnicity and LGBTQ+ status, thereby leaving less discretion for companies to selectively disclose certain diversity information and enhancing the comparability of such data across companies. Moreover, it is in the public interest to provide clear requirements for diversity disclosure, and Nasdaq's proposed Board Diversity Matrix format provides such clarity.

Nasdaq does not intend to obligate directors to self-identify in any of the categories related to gender identity, race, ethnicity and LGBTQ+. Nasdaq believes that a director should have autonomy to decide whether to provide such information to their company. Therefore, Nasdaq believes that it is reasonable and in the public interest to allow directors to opt out of disclosing the information required by proposed Rule 5606(a) by permitting a company to identify such directors in the ''Undisclosed'' category.

Nasdaq believes that it is in the public interest to utilize the Board Diversity Matrix format for all companies as proposed in Rule 5606(a). Additionally, Nasdaq believes that the format removes any impediments to aggregating and analyzing data across all companies by requiring each company to disclose separately the number of male, female, and non-binary directors, the number of male, female, and non-binary directors that fall into certain racial and ethnic categories, and the number of directors that identify as LGBTQ+. The format allows investors to easily disaggregate the data and track directors with multiple diversity characteristics.

As discussed above, most listed companies are required by law to complete an EEOC Employer Information Report EEO–1 Form. Although outside directors generally are not employees and therefore are not covered in the EEO–1,[229] Nasdaq believes that collecting the information required by proposed Rule 5606(a) is familiar to most companies, and that it is reasonable to require disclosure of the additional board information.

Nasdaq also believes that requiring currently listed companies to comply with proposed Rule 5606 within one year from the date of Commission approval is a reasonable amount of time, given that most companies already collect similar information for certain employees. Moreover, most companies are required to prepare an annual proxy statement and update the Commission within four business days when a new director is appointed to the board.[230]

Further, Nasdaq believes that the disclosure required by proposed Rule 5606(a) will remove impediments to shareholders by making available information related to board-level diversity in a standardized manner, thereby enhancing the consistency and comparability of the information and helping to better protect investors. The proposed disclosure will also help protect investors and the public interest by enabling investors to determine the total number of diverse directors, which is information that is not consistently available in existing proxy disclosures in cases where a single director has multiple diverse characteristics. While companies can elect to make this information available either in a proxy statement or on the company's website, Nasdaq believes it is in the public interest to allow companies the option to provide the disclosure in a way they believe will be most meaningful to their shareholders.

Nasdaq recognizes that the proposed definition of Underrepresented Minority in Rule 5605(f)(1) may not apply to companies outside of the United States because each country has its own unique demographic composition. Moreover, Nasdaq's definition of Underrepresented Minority proposed in Rule 5606(f)(1) may be inapplicable to a Foreign Issuer, making this Board Matrix data less relevant for such companies and not useful for investors. Therefore, Nasdaq believes that offering Foreign Issuers the option of a separate template that requires different disclosure categories will provide investors with more accurate disclosures related to the diversity of directors among the board of a Foreign Issuer. Additionally, Nasdaq believes that providing an ''Underrepresented Individual in Home Country Jurisdiction'' category provides Foreign Issuers with more flexibility to identify and disclose diverse directors within their home countries.

The annual requirement in the proposed rule will guarantee that the information is available to the public on a continuous and consistent basis. As described in the instructions to the Board Diversity Matrix disclosure form and Rule 5606(a), each year following the first year that a company publishes the Board Diversity Matrix, the company will be required to publish its data for the current and immediately prior years. Nasdaq believes that disclosing at least two years of data allows the public to view any changes and track a board's diversity progress.

In addition to providing a means for shareholders to assess a company's board-level diversity and measure its progress in improving that diversity over time, Nasdaq believes that proposed Rule 5606 will provide a means for Nasdaq to assess whether companies meet the diversity objectives of proposed Rule 5605(f). The ability to determine satisfaction of the proposed listing rule's diversity objectives will protect investors and the public interest.

Moreover, the proposed rule provides transparency into diversity based not only on race, ethnicity, and gender identity, but also on a director's self-identified sexual orientation. Nasdaq believes that expanding the diversity characteristics beyond those which are commonly reported by companies currently will broaden the way boards view diversity, and ensure that board diversity is occurring across all protected groups.

Finally, Nasdaq believes that the proposal is not unfairly discriminatory because proposed Rule 5606 will apply to all Nasdaq-listed companies, except for the following companies: Acquisition companies listed under IM–5101–2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series—which meet the definition of Exempt Companies as defined under proposed Rule 5605(f)(4). Nasdaq believes it is reasonable and not unfairly discriminatory to exempt these companies from the proposed rule because the exemption of these companies is consistent with the approach taken by Nasdaq in Rule 5615 as it relates to certain Nasdaq corporate governance standards for board composition.

Nasdaq further believes it is reasonable to provide companies with a one-year phase-in period to comply with proposed Rule 5606. Nasdaq believes there is only a *de minimis* burden placed on companies to collect the board data and prepare the Board Diversity Matrix. Moreover, as discussed above, companies already are required to gather similar information for certain employees. Therefore, Nasdaq believes that one year is

[229] The EEO–1 Form does not require a company to disclose data for outside directors because such directors are not company employees.

[230] *See* SEC Form 8–K, available at: *https://www.sec.gov/files/form8-k.pdf.*

sufficient time for companies to incorporate their directors into their data collection. Furthermore, newly listed companies have many obligations to meet under Nasdaq listing rules. Therefore, Nasdaq believes that it is reasonable under proposed Rule 5606(d) to provide newly listed Nasdaq companies, including companies listing in connection with a business combination under IM–5101–2, with one year from the time of listing to comply with the proposed rule.

II. Diverse Board Representation or Explanation

a. Removes Impediments to and Perfects the Mechanism of a Free and Open Market and a National Market System

As discussed above, studies suggest that the traditional director candidate selection process may create barriers to considering qualified diverse candidates for board positions by limiting the search for director nominees to existing directors' social networks and candidates with C-suite experience.[231] In analyzing Norway's experience in implementing a gender mandate, Dhir (2015) observed that ''[b]oard seats tend to be filled by directors engaging their networks, and the resulting appointees tend to be of the same socio-demographic background.'' [232] Dhir concluded that broadening the search for directors outside of traditional networks ''is unlikely to occur without some form of regulatory intervention, given the prevalence of homogenous social networks and in-group favoritism.'' [233] Regulatory action was effective in increasing the representation of women on boards in Norway by ''democratiz[ing] access to a space previously unavailable to women.'' [234] The number of public company board seats held by women in Norway increased from 6% in 2002 to 42% in 2020.[235] One Norwegian director ''grudgingly accept[ed] that the free market principles she held so dearly had disappointed her—and that the [mandate] was a necessary correction of market failure.'' [236]

In contrast, Nasdaq observed that other countries have made comparable progress using a disclosure-based model. Women account for at least 30% of the largest boards of companies in six countries using comply-or-explain models:[237] Australia, Finland, Sweden, New Zealand, Canada and the United Kingdom.[238] Nasdaq discussed the benefits and challenges of mandate and disclosure-based models with over a dozen stakeholders, and the majority of organizations were in agreement that companies would benefit from a regulatory impetus to drive meaningful and systemic change in board diversity, and that a disclosure-based approach would be more palatable to the U.S. business community than a mandate. While many organizations recognized that mandates can force boards to act more quickly and accelerate the rate of change, they believe that a disclosure-based approach is less controversial and would spur companies to take action and achieve the same results. Some stakeholders also highlighted additional challenges that smaller companies and companies in certain industries may face finding diverse board members. However, leaders from across the spectrum of stakeholders with whom Nasdaq spoke reinforced the notion that if companies recruit by skill set and expertise rather than title, then they will find there is more than enough diverse talent to satisfy demand.

Nasdaq also considered Commissioner Lee's observation that disclosure ''gets investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value. Importantly, it can also drive corporate behavior.'' Specifically, she observed that:

For one thing, when companies have to formulate disclosure on topics it can influence their treatment of them, something known as the ''what gets measured, gets managed'' phenomenon. Moreover, when companies have to be transparent, it creates external pressure from investors and others who can draw comparisons company to company. The Commission has long-recognized that influencing corporate behavior is an appropriate aim of our regulations, noting that ''disclosure may, depending on determinations made by a company's management, directors and shareholders, influence corporate conduct'' and that ''[t]his sort of impact is clearly consistent with the basic philosophy of the disclosure provisions of the federal securities laws.[239]

Nasdaq believes that a disclosure-based framework may influence corporate conduct if a company chooses to meet the diversity objective of Rule 5605(f)(2) by having two Diverse directors on the board. A company may satisfy that objective by broadening the search for qualified candidates and considering candidates from other professional pathways that bring a wider range of skills and perspectives beyond traditional C-suite experience.[240] Nasdaq believes that this will help increase opportunities for Diverse candidates that otherwise may be overlooked due to the impediments of the traditional director recruitment process, which will thereby remove impediments to a free and open market and a national market system. Further, boards that choose to have at least two Diverse directors may experience other benefits from diversity that perfect the mechanism of a free and open market and national market system. As discussed above in Section II.A.1.II.b (*Diversity and Investor Protection*), and further discussed below in Section II.A.2.II.b (*Prevent Fraudulent and Manipulative Acts and Practices*), studies suggest that diversity is positively associated with reduced stock volatility,[241] more transparent public disclosures,[242] and less information asymmetry,[243] leading to stock prices that better reflect public information, and further removing impediments to and perfecting a free and open market and a national market system. Importantly, Nasdaq believes that the disclosure-based framework proposed under Rule 5605(f) will not create additional impediments to a free and open market and a national market system because it will empower

[231] *See* GAO Report, *supra* note 44; Vell, *supra* note 100; Rhode & Packel, *supra* note 104, at 39; Deloitte, *Women in the Boardroom, supra* note 86; *see also* Parker, *supra* note 97, at 38 (acknowledging that, ''as is the case with gender, people of colour within the UK have historically not had the same opportunities as many mainstream candidates to develop the skills, networks and senior leadership experience desired in a FTSE Boardroom'').

[232] *See* Dhir, *supra* note 78, at 52.

[233] *Id.* at 51. *See also* Albertine d'Hoop-Azar et al., *Gender Parity on Boards Around the World,* Harv. L. Sch. Forum on Corp. Governance (January 5, 2017), available at: *https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/* (comparing gender diversity on boards in countries with varying requirements and enforcement measures and concluding that external pressures—''progressive societal norms'' and regulations—are needed to increase board diversity).

[234] *See* Dhir, *supra* note 78, at 101.

[235] *See* Marianne Bertrand et al., *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway,* Nat'l Bureau of Econ. Rsch. Working Paper 20256 (June 2017), available at *https://www.nber.org/papers/w20256;* Statistics Norway, *Board and management in limited companies* (Mar. 6, 2020), *https://www.ssb.no/en/styre* (last accessed Nov. 27, 2020).

[236] *See* Dhir, *supra* note 78, at 116.

[237] *See* Paul Hastings, *supra* note 177; Deloitte, *Women in the Boardroom, supra* note 86.

[238] *See* Conference Board of Canada, *supra* note 201; Osler, *supra* note 203, at 4.

[239] *See* Lee, *supra* note 22.

[240] *See, e.g.,* Hillman et al., *supra* note 105 (finding that African-American and white women directors were more likely to have specialized expertise in law, finance, banking, public relations or marketing, or community influence from positions in politics, academia or clergy).

[241] *See* Bernile et al., *supra* note 28.

[242] *See* Gul et al., *supra* note 66; Bravo and Alcaide-Ruiz, *supra* note 56.

[243] *See* Abad et al., *supra* note 67.

companies to maintain decision-making authority over the composition of their boards.

To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2) to have at least two Diverse directors, Nasdaq believes that proposed Rule 5605(f)(3) will provide analysts and investors with a better understanding about the company's reasons for not doing so and its philosophy regarding diversity. Rule 5605(f) will thus remove impediments to a free and open market and a national market system by enabling the investment community to conduct more informed analyses of, and have more informed conversations with, companies. Nasdaq believes that such analyses and conversations will be better informed by consistent, comparable data across companies, which Nasdaq proposes to achieve by adopting a consistent definition of ''Diverse'' under Rule 5605(f)(1). Nasdaq further believes that providing such disclosure will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency and perfecting the mechanism of a free and open market and a national market system.

b. Prevent Fraudulent and Manipulative Acts and Practices

Nasdaq's analysis discussed above in Section II.A.1.II raises the concern that the failure of homogenous boards to consider a broad range of viewpoints can result in suboptimal decisions that have adverse effects on company performance, board performance and stakeholders. Nasdaq believes that including diverse directors with a broader range of skills, perspectives and experiences may help detect and prevent fraudulent and manipulative acts and practices by mitigating ''groupthink.'' Increased board diversity also may reduce the likelihood of insider trading and other fraudulent and manipulative acts and practices.

Nasdaq reached this conclusion by reviewing public statements by investors and organizations regarding the impact of groupthink on decision making processes, as well as academic studies on the relationship between diversity, groupthink and fraud. Nasdaq observed that groupthink can result in ''self-censorship'' [244] and failure to voice dissenting viewpoints in pursuit of ''consensus without critical evaluation and without considering different possibilities.'' [245] In contrast, ''board members who possess a variety of viewpoints may raise different ideas and encourage a full airing of dissenting views. Such a broad pool of talent can be assembled when potential board candidates are not limited by gender, race, or ethnicity.'' [246]

Dhir (2015) concluded that gender diversity may ''promote cognitive diversity and constructive conflict in the boardroom'' and may be more effective at overseeing management.[247] One respondent in Dhir's survey of Norwegian directors observed that:

> I've seen situations where the women were more willing to dig into the difficult questions and really go to the bottom even if it was extremely painful for the rest of the board, but mostly for the CEO . . . when it comes to the really difficult situations, [where] you think that the CEO has . . . done something criminal . . . [o]r you think that he has done something negligent, something that makes it such that you . . . are unsure whether he's the suitable person to be in the driving seat.[248]

Another director observed that ''[i]f you have different experiences and a more diversified board, you will have different questions asked.'' [249] Dhir concluded that ''women directors may be particularly adept at critically questioning, guiding and advising management without disrupting the overall working relationship between the board and management.'' [250]

Pucheta-Martínez et al. (2016) reasoned that questioning management is a critical part of the audit committee's oversight role, along with ensuring that management does not pressure the external auditor to issue a clean audit opinion notwithstanding the identification of any uncertainties or scope limitations.[251] Otherwise, ''[a]uditors may accept the demands of management for a clean audit report when the firm deserves a scope limitation and an uncertainty qualification.'' [252] The authors found that ''the percentage of female [directors] on [audit committees] reduces the probability of [audit] qualifications due to errors, non-compliance or the omission of information,'' [253] and further found a positive association between gender-diverse audit committees and disclosing audit reports with uncertainties and scope limitations. This suggests that gender-diverse audit committees better ''ensure that managers do not seek to pressure auditors into issuing a clean opinion instead of a qualified opinion'' when any uncertainties or scope limitations are identified.[254]

Nasdaq also reviewed other studies that found a positive association between board gender diversity and important investor protections regardless of whether women are on the audit committee, and considered the assessment of some academics that their findings may extend to other forms of diversity, including racial and ethnic diversity. Nasdaq therefore believes that such findings with respect to audit committees would be expected to be more broadly applicable to the quality of the broader board's decision-making process, and to other forms of diversity, including diversity of race, ethnicity and sexual orientation.

In examining the association between broader board gender diversity and fraud, Cumming, et al. observed that ''[g]ender diversity in particular facilitates more effective monitoring by the board and protection of shareholder interests by broadening the board's expertise, experience, interests, perspectives and creativity.'' [255] They observed that the presence of women on boards is associated with a lower likelihood of securities fraud; indeed, they found ''strong evidence of a negative and diminishing effect of women on boards and the probability of being in our fraud sample.'' [256] The authors suggested that ''other forms of board diversity, including but not limited to gender diversity, may likewise reduce fraud.'' [257]

Similarly, Wahid (2017) noted that board gender diversity may ''lead to less biased and superior decision-making'' because it ''has a potential to alter group dynamics by affecting cognitive conflict and cohesion.'' [258] Wahid (2017) concluded that ''gender-diverse boards commit fewer financial reporting mistakes and engage in less fraud,'' [259] finding that companies with female directors have ''fewer irregularity-type [financial] restatements, which tend to be indicative of financial manipulation.'' [260] Wahid also suggested that other forms of diversity, including

[244] *See* Forbes and Milliken, *supra* note 74, at 496.

[245] *See* Dhir, *supra* note 78, at 124.

[246] *See* Petition for Amendment of Proxy Rule, *supra* note 80, at 4.

[247] *See* Dhir, *supra* note 78, at 150.

[248] *Id.* at xiv.

[249] *Id.* at 120.

[250] *Id.* at 35.

[251] *See* Pucheta-Martínez et al., *supra* note 52, at 368.

[252] *Id.* at 364.

[253] *Id.* at 363.

[254] *Id.* at 368.

[255] *See* Cumming et al., *supra* note 62, at 34.

[256] *Id.* at 12–14.

[257] *Id.* at 33.

[258] *See* Wahid, *supra* note 59, at 6.

[259] *Id.* at 1.

[260] *Id.* at 23.

racial diversity, could introduce additional perspectives to the boardroom,[261] which Nasdaq believes could further mitigate groupthink.

Abbott, Parker and Persley (2012) posited that ''a female board presence contribut[es] to the board's ability to maintain an attitude of mental independence, diminish[es] the extent of groupthink and enhance[es] the ability of the board to monitor financial reporting.'' [262] They noted that ''poorer [internal] controls and the lack of an independent and questioning board-level attitude toward accounting judgments can create an opportunity for fraud.'' [263] They observed a lower likelihood of a material financial restatements stemming from fraud or error in companies with at least one woman on the board.[264]

Nasdaq believes that these studies provide substantial evidence suggesting an association between gender diverse boards or audit committees and a lower likelihood of fraud; a lower likelihood of receiving audit qualifications due to errors, non-compliance or omission of information; and a greater likelihood of disclosing audit reports with uncertainties and scope limitations. Moreover, academics have suggested that other forms of diversity, including racial and ethnic diversity, may reduce fraud and mitigate groupthink. Further, while homogenous boards may unwittingly fall into the trap of groupthink due to a lack of diverse perspectives, ''heterogeneous groups share conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of a wide range of interpretations, alternatives, and consequences.'' [265] Nasdaq therefore believes that the proposed rule is designed to reduce groupthink, and otherwise to enhance the functioning of boards, and thereby to prevent fraudulent and manipulative acts and practices.

Further, the Commission has suggested that in seeking board diversity, ''[t]o the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent.'' [266] Nasdaq believes that the benefits of the proposed rule are analogous to the benefits of Nasdaq's rules governing and requiring director independence. In 2003, Nasdaq adopted listing rules requiring, among other things, that independent directors comprise a majority of listed companies' boards, which were ''intended to enhance investor confidence in the companies that list on Nasdaq.'' [267] The Commission observed that self-regulatory organizations ''play an important role in assuring that their listed issuers establish good governance practices,'' and concluded that the proposed rule changes would secure an ''objective oversight role'' for issuers' boards of directors, and ''foster greater transparency, accountability, and objectivity'' in that role.'' [268] Along the same lines, in approving Nasdaq's application for registration as a national securities exchange, the Commission found Nasdaq's rules governing the independence of members of boards and certain committees to be consistent with Section 6(b)(5) of the Act because they advanced the ''interests of shareholders'' in ''greater transparency, accountability, and objectivity'' in oversight and decision-making by corporate boards.[269] Nasdaq proposes to promote accountability in corporate decision-making by requiring companies who do not have at least two Diverse directors on their board to provide investors with a public explanation of the board's reasons for not doing so under Rule 5605(f)(3).

Nasdaq believes it is critical to the detection and prevention of fraudulent and manipulative acts and practices to have directors on the board who are willing to critically question management and air dissenting views. Nasdaq believes that boards comprised of directors from Diverse backgrounds enhance investor confidence by ensuring that board deliberations consider the perspectives of more than one demographic group, leading to robust dialogue and better decision making. However, Nasdaq recognizes that directors may bring diverse perspectives, skills and experiences to the board, notwithstanding that they have similar attributes. Nasdaq therefore believes it is in the public interest to permit a company that chooses not to meet the diversity objectives of Rule 5605(f)(2) to explain why it does not, in accordance with Rule 5605(f)(3)—for example, if it believes that defining diversity more broadly than Nasdaq, for example by considering national origin, veteran status and disabilities, brings a wide range of perspectives and experiences to the board. Nasdaq believes such disclosure will provide investors with a better understanding of the company's philosophy regarding diversity. This would better inform the investment community and enable more informed analyses of, and conversations with, companies. Therefore, Nasdaq believes satisfying Rule 5605(f)(2) through disclosure pursuant to Rule 5605(f)(3) is consistent with Section 6(b)(5) of the Act because it advances the ''interests of shareholders'' in ''greater transparency, accountability, and objectivity'' of boards and their decision-making processes.[270] In addition, as discussed further in Section II.A.2.II.c (*Promotes Investor Protection and the Public Interest*) below, Nasdaq believes that the proposed diversity requirement could help to reduce information asymmetry, and thereby reduce the risk of insider trading or other opportunistic insider behavior.

c. Promotes Investor Protection and the Public Interest

Nasdaq has found substantial evidence that board diversity is positively associated with more transparent public disclosures and higher quality financial reporting, thereby promoting investor protection. Specifically, studies have concluded that companies with gender-diverse boards are associated with more transparent public disclosures and less information asymmetry, leading to stock prices that better reflect public information. Gul, Srinidhi & Ng (2011) found that ''gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the

[261] *Id.* at 24–25; *see also* Shecter, *supra* note 61 (quoting Wahid as saying that ''[i]f you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds. . .. If we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective.'').

[262] *See* Abbott et al., *supra* note 58, at 607.

[263] *Id.* at 610.

[264] *Id.* at 613 (''The previously discussed lines of research lead us to form our hypothesis. In summary, restatements may stem from error or fraud. In either instance, the internal control system (to which the board of directors contributes by setting the overall tone at the top) has failed to detect or prevent a misstatement. Ineffective internal controls may stem from insufficient questioning of assumptions underlying financial reporting, inadequate attention to the internal control systems, or insufficient support for the audit committee's activities.'').

[265] *See* Dallas, *supra* note 76, at 1391.

[266] *See* Proxy Disclosure Enhancements, *supra* note 73, 74 FR at 68,355.

[267] *See* Order Approving Proposed Rule Changes, 68 FR at 64,161.

[268] *Id.* at 64, 175.

[269] *See* In re Nasdaq Stock Market, 71 FR 3550, 3565 (Jan. 23, 2006). *See also* 68 FR 18,788, 18,815 (April 16, 2003) (in adopting Rule 10A–3, setting standards for the independence of audit committee members, the Commission concluded that such standards would ''enhance the quality and accountability of the financial reporting process and may help increase investor confidence, which implies increased efficiency and competitiveness of the U.S. capital markets'').

[270] *Id.*

incentives for private information collection in small firms.'' [271] Bravo and Alcaide-Ruiz (2019) found a positive association between women on the audit committee with financial or accounting expertise and the voluntary disclosure of forward-looking information.[272] Abad et al. (2017) concluded that companies with gender-diverse boards are associated with lower levels of information asymmetry, suggesting that ''the policies recently implemented in several European countries to increase the presence of female directors in company boards could have beneficial effects on stock markets by reducing the risk of informed trading and enhancing stock liquidity.'' [273]

Nasdaq believes that one consequence of information asymmetry is that insiders may engage in opportunistic behavior prior to a public announcement of financial results and before the market incorporates the new information into the company's stock price. This can result in unfair gains or an avoidance of losses at the expense of shareholders who did not have access to the same information. This may exacerbate the principal-agent problem, in which the interests of a company's board and shareholders are not aligned. Lucas-Perez et al. (2014) found that board gender diversity is positively associated with linking executive compensation plans to company performance,[274] which may be an effective mechanism to deter opportunistic behavior by management and better align their interests with those of their company's shareholders.[275]

Another concern is that ''[w]hen information asymmetry is high, stakeholders do not have sufficient resources, incentives, or access to relevant information to monitor managers' actions, which gives rise to the practice of earnings management.'' [276] Earnings management ''is generally defined as the practice of using discretionary accounting methods to attain desired levels of reported earnings.'' [277] Manipulating earnings is particularly concerning to investors because ''[i]f users of financial data are 'misled' by the level of reported income, then investors' allocation of resources may be inappropriate when based on the financial statements provided by management,'' [278] thereby undermining the efficacy of the capital formation process for investors who rely on such information to make informed investment and voting decisions.

Gull et al. (2018) [279] observe that overseeing management is a crucial component of investor protection, particularly with regard to earnings management:

> The role of the board of directors and board characteristics (*i.e.* board independence and gender diversity) is usually associated with the protection of shareholder interests. . .. This role is particularly crucial with regard to the issue of earnings management, in that one of the responsibilities of boards is to monitor management.[280]

The authors of that study found that the presence of female audit committee members with business expertise is associated with a lower magnitude of earnings management. Srinidhi, Gul and Tsui (2011) observed that better oversight of management combined with lower information asymmetry leads to better earnings quality. They noted that ''[e]arnings quality is an important outcome of good governance demanded by investors and therefore its improvement constitutes an important objective of the board.'' [281] They found that companies with women on the board, specifically on the audit committee, exhibit ''higher earnings quality'' and ''better reporting discipline by managers.'' [282] They concluded that ''including female directors on the board and the audit committee are plausible ways of improving the firm's reporting discipline and increasing investor confidence in financial statements.'' [283]

Chen, Eshleman and Soileau (2016) suggested that the relationship between gender diversity and higher earnings quality observed by Srinidhi, Gul and Tsui (2011) is ultimately driven by reduced internal control weaknesses, noting that ''prior literature has established a negative relationship between internal control weaknesses and earnings quality.'' [284] Internal control over financial reporting are procedures designed ''to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP.'' [285] Weaknesses in internal controls can ''lead to poor financial reporting quality'' and ''more severe insider trading'' [286] or failure to detect a material misstatement. According to the PCAOB:

> A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.[287]

A material misstatement can occur ''as a result of some type of inherent risk, whether fraud or error (*e.g.,* management's aggressive accounting practices, erroneous application of GAAP).'' [288] The failure to prevent or detect a material misstatement before financial statements are issued can require the company to reissue its financial statements and potentially face costly shareholder litigation. Chen et al. found that having at least one woman on the board (regardless of whether or not she is on the audit committee) ''may lead [a] to reduced likelihood of material weaknesses [in internal control over financial reporting],'' [289] and Abbott, Parker and Persley (2012) found ''a significant association between the presence of at least one woman on the board and a lower likelihood of [a material financial] restatement.'' [290] Notably, while the Sarbanes-Oxley Act (''SOX'') implemented additional measures to ensure that a company has robust internal controls, the findings of Abbott et al. were consistent among a sample of pre- and post-SOX restatements, suggesting that ''an additional, beneficial layer of independence in group decision-making is associated with gender diversity.'' [291]

Nasdaq believes that the proposal to require listed companies to have at least two Diverse directors under Rule 5605(f) could help to lower information asymmetry and reduce the risk of insider trading or other opportunistic insider behavior, which would help to increase stock price informativeness and enhance stock liquidity, thereby protecting investors and promoting capital formation and efficiency. Nasdaq

[271] *See* Gul et al., *supra* note 66, at 2.

[272] *See* Bravo and Alcaide-Ruiz, *supra* note 56, at 151.

[273] *See* Abad et al., *supra* note 67, at 202.

[274] *See* Lucas-Perez et al., *supra* note 69.

[275] *Id.*

[276] *See* Vernon J. Richardson, *Information Asymmetry and Earnings Management: Some Evidence,* 15 Rev. Quantitative Fin. and Acct. 325 (2000).

[277] *See* Gull et al., *supra* note 55, at 2.

[278] *Id.*

[279] *See generally id.*

[280] *Id.* at 6 (citations omitted).

[281] *See* Srinidhi et al., *supra* note 50, at 1638.

[282] *Id.* at 1612.

[283] *Id.*

[284] *See* Chen et al., *supra* note 64, at 18.

[285] *See* Public Company Accounting Oversight Board, *Auditing Standard No. 5: Appendix A,* A5 available at: *https://pcaobus.org/oversight/standards/archived-standards/details/Auditing_Standard_5_Appendix_A.*

[286] *See* Chen et al., *supra* note 64, at 12.

[287] *See* Public Company Accounting Oversight Board, *supra* note 285, at A7.

[288] *See* Abbott et al., *supra* note 58, at 609–10.

[289] *See* Chen et al., *supra* note 64, at 18.

[290] *See* Abbott et al., *supra* note 58, at 607.

[291] *Id.* at 609.

believes that information asymmetry could also be reduced by permitting companies to satisfy Rule 5605(f)(2) by publicly disclosing their reasons for not meeting its diversity objectives in accordance with Rule 5605(f)(3), because the requirement will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, which will further protect investors and promote capital formation and efficiency.

Moreover, Nasdaq believes that proposed Rule 5605(f) could foster more transparent public disclosures, higher quality financial reporting, and stronger internal control over financial reporting and mechanisms to monitor management. This could be particularly beneficial for Smaller Reporting Companies that are not subject to the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over financial reporting, thereby promoting investor protection.

Nasdaq believes that the body of research on the relationship between economic performance and board diversity summarized under Section II.A.1.II.a above provides substantial evidence supporting the conclusion that board diversity does not have adverse effects on company financial performance, and therefore Nasdaq believes the proposal will not negatively impact capital formation, competition or efficiency among its public companies.[292] Nasdaq considered that some studies on gender diversity alone have had mixed results,[293] and that the U.S. GAO (2015) and Carter et al. (2010) concluded that the mixed results are due to differences in methodologies, data samples and time periods.[294] This is not the first time Nasdaq has considered whether, on balance, various studies finding mixed results related to board composition and company performance are sufficient rationale to propose a listing rule. For example, in 2003, notwithstanding the mixed results of studies regarding the relationship between company performance and board independence,[295] Nasdaq adopted listing rules requiring a majority independent board that were ''intended to enhance investor confidence in the companies that list on Nasdaq.'' [296] In its Approval Order, the SEC noted that ''[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets;'' the Commission concluded that the independence rules would secure an ''objective oversight role'' for issuers' boards, and ''foster greater transparency, accountability, and objectivity'' in that role.[297] Nasdaq believes this reasoning applies to the current proposed rule as well. Even without clear consensus among studies related to board diversity and company performance, the heightened focus on corporate board diversity by investors demonstrates that investor confidence is undermined when data on board diversity is not readily available and when companies do not explain the reasons for the apparent absence of diversity on their boards.[298] Legislators are increasingly taking action to encourage corporations to diversify their boards and improve diversity disclosures.[299] Moreover, during its discussions with stakeholders, Nasdaq found consensus across every constituency that there is inherent value in board diversity. Lastly, it has been a longstanding principle that ''Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process.'' [300]

For all the foregoing reasons, Nasdaq believes that proposed Rule 5605(f) will promote investor protection and the public interest by enhancing investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two Diverse directors on their boards or by explaining their rationale for not meeting that objective. To the extent a company chooses not to meet the diversity objectives of Rule 5605(f)(2), Nasdaq believes that the proposal will provide investors with additional disclosure about the company's reasons for doing so under Rule 5605(f)(3). For example, the company may choose to disclose that it does not meet the diversity objectives of Rule 5605(f)(2) because it is subject to an alternative standard under state or foreign laws and has chosen to satisfy that diversity objective instead. On the other hand, many firms may strive to achieve even greater diversity than the objectives set forth in our proposed rule. Nasdaq believes that providing such flexibility and clear disclosure where the company determines to follow a different path will improve the quality of information available to investors who rely on this information to make informed investment and voting decisions, thereby promoting capital formation and efficiency, and further promoting the public interest.

d. Not Designed to Permit Unfair Discrimination Between Customers, Issuers, Brokers, or Dealers

Nasdaq believes that proposed Rule 5605(f) is not designed to permit unfair discrimination among companies because it requires all companies subject to the rule to have at least two Diverse directors or explain why they do not. Further, the proposal requires at least one of the two Diverse directors to be an individual who self-identifies as Female. While the proposal provides different requirements for the second Diverse director among Smaller Reporting Companies, Foreign Issuers and other companies, Nasdaq believes that the rule is not designed to permit unfair discrimination among companies. In all cases, a company can choose to meet the diversity objectives of the entire rule or to satisfy only certain elements of the rule. Further, the proposed rule does not limit board sizes—if a board chooses to nominate a Diverse individual to the board to meet the diversity objectives of the proposed rule, it is not precluded from also nominating a non-Diverse director for an additional board seat.

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[292] *See* Alexandre Di Miceli and Angela Donaggio, *Women in Business Leadership Boost ESG Performance: Existing Body of Evidence Makes Compelling Case,* 42 International Finance Corporation World Bank Group, Private Sector Opinion at 11 n.15 (2018), available at: *https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/private+sector+opinion/women+in+business+leadership+boost+esg+performance* (''The overwhelming majority of empirical studies conclude that a higher ratio of women in business leadership does not impair corporate performance (virtually all studies find positive or non-statistically significant results)''). *See also* Wahid, *supra* note 59, at 6 (suggesting that ''at a minimum, gender diversity on corporate boards has a neutral effect on governance quality, and at best, it has positive consequences for boards' ability to monitor firm management'').

[293] *See, e.g.,* Pletzer et al., *supra* note 38; Post and Byron, *supra* note 39; Adams and Ferreira, *supra* note 42.

[294] *See* GAO Report, *supra* note 44, at 5 (''Some research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not. These mixed results depend, in part, on differences in how financial performance was defined and what methodologies were used''); Carter (2010), *supra* note 40, at 400 (observing that the different ''statistical methods, data, and time periods investigated vary greatly so that the results are not easily comparable.'').

[295] *See supra* note 45.

[296] *See* Order Approving Proposed Rule Changes, 68 FR at 64,161.

[297] *Id.* at 64,176.

[298] *See supra* notes 4 and 8.

[299] *See supra* note 112.

[300] *See* Nasdaq Rulebook, Rule 5101.

i. Rule 5605(f)(2)(B): Foreign Issuers

Similar to all other companies subject to Rule 5605(f), the proposal requires all Foreign Issuers to have, or explain why they do not have, at least two Diverse directors, including one director who self-identifies as Female. However, Nasdaq proposes to provide Foreign Issuers with additional flexibility with regard to the second Diverse director. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. While the proposal provides a different requirement for the second Diverse director for Foreign Issuers, Nasdaq believes it is not designed to permit unfair discrimination between Foreign Issuers and other companies because it recognizes that the unique demographic composition of the United States, and its historical marginalization of Underrepresented Minorities and the LGBTQ+ community, may not extend to all countries outside of the United States. Further, Nasdaq believes that it is challenging to apply a consistent definition of minorities to all countries globally because ''[t]here is no internationally agreed definition as to which groups constitute minorities.'' [301] Similarly, ''there is no universally accepted international definition of indigenous peoples.'' [302] Rather, the United Nations *Declaration on the Rights of Indigenous Peoples* recognizes ''that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.'' [303] Accordingly, Nasdaq believes that it is not unfairly discriminatory to allow an alternative mechanism for Foreign Issuers to satisfy Rule 5605(f)(2) in recognition that the U.S.-based EEOC definition of Underrepresented Minorities is not appropriate for every Foreign Issuer. In addition, Foreign Issuers have the ability to satisfy Rule 5605(f)(2)(B) by explaining that they do not satisfy this alternative definition. Similarly, any company that is not a Foreign Issuer, but that prefers the alternative definition available for Foreign Issuers, could follow Rule 5605(f)(2)(B) and disclose its reasons for doing so.

Under the proposal, Foreign Issuer means (a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)) or (b) a company that (i) is considered a ''foreign issuer'' under Rule 3b–4(b) under the Act, and (ii) has its principal executive offices located outside of the United States. For example, a company that is considered a ''foreign issuer'' under Rule 3b–4(b) under the Act and has its principal executive offices located in Ireland would qualify as a Foreign Issuer for purposes of Rule 5605(f)(2), even if it is not considered a Foreign Private Issuer under Nasdaq or SEC rules.

Nasdaq recognizes that Foreign Issuers may be located in jurisdictions that impose privacy laws limiting or prohibiting self-identification questionnaires, particularly as they relate to race or ethnicity. In such countries, a company may not be able to determine each director's self-identified Diverse attributes due to restrictions on the collection of personal information. The company may instead publicly disclose pursuant to Rule 5605(f)(3) that ''Due to privacy laws in the company's home country jurisdiction limiting its ability to collect information regarding a director's self-identified Diverse attributes, the company is not able to determine that it has two Diverse directors as set forth under Rule 5605(f)(2)(B)(ii).''

ii. Rule 5605(f)(2)(C): Smaller Reporting Companies

While the proposal provides a different requirement for the second Diverse director for Smaller Reporting Companies, Nasdaq believes that this distinction is not designed to permit unfair discrimination among companies. Nasdaq has designed the proposed rule to ensure it does not have a disproportionate economic impact on Smaller Reporting Companies by imposing undue costs or burdens. Nasdaq recognizes that Smaller Reporting Companies, especially pre-revenue companies that depend on the capital markets to fund ground-breaking research and technological advancements, may not have the resources to compensate an additional director or engage a search firm to find director candidates outside of the directors' traditional networks. Nasdaq believes that this is a reasonable basis to distinguish Smaller Reporting Companies from other companies subject to the rule.

Smaller Reporting Companies already are provided certain exemptions from Nasdaq's listing rules. For example, under Rule 5605(d)(3), Smaller Reporting Companies must have a compensation committee comprised of at least two independent directors and a formal written compensation committee charter or board resolution that specifies the committee's responsibilities and authority, but such companies are not required to grant authority to the committee to retain or compensate consultants or advisors or consider certain independence factors before selecting such advisors, consistent with Rule 10C–1 of the Act.[304] In its approval order, the SEC concluded as follows:

> The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for Nasdaq to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further . . . in view of the potential additional costs of an annual review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.[305]

The Commission also makes accommodations for Smaller Reporting Companies based on their more limited resources, allowing them to comply with scaled disclosure requirements in certain SEC reports rather than the more rigorous disclosure requirements for larger companies. For example, Smaller Reporting Companies are not required to include a compensation discussion and analysis in their proxy or Form 10–K describing the material elements of the compensation of its named executive officers.[306] Eligible Smaller Reporting Companies also are relieved from the SOX 404(b) requirement to obtain an independent auditor's attestation of management's assessment of the effectiveness of internal control over

[301] *See* United Nations, *Minority Rights: International Standards and Guidance for Implementation* 2 (2010), available at: *https://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf. See also* G.A. Res. 47/135. art. 1.1 (Dec. 18, 1992) (''States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.''). The preamble to the Declaration also ''[r]eaffirm[s] that one of the basic aims of the United Nations, as proclaimed in the Charter, is to promote and encourage respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion.''

[302] *See* United Nations, *Minority Rights, supra* note 301, at 3.

[303] *See* G.A. Res. 61/295 (Sept. 13, 2007).

[304] *See* Nasdaq Rulebook, Rule 5605(d)(3).

[305] *See* Order Granting Accelerated Approval of Proposed Rule Change, 78 FR 4,554, 4,567 (Jan. 22, 2013).

[306] *See* 17 CFR 229.402(l).

financial reporting.[307] In each case, companies may choose to comply with the more rigorous requirements in lieu of relying on the exemptions.

Any company that is not a Smaller Reporting Company, but prefers the alternative rule available for Smaller Reporting Companies, could follow Rule 5605(f)(2)(C) and disclose their reasons for doing so. As such, Nasdaq believes that the proposed alternative rule for Smaller Reporting Companies is not designed to, and does not, unfairly discriminate among companies. Lastly, Nasdaq believes that Rule 5605(f)(2)(C) is not designed to permit unfair discrimination among companies because it requires Smaller Reporting Companies to have at least one director who self-identifies as Female, similar to other companies subject to Rule 5065(f).

iii. Rule 5605(f)(3): Public Disclosure of Non-Diverse Board

Under proposed Rule 5605(f)(3), if a company determines not to meet the diversity objectives of Rule 5605(f) in its entirety, it must specify the applicable requirements of the Rule and explain its reasons for not having at least two Diverse directors. Nasdaq designed the proposal to avoid unduly burdening competition or efficiency, or conflicting with existing securities laws, by providing all companies subject to Rule 5605(f) with the option to make the public disclosure required under Rule 5605(f)(3) in the company's proxy statement or information statement for its annual meeting of shareholders or, alternatively on the company's website, provided that the company submits a URL link to such disclosure to Nasdaq through the Listing Center no later than 15 calendar days after the company's annual shareholder meeting. Nasdaq believes Rule 5605(f)(3) is not designed to permit unfair discrimination among companies because the proposed rule provides all companies subject to Rule 5605(f) the option to disclose an explanation rather than meet the diversity objectives of Rule 5605(f)(2).

Certain federal securities laws similarly permit companies to satisfy corporate governance requirements through disclosure of reasons for not meeting the applicable requirement. For example, under Regulation S–K, Item 407 requires a company to disclose whether or not its board of directors has determined that the company has at least one audit committee financial expert. If a company does not have a financial expert on the audit committee, it must provide an explanation.[308] Item 406 requires a company to disclose whether it has adopted a written code of ethics that applies to the chief executive officer and senior financial or accounting officers. If a company has not adopted such a code of ethics, it must disclose the reasons why not.[309] Item 402 regarding pay ratio disclosure defines how total compensation for employees should be calculated, but permits companies to use a different measure as long as they explain their approach.[310]

Furthermore, Nasdaq rules and SEC guidance already recognize that website disclosure can be a method of disseminating information to the public. For example, Nasdaq listing rules permit companies to provide website disclosures related to third party director compensation,[311] foreign private issuer home country practices,[312] and reliance on the exception relating to independent compensation committee members.[313] The SEC has recognized that ''[a] company's website is an obvious place for investors to find information about the company'' [314] and permits companies to make public disclosure of material information through website disclosures if, among other things, the company's website is ''a recognized channel of distribution of information.'' [315]

iv. Rule 5605(f)(4): Exempt Companies

Under proposed Rule 5605(f)(4), Nasdaq proposes to exempt the following types of companies from the requirements of Rule 5605(f) (defined as ''Exempt Companies''): acquisition companies listed under IM–5101–2; asset-backed issuers and other passive issuers (as set forth in Rule 5615(a)(1)); cooperatives (as set forth in Rule 5615(a)(2)); limited partnerships (as set forth in Rule 5615(a)(4)); management investment companies (as set forth in Rule 5615(a)(5)); issuers of non-voting preferred securities, debt securities and Derivative Securities (as set forth in Rule 5615(a)(6)); and issuers of securities listed under the Rule 5700 Series. Each of the types of Exempt Companies either has no board of directors, lists only securities with no voting rights towards the election of directors, or is not an operating company, and the holders of the securities they issue do not expect to have a say in the composition of their boards. As such, Nasdaq believes the proposal is not designed to permit unfair discrimination by excluding Exempt Companies from the application of proposed Rule 5605(f). These companies already are exempt from certain of Nasdaq's corporate governance standards related to board composition, as described in Rule 5615.

v. Rule 5605(f)(5): Phase-in Period

Proposed Rule 5605(f)(5)(A) will allow any newly listing company that was not previously subject to a substantially similar requirement of another national securities exchange one year from the date of listing to satisfy the requirements of Rule 5605(f). Proposed Rule 5605(f)(5)(B) also will allow any company that ceases to be a Foreign Issuer, a Smaller Reporting Company or an Exempt Company one year from the date that the company no longer qualifies as a Foreign Issuer, a Smaller Reporting Company or an Exempt Company, respectively, to satisfy the requirements of Rule 5605(f). This phase-in period will apply after the end of the transition period provided in Rule 5605(f)(7).

Nasdaq believes this approach is not designed to permit unfair discrimination because it provides all companies that become newly subject to the rule the same time period within which to comply. In addition, this approach is similar to other phase-in periods granted to companies listing on or transferring to Nasdaq. For example, Rule 5615(b)(1) provides a company listing in connection with its initial public offering one year to fully comply with the compensation and nomination committee requirements of Rules 5605(d) and (e), and the majority independent board requirement of Rule 5605(b). Similarly, SEC Rule 10A–3(b)(1)(iv)(A) allows a company up to one year from the date its registration statement is effective to fully comply with the applicable audit committee composition requirements. Nasdaq Rule 5615(b)(3) provides a one-year timeframe for compliance with the board composition requirements for companies transferring from other listed markets that do not have a substantially similar requirement.

[307] *See* Accelerated Filer and Large Accelerated Filer Definitions, 85 FR 17,178 (March 26, 2020).

[308] *See* 17 CFR 229.407(d)(5).

[309] *Id.* § 229.406(a).

[310] *Id.* § 229.402.

[311] *See* Nasdaq Rulebook, Rule 5250(b)(3)(A).

[312] *Id.,* Rule 5615(a)(3)(B) and IM–5615–3.

[313] *Id.,* Rules 5605(d)(2)(B) (non-independent compensation committee member under exceptional and limited circumstances) and 5605(e)(3) (non-independent nominations committee member under exceptional and limited circumstances).

[314] *See* Commission Guidance on the Use of Company websites, 73 FR 45,862, 45,864 (Aug. 7, 2008).

[315] *Id.* at 45,867.

vi. Rule 5605(f)(7): Effective Dates/ Transition

Under proposed Rule 5605(f)(7), each company must have, or explain why it does not have, one Diverse director no later than two calendar years after the Approval Date,[316] and two Diverse directors no later than (i) four calendar years after the Approval Date for companies listed on the NGS or NGM tiers, or (ii) five calendar years after the Approval Date for companies listed on the NCM tier.

Nasdaq believes this approach is not designed to permit unfair discrimination because it recognizes that companies listed on the Nasdaq Capital Market may not have the resources necessary to compensate an additional director or engage a search firm to search for director candidates outside of the directors' traditional networks. Therefore, Nasdaq believes it is in the public interest to provide such companies with one additional year to meet the diversity objectives of Rule 5605(f), should they choose to do so. Nasdaq notes that all companies may choose to follow a timeframe applicable to a different market tier, provided they publicly describe their explanation for doing so. They also may construct their own timeframe for meeting the diversity objectives of Rule 5605(f), provided they publicly disclose their reasons for not abiding by Nasdaq's timeframe.

e. Not Designed to Regulate by Virtue of any Authority Conferred by the Act Matters Not Related to the Purposes of the Act or the Administration of the Exchange

Nasdaq believes that the proposal is not designed to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.[317] The proposal relates to the Exchange's corporate governance standards for listed companies. As discussed above, ''[t]he Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, enhance investor confidence in the securities markets.'' [318] And because ''it is not always feasible to define . . . every practice which is inconsistent with the public interest or with the protection of investors,'' the Act leaves to SROs ''the necessary work'' of rulemaking pursuant to Section 6(b)(5).[319]

Nasdaq recognizes that U.S. states are increasingly proposing and adopting board diversity requirements, and because corporations are creatures of state law, some market participants may believe that such regulation is best left to states. However, Nasdaq considered that certain of its listing rules related to corporate governance currently relate to areas that are also regulated by states. For example, states impose standards related to quorums [320] and shareholder approval of certain transactions,[321] which also are regulated under Nasdaq's listing rules.[322] Nasdaq has adopted rules relating to such matters to ensure uniformity of such rules among its listed companies. Similarly, Nasdaq believes that the proposed rule will create uniformity among listed companies by helping to assure investors that all non-exempt companies have at least two Diverse directors on their board or publicly describe why they do not.

Further, Nasdaq believes the proposal will enhance investor confidence that listed companies that have two Diverse directors are considering the perspectives of more than one demographic group, leading to robust dialogue and better decision making, as well as the other corporate governance benefits of diverse boards discussed above in Section II.A.1.II. To the extent companies choose to disclose their reasons for not meeting the diversity objectives of Rule 5605(f)(2) pursuant to Rule 5605(f)(3), Nasdaq believes that such disclosure will improve the quality of information available to investors who rely on this information to make an informed voting decision, thereby promoting capital formation and efficiency. It has been the Exchange's longstanding principle that ''Nasdaq stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process.'' [323]

In addition, as discussed in Section II.A.1.I, in passing Section 342 of the Dodd-Frank Act, Congress recognized the need to respond to the lack of diversity in the financial services industry, and the Standards designed by the Commission and other financial regulators provide a framework for addressing that industry challenge. The Standards themselves identify several focus areas, including the importance of ''Organizational Commitment,'' which speaks to the critical role of senior leadership—including boards of directors—in promoting diversity and inclusion across an organization. In addition, like the proposed rule, the Standards also consider ''Practice to Promote Transparency,'' and recognize that transparency is a key component of any diversity initiative. Specifically, the Standards provide that the ''transparency of an entity's diversity and inclusion program promotes the objectives of Section 342,'' and also is important because it provides the public with necessary information to assess an entity's diversity policies and practices.[324]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Nasdaq reviewed requirements related to board diversity in two dozen foreign jurisdictions, and almost every jurisdiction imposes diversity-focused requirements on listed companies, either through a securities exchange, financial regulator or the government. Nasdaq competes for listings globally, including in countries that have implemented a more robust regulatory reporting framework for diversity and ESG disclosures. Currently in the U.S., the Long Term Stock Exchange (''LTSE''), which includes a number of sponsors which have investment businesses, has communicated to institutional investors that it that it seeks to distinguish itself by focusing on corporate governance, including, for example, diversity and inclusion. Under Rule 14.425, companies listed on LTSE must adopt and publish a long-term stakeholder policy that explains, among other things, ''the Company's approach to diversity and inclusion.'' [325]

[316] The ''Approval Date'' is the date that the SEC approves the proposed rule.

[317] *See* 15 U.S.C. 78f(b)(5).

[318] *See* Order Approving Proposed Rule Changes, 68 FR at 64,161.

[319] *See Heath* v. *SEC,* 586 F.3d 122, 132 (2d Cir. 2009) (citing *Avery* v. *Moffat,* 55 N.Y.S.2d 215, 228 (Sup. Ct. 1945)).

[320] *See, e.g.,* 8 Del. Code § 216 (providing that a quorum at a shareholder's meeting shall consist of no less than ⅓ of the shares entitled to vote at such meeting).

[321] *See, e.g., id.* §§ 251, 271 (providing that shareholder approval by a majority of the outstanding voting shares entitled to vote is required for mergers and the sale of all or substantially all of a corporation's assets).

[322] *See, e.g.,* Nasdaq Rulebook, Rules 5620(c) and 5635(a).

[323] *Id.,* Rule 5101.

[324] Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 FR 33,016 (June 10, 2015).

[325] *See* Long-Term Stock Exchange Rule Book, Rule 14.425.

I. Board Statistical Disclosure

The Exchange does not believe that proposed Rule 5606 will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the adoption of Rule 5606 will not impose any undue burden on competition among listed companies for the reasons set forth below.

With a few exceptions, all companies would be required to make the same disclosure of their board-level statistical information. The average board size of a company that is currently listed on the Exchange is eight directors. Although a company would be required to disclose its board-level statistical data, directors may choose to opt out rather than reveal their diversity characteristics to their company. A company would identify such directors in the ''Undisclosed'' category. For directors who voluntarily disclose their diversity characteristics, the company would collect their responses and disclose the information in either the company's proxy statement, information statement of shareholder meeting or on the company's website, using Nasdaq's required format. While the time and economic burden may vary based on a company's board size, Nasdaq does not believe there is any significant burden associated with gathering, preparing and reporting this data. Therefore, Nasdaq believes that there will be a *de minimis* time and economic burden on listed companies to collect and disclose the diversity statistical data.

Some investors value demographic diversity, and list it as an important factor influencing their director voting decisions.[326] Investors have stated that consistent data would make its collection and analysis easier and more equitable for investors that are not large enough to demand or otherwise access individualized disclosures.[327] Therefore, Nasdaq believes that any burden placed on companies to gather and disclose their board-level diversity statistics is counterbalanced by the benefits that the information will provide to a company's investors.

Moreover, as discussed above, most listed companies are required to submit an annual EEO–1 Report, which provides statistical data related to race and gender data among employees similar to the data required under proposed Rule 5606(a). Because most companies are already collecting similar information annually to satisfy their EEOC requirement, Nasdaq does not believe that adding directors to the collection will place a significant burden on these companies. Additionally, the information requested from Foreign Issuers is limited in scope and therefore does not impose a significant burden on them.

Nasdaq faces competition in the market for listing services. Proposed Rule 5606 reflects that competition, but it does not impose any burden on competition with other exchanges. As discussed above, investors have made clear their desire for greater transparency into public companies' board-level diversity as it relates to gender identity, race, and ethnicity. Nasdaq believes that the proposed rule will enhance the competition for listings. Other exchanges can set similar requirements for their listed companies, thereby increasing competition to the benefit of those companies and their shareholders. Accordingly, Nasdaq does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

II. Diverse Board Representation or Explanation

Nasdaq believes that proposed Rule 5605(f) will not impose burdens on competition among listed companies because the Exchange has constructed a framework for similarly-situated companies to satisfy similar requirements (*i.e.,* Foreign Issuers, Smaller Reporting Companies and other companies), and has provided all companies with the choice of satisfying the requirements of Rule 5605(f)(2) by having at least two Diverse directors, or by explaining why they do not. Nasdaq believes that this will avoid imposing undue costs or burdens on companies that, for example, cannot afford to compensate an additional director or believe it is not appropriate, feasible or desirable to meet the diversity objectives of Rule 5605(f) based on the company's particular circumstances (for example, the company's size, operations or current board composition). Rather than requiring a company to divert resources to compensate an additional director, and place the company at a competitive disadvantage with its peers, the rule provides the flexibility for such company to explain why it does not meet the diversity objective.

The cost of identifying director candidates can range from nothing or a nominal fee (via personal, work or school-related networks, or board affinity organizations, as well as internal research by the corporate secretary's team) to amounts that can vary widely depending on the specific search firm and the size of the company. Some industry observers estimate board searches for independent directors cost about one-third of a director's annual compensation, while others estimate it costs between $75,000 and $150,000. The underlying figures vary; for example, one search firm generally charges $25,000 to $50,000. Nasdaq observes that total annual director compensation can range widely; median director pay is estimated at $134,000 for Russell 3000 companies and $232,000 for S&P 500 companies. Moreover, there is a wider range of underlying compensation amounts. For example, Russell 3000 directors may receive approximately $32,600 (10th percentile), or up to $250,000 (90th percentile) or more. S&P 500 directors may receive approximately $100,000 (10th percentile) or up to $310,000 (90th percentile) or more.[328] Most, if not all, of these costs would be borne in any event in the search for new directors regardless of the proposed rule. While the proposed rule might lead some companies to search for director candidates outside of already established networks, the incremental costs of doing so would be tied directly to the benefit of a broader search.

To reduce costs for companies that do not currently meet the diversity objectives of Rule 5605(f)(2), Nasdaq is proposing to provide listed companies that have not yet met their diversity objectives with free access to a network of board-ready diverse candidates and a tool to support board evaluation, benchmarking and refreshment. This offering is designed to ease the search for diverse nominees and reduce the costs on companies that choose to meet the diversity objectives of Rule 5605(f)(2). Nasdaq is contemporaneously submitting a rule filing to the Commission regarding the provision of such services. Nasdaq also plans to publish FAQs on its Listing Center to provide guidance to companies on the application of the proposed rules, and to establish a dedicated mailbox for companies and their counsel to email additional questions to Nasdaq regarding the application of the proposed rule. Nasdaq believes that these services will

[326] *See* Hunt et al., *supra* note 26.

[327] *See* Petition for Rulemaking, *supra* note 123, at 2.

[328] Total annual director compensation varies by compensation elements and structure as well as amount, which is generally based on the size, sector, maturity of the company, and company specific situation. *See* Mark Emanuel et al., Semler Brossy and the Conference Board, *Director Compensation Practices in the Russell 3000 and S&P 500* (2020 ed.), available at *https://conferenceboard.esgauge.org/directorcompensation/report.*

help to ease the compliance burden on companies whether they choose to meet the listing rule's diversity objectives or provide an explanation for not doing so.

Nasdaq also has structured the proposed rule to provide companies with at least four years from the Approval Date to satisfy Rule 5605(f)(2) so that companies do not incur immediate costs striving to meet the diversity objectives of Rule 5605(f)(2). Nasdaq also has reduced the compliance burden on Smaller Reporting Companies and Foreign Issuers by providing them with additional flexibility when satisfying the requirement related to the second Diverse director. Smaller Reporting Companies could satisfy the proposed diversity objective to have two Diverse directors under Rule 5605(f)(2)(C) with two Female directors. Like other companies, Smaller Reporting Companies also could satisfy the second director objective by including an individual who self-identifies as an Underrepresented Minority or a member of the LGBTQ+ community. Foreign Issuers could satisfy the second director objective by including another Female director, or an individual who self-identifies as LGBTQ+ or an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Nasdaq has further reduced the compliance burdens on companies listed on the Nasdaq Capital Market tier by providing them with five years from the Approval Date to satisfy Rule 5605(f)(2), recognizing that such companies may face additional challenges and resource constraints when identifying additional director nominees who self-identify as Diverse.

For the foregoing reasons, Nasdaq does not believe that proposed Rule 5605(f) will impose any burden on competition among issuers that is not necessary or appropriate in furtherance of the purposes of the Act. Further, Nasdaq does not believe the proposed rule will impose any burden on competition among listing exchanges. As described above, Nasdaq competes with other exchanges globally for listings, including exchanges based in jurisdictions that have implemented disclosure requirements related to diversity. Within the United States, LTSE requires listed companies to adopt and publish a long-term stakeholder policy that explains, among other things, ''the Company's approach to diversity and inclusion.'' [329] Other listing venues within the United States may propose to adopt rules similar to LTSE's requirements or the Exchange's proposal if they believe companies would prefer to list on an exchange with diversity-related listing standards.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–081 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–2020–081. 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–2020–081, and should be submitted on or before January 4, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[330]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–27091 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

[329] *See* Long-Term Stock Exchange Rule Book, Rule 14.425.

[330] 17 CFR 200.30–3(a)(12).

FEDERAL REGISTER

Vol. 85 Friday,
No. 239 December 11, 2020

Part VI

Securities and Exchange Commission

17 CFR Part 210
Qualifications of Accountants; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 210

[Release No. 33–10876; 34–90210; FR–88; IA–5613; IC–34052; File No. S7–26–19]

RIN 3235–AM63

Qualifications of Accountants

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is adopting amendments to update certain auditor independence requirements. These amendments are intended to more effectively focus the independence analysis on those relationships or services that are more likely to pose threats to an auditor's objectivity and impartiality.

DATES:

Effective date: June 9, 2021.

Compliance dates: See Section II.G for further information on transitioning to the final amendments.

FOR FURTHER INFORMATION CONTACT: Duc Dang, Senior Special Counsel, or Natasha Guinan, Chief Counsel, Office of the Chief Accountant, at (202) 551–5300; Alexis Cunningham, or Jenson Wayne, Assistant Chief Accountants, Chief Accountant's Office, Division of Investment Management, at (202) 551–6918, or Pamela K. Ellis, Senior Counsel, Brian McLaughlin Johnson, Assistant Director, Investment Company Regulation Office, or Sirimal R. Mukerjee, Branch Chief, Investment Adviser Regulation Office, Division of Investment Management, at (202) 551–6792, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 210.2–01 (''Rule 2–01'') of 17 CFR 210.01 *et seq.* (''Regulation S–X'').[1]

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I. Introduction

On December 30, 2019, the Commission proposed amendments to Rule 2–01 to update certain auditor independence requirements, including by focusing the requirements on those relationships and services that are more likely to threaten an auditor's objectivity and impartiality in light of current market conditions and industry practice.[2] Specifically, the Commission proposed amendments to the definitions of ''affiliate of the audit client,'' ''investment company complex,'' and ''audit and professional engagement period'' in Rule 2–01. The Commission also proposed amending requirements relating to certain loans or debtor-creditor relationships in 17 CFR 210.2–01(c)(1) (''Rule 2–01(c)(1)'') and the reference to ''substantial stockholders'' in 17 CFR 210.2–01(c)(3) (''Rule 2–01(c)(3)'' and the ''Business Relationships Rule''). Finally, the Commission proposed amendments to address inadvertent violations of the independence requirements as a result of mergers and acquisitions and to make certain miscellaneous updates.

The Commission has long recognized that an audit by an objective, impartial, and skilled professional contributes to both investor protection and investor confidence.[3] If investors do not perceive that the auditor is independent from the audit client, investors will derive less confidence from the auditor's report and the audited financial statements. As such, the Commission's auditor independence rule, as set forth in Rule 2–01, requires auditors [4] to be independent of their audit clients both ''in fact and in appearance.'' [5]

As the Commission noted in the Proposing Release, except for revisions made in connection with amendments required by the Sarbanes-Oxley Act of 2002 (''Sarbanes-Oxley Act'') [6] and the recent amendments related to certain debtor-creditor relationships,[7] many of the provisions from the 2000 Adopting Release have remained unchanged since adoption. The amendments we are adopting maintain the bedrock principle that auditors must be independent in fact and in appearance while improving the relevance of the Commission's auditor independence standards in light

[1] Hereinafter, all references to Rule 2–01 and any paragraphs included within the rule refer to Rule 2–01 of Regulation S–X.

[2] *Amendments to Rule 2–01, Qualifications of Accountants,* Release No. 33–10738, Dec. 30, 2019 [85 FR 2332 (Jan. 15, 2020)] (the ''Proposing Release'').

[3] *See Revision of the Commission's Auditor Independence Requirements,* Release No. 33–7919 (Nov. 21, 2000) [65 FR 76008 (Dec. 5, 2000)] (''2000 Adopting Release'').

[4] We use the terms ''accountants'' and ''auditors'' interchangeably in this release.

[5] *See* current Preliminary Note 1 to § 210.2–01 and 17 CFR 210.2–01(b) (''Rule 2–01(b)''). *See also United States* v. *Arthur Young & Co.,* 465 U.S. 805, 819 n.15 (1984) (''It is therefore not enough that financial statements be accurate; the public must also perceive them as being accurate. Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional.'').

[6] *See Strengthening the Commission's Requirements Regarding Auditor Independence,* Release No. 33–8183 (Jan. 28, 2003) [68 FR 6005 (Feb. 5, 2003)].

[7] *See Auditor Independence With Respect to Certain Loans or Debtor-Creditor Relationships,* Release 33–10648 (June 18, 2019) [84 FR 32040 (July 5, 2019)] (''Loan Provision Adopting Release''*).* In this release, references to the ''Loan Provision'' mean 17 CFR 210.2–01(c)(1)(ii)(A) (''Rule 2–01(c)(1)(ii)(A)'').

of existing market conditions by more effectively focusing the independence analysis on those relationships or services that are more likely [8] to threaten an auditor's objectivity and impartiality.

Many commenters broadly supported the objectives of the proposed amendments or were generally in favor of the proposals.[9] A few commenters did not support the proposals.[10] One of these commenters expressed the view that the proposals could negatively affect investor protection and capital formation and suggested that, in lieu of the proposals, more should be done to strengthen auditor independence standards and the enforcement of such standards.[11]

While commenters were largely supportive of the proposals, we also received recommendations for modifying or clarifying certain aspects of the proposed amendments. After reviewing and considering the public comments and recommendations received, we are adopting the amendments largely as proposed. As we discuss further below, in certain cases we are adopting the proposed amendments with modifications that are intended to address comments received.

[8] As compared to the relationships and services that are deemed independence-impairing under existing Rule 2–01, but are unlikely to threaten an auditor's objectivity and impartiality and would no longer be deemed independence-impairing pursuant to the final amendments.

[9] *See, e.g.,* letters from American Investment Council (Mar. 16, 2020) (''AIC''), Investment Company Institute and Independent Directors Council (Mar. 16, 2020) (''ICI/IDC''), EQT AB (Mar. 13, 2020) (''EQT''), Financial Executives International (Mar. 16, 2020) (''FEI''), Center For Capital Markets Competitiveness—U.S. Chamber of Commerce (Mar. 16, 2020) (''CCMC''), National Association of State Boards of Accountancy (Feb. 25, 2020) (''NASBA''), New York State Society of Certified Public Accountants (Mar. 13, 2020) (''NYSSCPA''), Center for Audit Quality (Mar. 16, 2020) (''CAQ''), American Institute of Certified Public Accountants (Mar. 16, 2020) (''AICPA''), Deloitte LLP (Mar. 4, 2020) (''Deloitte''), BDO USA, LLP (Mar. 10, 2020) (''BDO''), Ernst & Young LLP (Mar. 13, 2020) (''EY''), KPMG LLP (Mar. 13, 2020) (''KPMG''), RSM LLP (Mar. 16, 2020) (''RSM''), PricewaterhouseCoopers LLP (Mar. 16, 2020) (''PwC''), Grant Thornton LLP (Mar. 16, 2020) (''GT''), Crowe LLP (Mar. 16, 2020) (''Crowe''), and William G. Parrett (Mar. 16, 2020) (''Parrett''). The comment letters on the Proposing Release are available at *https://www.sec.gov/comments/s7-26-19/s72619.htm.*

[10] *See, e.g.,* letters from Council of Institutional Investors (Mar. 16, 2020) (''CII''), Consumer Federation of America (May 4, 2020) (''CFA''), Center for American Progress, *et al* (May 26, 2020) (''CAP''), and Roy T. Van Brunt (July 23, 2020) (''Van Brunt'').

[11] *See* letter from CFA.

II. Amendments

A. Amendments to Definitions

1. Amendments to the Definitions of Affiliate of the Audit Client and the Investment Company Complex

The term ''audit client'' [12] is defined as ''the entity whose financial statements or other information is being audited, reviewed or attested'' [13] and ''any affiliates of the audit client.'' [14] The current definition of affiliate of the audit client includes, in part, ''[a]n entity that has control over the audit client, or over which the audit client has control, or which is under common control with the audit client, including the audit client's parents and subsidiaries'' and ''[e]ach entity in the investment company complex when the audit client is an entity that is part of an investment company complex.'' [15]

Under current Rule 2–01, the requirement to identify and monitor for potential independence-impairing relationships and services applies to affiliated entities, including sister entities,[16] regardless of whether the sister entities are material to the controlling entity.[17] This same requirement to identify and monitor for potential independence-impairing relationships and services applies to entities, including sister entities that are part of an investment company complex (''ICC'').[18]

The Proposing Release noted the challenges in practical application that are associated with the current definitions of affiliate of the audit client and ICC.[19] In particular, the Proposing Release noted how these definitions can result in relationships with and services to certain sister entities that are less likely to threaten an auditor's objectivity and impartiality being deemed independence-impairing under our rules.[20] To address those challenges, the Commission proposed amendments to the definitions of both affiliate of the audit client and ICC. After considering the public comments and recommendations received, we are adopting amendments to both definitions with modifications, as discussed in further detail below.

[12] 17 CFR 210.2–01(f)(6) (''Rule 2–01(f)(6)'').

[13] The term ''entity under audit'' as used herein and in the final amendments refers to this part of the Rule 2–01(f)(6) definition of audit client.

[14] *See* Rule 2–01(f)(6). For purposes of 17 CFR 210.2–01(c)(1)(i) (''Rule 2–01(c)(1)(i)'') (*Investments in Audit Clients*), entities covered by 17 CFR 210.2–01(f)(4)(ii) (''Rule 2–01(f)(4)(ii)'') or 17 CFR 210.2–01(f)(4)(iii) (''Rule 2–01(f)(4)(iii)'') are not considered affiliates of the audit client, as they are already addressed by 17 CFR 210.2–01(c)(1)(i)(E).

[15] 17 CFR 210.2–01(f)(4)(i) (''Rule 2–01(f)(4)(i)'') and 17 CFR 210.2–01(f)(4)(iv) (''Rule 2–01(f)(4)(iv)'').

[16] *See* 17 CFR 210.2–01(f)(4) (''Rule 2–01(f)(4)'') and Rule 2–01(f)(6). We use the term ''sister entities'' to refer to entities that are under common control with the entity under audit.

[17] *See* Rule 2–01(f)(4).

[18] *Id.* and 17 CFR 210.2–01(f)(14) (''Rule 2–01(f)(14)'').

[19] *See* Section II.A.1 of the Proposing Release.

[20] *Id.*

a. Amendments With Respect to Common Control and Affiliate of the Audit Client

i. Proposed Amendments

The Commission proposed amending the definition of an affiliate of the audit client set forth in Rule 2–01(f)(4)(i) to include a materiality qualifier with respect to operating companies, including portfolio companies, under common control [21] and to clarify the application of this definition to operating companies and direct auditors of an investment company or investment adviser or sponsor to the ICC definition.[22] In the Proposing Release, the Commission discussed challenges related to applying the current affiliate of the audit client and ICC definitions, including challenges related to the limited pool of available qualified auditors, ongoing monitoring for independence, and related costs.[23]

Under the proposal, a sister entity would be deemed an affiliate of the audit client ''unless the entity is not material to the controlling entity.'' The Proposing Release set forth the Commission's view that it is appropriate to exclude sister entities that are not material to the controlling entity from being considered affiliates of the audit client because an auditor's relationships and services with such sister entities do not typically pose a threat to the auditor's objectivity and impartiality and their exclusion would allow auditors and audit clients to focus on those relationships that are more likely to threaten the auditor's objectivity and impartiality.

[21] *See* Proposed Rule 2–01(f)(4)(i)(B).

[22] *See* Proposed Rule 2–01(f)(4)(ii). Specifically, the ''and'' between the second significant influence provision would be replaced by an ''or.'' Consistent with footnote 18 of the Proposing Release, the term ''operating company'' in this release refers to entities that are not investment companies, investment advisers, or sponsors, and the term ''portfolio company'' refers to an operating company that has investment companies or unregistered funds in private equity structures among its investors. In Section II.A.1.a of the Proposing Release, the Commission expressed its belief that it would be appropriate to identify the affiliates of the audit client for a portfolio company under audit using the proposed affiliate of the audit client definition, rather than the proposed ICC definition, because portfolio companies are a type of operating company that are often unrelated to each other, even though they are controlled by the same entity in the private equity structure or ICC.

[23] *See* Section II.A.1.a of the Proposing Release.

The Proposing Release noted that materiality is applied in the existing affiliate of the audit client definition in Rules 2–01(f)(4)(ii) and (iii) [24] and that the proposed materiality qualifier would be consistent, in part, with the definition of ''affiliate'' used by the American Institute of Certified Public Accountants (''AICPA'') in its ethics and independence rules.[25] The AICPA ethics and independence rules typically apply when domestic companies are not also subject to the Commission and PCAOB independence requirements. Auditors therefore have experience in applying a materiality standard when identifying affiliates, whether applying the independence rules of the Commission or the AICPA.

ii. Comments Received

Commenters generally supported the proposed changes to the definition of the affiliate of the audit client.[26] Consistent with the discussion in the Proposing Release, commenters discussed the challenges presented by the current definitions (*e.g.,* cost, difficulty of application, and impact on the available pool of qualified auditors) and agreed that introducing a materiality qualifier into the analysis would better focus the analysis on threats to an auditor's objectivity and impartiality and address some of those challenges.[27]

A few commenters opposed the proposed materiality qualifier to the affiliate of the audit client definition.[28] These commenters asserted that introducing a materiality qualifier would increase the risk that auditors would be performing audits when they are not objective and impartial, noting that there is evidence that auditors' materiality judgments vary widely.[29] One of these commenters suggested that the Commission ''examine the evidence before changing its current approach.'' [30]

In addition to these comments on the proposed amendments, we also received feedback on additional changes to the definition of affiliate of the audit client and other related changes, as discussed in more detail below.

Comments Recommending a Dual Materiality Threshold

Many commenters recommended that we further amend the common control provision in the affiliate of the audit client definition to add a materiality qualifier with respect to the entity under audit to accompany the proposed materiality qualifier with respect to the sister entity (a ''dual materiality threshold'').[31] This dual materiality threshold would result in a sister entity being deemed an affiliate of the audit client only if the entity under audit and the sister entity are each material to the controlling entity.[32]

These commenters stated that, when the entity under audit is not material to the controlling entity, services provided to or relationships with sister entities typically do not create threats to an auditor's objectivity and impartiality.[33] For example, one commenter stated that, in its experience, the entity under audit and the sister entities typically have their own governance structures, which indicates that there is no mutuality of interest between the auditor and the audit client.[34] Another commenter stated that the proposed single materiality threshold would, in fact, ''increase'' the burden on private equity firms by requiring more time and resources to monitor the ''continuously evolving universe of entities that the private firm would need to address . . .'' [35] This commenter contended that in the event the entity under audit is not material to the controlling entity, a dual materiality threshold would alleviate the burdens associated with a materiality analysis that would otherwise have to be conducted on each sister entity.

Commenters also suggested that because a dual materiality threshold is used by the AICPA and IESBA ethics and independence requirements, adopting a similar threshold would ease compliance burdens associated with the application of the affiliate definition and on-going monitoring for audit firms and clients.[36] A few commenters noted that any risks associated with a potential dual materiality threshold would be mitigated by the continued protections afforded by Rule 2–01(b).[37]

One commenter that opposed the proposed amendment noted that it also opposed the ''double trigger threshold'' of the AICPA.[38]

Other Comments on Materiality and Monitoring

In response to a request for comment as to whether the proposed amendments should include a materiality assessment between the entity under audit and sister entities, commenters generally did not support adding such a provision.[39] For example, one commenter stated that concepts of financial materiality do not lend themselves to an evaluation of relationships between sister entities, and noted that if one entity had a material investment in the other, the other provisions of the affiliate of the audit client definition would address such a relationship.[40]

Some commenters suggested that a materiality qualifier also should be applied when considering whether an entity that has control over the entity under audit (*i.e.,* a controlling entity) is

[24] Rule 2–01(f)(4)(ii) includes as an affiliate of the audit client ''an entity over which the audit client has significant influence, unless the entity is not material to the audit client.'' Rule 2–01(f)(4)(iii) includes as an affiliate of the audit client ''an entity that has significant influence over the audit client, unless the audit client is not material to the entity.''

[25] *See* AICPA Professional Code of Conduct, *available at https://pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf.* The Proposing Release acknowledged that the proposed amendment may not result in the same number of sister entities being deemed material to the controlling entity under Commission rules and the AICPA rules. For example, in defining control, the AICPA uses the accounting standards adopted by the Financial Accounting Standards Board (''FASB''), whereas the Commission defines control in Rule 1–02(g) of Regulation S–X. Also, the AICPA affiliate definition pertaining to common control deems a sister entity as an affiliate if the entity under audit and the sister entity are each material to the entity that controls both. The proposed amendment only focused on the materiality of the sister entity to the controlling entity.

[26] *See e.g.,* letters from Illinois CPA Society (Feb. 21, 2020) (''Illinois CPA''), SEC Professional Group (Feb. 25, 2020) (''SEC Pro Group''), International Bancshares Corporation (''Mar. 13, 2020'') (''IBC''), NASBA, CAQ, AICPA, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Crowe, Parrett, AIC, ICI/IDC, EQT, FEI, and CCMC.

[27] *See e.g.,* letters from Deloitte, GT, EQT, and CAQ.

[28] *See e.g.,* letters from CFA and CII. Both commenters expressed their disagreement regarding the proposed materiality qualifier within a discussion that covers both the affiliate of the audit client and the ICC definitions.

[29] *See* letters from CFA and CII (citing Katherine Schipper et al., *Auditors' Quantitative Materiality Judgments: Properties and Implications for Financial Reporting Reliability,* 52 J. Acct. Res. 1303 (Dec. 2019), *available at https://onlinelibrary.wiley.com/doi/full/10.1111/1475-679X.12286). See infra* note 262 and accompanying text.

[30] *See* letter from CFA.

[31] *See e.g.,* letters from CAQ, AICPA, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Crowe, Parrett, AIC, CCMC, New York State Society of Certified Public Accountants (Mar. 13, 2020) (''NYSSCPA''), and Connecticut Society of Certified Public Accountants (Apr. 15, 2020) (''CTCPA''). These commenters noted that analogous provisions exist in the AICPA and the International Ethics Standards Board for Accountants (''IESBA'') ethics and independence requirements.

[32] *Id.*

[33] *See e.g.,* letters from BDO, Deloitte, EY, KPMG, PwC, Crowe, CTCPA, CCMC, and GT.

[34] *See* letter from Deloitte.

[35] *See* letter from AIC.

[36] *See e.g.,* letters from CAQ, Deloitte, BDO, RSM, PwC, CCMC, GT, and CTCPA.

[37] *See e.g.,* letters from BDO, AICPA, AIC, and EY.

[38] *See* letter from CII. This commenter cited footnote 20 of the Proposing Release and indicated its agreement that requiring materiality between the entity under audit and the controlling entity may exclude, from the proposed definition, sister entities whose relationships with or services from an auditor would impair the auditor's objectivity and impartiality.

[39] *See e.g.,* letters from Deloitte, KPMG, RSM, and PwC.

[40] *See* letter from KPMG.

an affiliate under Rule 2–01(f)(4).[41] However, another commenter disagreed, stating that it believes parents and subsidiaries should continue to be affiliates regardless of materiality.[42]

In response to a request for comment as to whether auditors and audit clients would face challenges in applying the materiality concept in connection with the proposed amendment and whether additional guidance was needed, some commenters noted that the concept of materiality already exists within Rule 2–01, and as such, indicated that current materiality guidance is sufficient.[43] By contrast, other commenters suggested that there may be challenges in applying the materiality concept in connection with the proposed amendments,[44] and a few commenters requested additional guidance or examples.[45] One commenter suggested that to ease the burden of monitoring for compliance in connection with unforeseen changes in circumstances, the Commission should consider establishing a framework to allow auditors to address ''inadvertent independence violations that might arise when a materiality threshold is crossed.'' [46]

Some commenters suggested that the Commission reiterate the shared responsibility of audit firms and their audit clients to monitor independence, including monitoring affiliates and obtaining information necessary to assess materiality.[47] One commenter recommended the Commission clarify that, once the initial materiality assessment has been made, the auditor and audit client could satisfy their obligations under the proposed amendments by reevaluating materiality in response to significant transactions, Commission filings, or other information that become known to the auditor or the audit client through reasonable inquiry.[48] Another commenter requested the Commission discuss expectations regarding best efforts to obtain information and monitoring if, for example, certain information can only be obtained annually.[49]

Comments on ''Entity Under Audit''

In the Proposing Release, the Commission used the term ''entity under audit'' to describe the application of the proposed amendments. The Commission explained that it was using this term to refer to the entity ''whose financial statements or other information is being audited, reviewed or attested.'' [50] The quoted language is the first clause of the definition of the term ''audit client'' in Rule 2–01(f)(6). Because the definition of audit client also includes any affiliates of the audit client, the Commission used the term ''entity under audit'' to describe those entities whose financial statements were subject to audit, review, or attestation, in an attempt to avoid the potential confusion that may arise from using the term ''audit client.''

In response to this discussion, some commenters suggested that Rule 2–01 incorporate more precise usage of the terms ''audit client'' and ''entity under audit,'' which may require defining the term ''entity under audit.'' [51] Several of those commenters recommended that the term ''entity under audit'' be included in the definition of affiliate of the audit client,[52] because the term ''audit client,'' which is defined to include affiliates in the definition of affiliate of the audit client, may cause confusion. One of these commenters characterized the reference to audit client in the existing affiliate of the audit client definition as a ''circular reference.'' [53]

Comments on ''Controlling Entity'' and ''Control''

While we did not propose any amendments to the term ''control'' as defined in 17 CFR 210.1–02(g) (''Rule 1–02(g)'') of Regulation S–X, a few commenters suggested that, for private equity firms, the term ''controlling entity'' should be defined as the overall private equity firm or the ultimate parent.[54] One of these commenters requested further explanation or guidance, such as through illustrative examples, to address whether the relationship between an investment adviser and a fund it advises should be treated as a control relationship and suggested that the term ''control'' should be linked to the accounting literature.[55] While these comments pertained to entities within an ICC, the comments are relevant when the entity under audit is not an investment company or investment adviser or sponsor, but the entity under audit controls or is controlled by an investment company or investment adviser or sponsor.[56]

iii. Final Amendments

After considering the public comments and recommendations received, we are adopting amended 17 CFR 210.2–01(f)(4) (''amended Rule 2–01(f)(4)'') with certain modifications from the proposal, as described below. We considered the comments received opposing the addition of materiality to the common control provision, but continue to believe that materiality is an appropriate principle to effectively focus on relationships with and services provided to sister entities that are more likely to threaten an auditor's objectivity and impartiality.

Dual Materiality Threshold

In response to comments, we are modifying the proposed amendments to Rule 2–01(f)(4)(ii) to incorporate a dual materiality threshold such that a sister entity will be included as an affiliate of the audit client if the sister entity and the entity under audit are each material to the controlling entity. Under the final amendments, if either the sister entity or the entity under audit is not material to the controlling entity, then the sister entity will not be deemed an affiliate of the audit client pursuant to amended 17 CFR 210.2–01(f)(4)(ii) (''amended Rule 2–01(f)(4)(ii)'').[57] In the Proposing Release, the Commission suggested that requiring that the entity under audit be material to the controlling entity as part of the proposed definition may exclude sister entities whose relationships with or services from an auditor would impair the auditor's objectivity and impartiality.[58] However, after consideration of the comments received and further evaluation, we are persuaded that where the entity under audit is not material to the controlling entity, an auditor's relationships with or services provided to sister entities would generally not threaten the auditor's objectivity and impartiality. In

[41] *See e.g.,* letters from CAQ, AICPA, Deloitte, BDO, Crowe, CTCPA, and AIC. *See also supra* note 25. The relevant AICPA definition, 0.400.02, includes as an affiliate ''[a]n entity (for example, parent, partnership, or LLC) that *controls a financial statement attest client* when the *financial statement attest client* is material to such entity'' (emphasis in original).

[42] *See* letter from RSM.

[43] *See e.g.,* letters from Deloitte, EY, and Crowe.

[44] *See e.g.,* letters from NYSSCPA and PwC. For example, one commenter suggested the Commission define ''controlling entity.'' *See* letter from PwC.

[45] *See e.g.,* letters from NYSSCPA, CTCPA, and AIC.

[46] *See* letter from PwC.

[47] *See e.g.,* letters from CAQ, PwC, and EY.

[48] *See* letter from Deloitte.

[49] *See* letter from GT.

[50] *See* footnote 11 of the Proposing Release and accompanying text.

[51] *See e.g.,* letters from AICPA, Deloitte, EY, Crowe, PwC, and GT.

[52] *See e.g.,* letters from AICPA, Deloitte, EY, and Crowe.

[53] *See* letter from Crowe.

[54] *See e.g.,* letters from PwC and AIC.

[55] *See* letter from PwC.

[56] *See infra* Examples 3 and 4 in Section II.A.1.a.iii.

[57] We also are making a technical amendment to renumber the paragraphs within amended Rule 2–01(f)(4).

[58] *See* footnote 20 of the Proposing Release.

this regard, we agree that when the entity under audit is not material to the controlling entity, it is less likely that a mutuality of interest would develop as a result of relationships with or services provided to sister entities. For example, as one commenter observed, sister entities with separate governance structures, such as sister portfolio companies within an ICC, typically lack decision-making capacity over other sister entities, including an entity under audit.

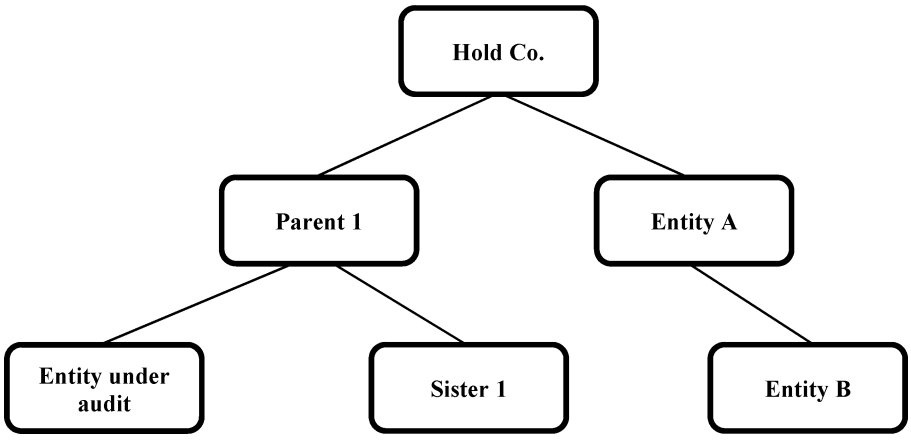
We also recognize the benefit to auditors, audit clients, and investors of reducing compliance-related challenges. The adopted dual materiality threshold may help address some commenters' concerns about the inability to obtain all relevant information needed to make a materiality determination with respect to sister entities under the proposed single materiality threshold. Under the adopted dual materiality threshold, the need to assess the materiality relationship between the entity under audit and each of the controlling entities should reduce information access concerns because, in the event the entity under audit is not material to the controlling entity, the materiality assessment would be made for fewer sister entities as compared to the proposed single materiality threshold. However, as discussed in Section II.A.1.b.ii below, the auditor's non-audit services to and relationships with sister entities that are no longer deemed affiliates as a result of applying the dual materiality threshold will continue to be subject to the principles set forth in Rule 2–01(b), and as such, knowledge of services to and relationships with such non-affiliate sister entities will be needed to sufficiently consider the general standard.

Some commenters also suggested that we incorporate a materiality qualifier in the evaluation of whether controlling entities would be considered affiliates, similar to analogous provisions in the AICPA and IESBA ethics and independence requirements. While commenters cited the benefits of having a common regime for the consideration of controlling entities, we were not persuaded that the benefits from such conformity would justify the potential risk to an auditor's objectivity and impartiality in these circumstances. In particular, commenters did not specifically highlight ongoing monitoring or other compliance challenges associated with the identification of affiliates that control an entity under audit. It does not appear that the challenges related to the changing population of potential affiliates and the ability to obtain appropriate information that occur in the common control context also exist when evaluating entities that have control over the entity under audit. In addition, the relationship between sister entities and an entity under audit is generally different than the relationship between a controlling entity and the entity under audit. The controlling entity typically has some decision-making ability or an ability to influence the entity under audit. As such, we believe an auditor's independence likely would be impaired if the auditor provides non-audit services to or engages in relationships with the controlling entity that are described in Rule 2–01(c), even in situations in which the entity under audit is not material to the controlling entity. Accordingly, we are not adopting commenters' recommendations to incorporate a materiality qualifier in the evaluation of whether controlling entities should be considered affiliates.

Entity Under Audit

We are making modifications to incorporate the term ''entity under audit'' within amended 17 CFR 210.2–01(f)(4)(i) (''amended Rule 2–01(f)(4)(i)'') and amended 17 CFR 210.2–01(f)(4)(ii) (''amended Rule 2–01(f)(4)(ii)''). Given the comments received on this point and in light of other changes we are making to the final amendments, we believe it is appropriate to replace the term ''audit client'' with ''entity under audit'' in amended Rules 2–01(f)(4)(i) and (ii). Specifically, as illustrated in the example below, we are concerned that if we do not revise this terminology, it could be applied in a manner that would negate the adopted dual materiality threshold.

Figure 1



In Figure 1, assume the controlling entities (*i.e.,* Parent 1 and Hold Co.) have control over all entities downstream from them. If amended Rules 2–01(f)(4)(i) and (ii) referred to an ''audit client'' instead of an ''entity under audit,'' Sister 1 may be deemed an affiliate of the audit client regardless of the materiality of Sister 1 or the Entity Under Audit to Parent 1 based on the following application:

- Parent 1 controls the entity under audit, which makes Parent 1 an affiliate of the audit client. Parent 1 also is an ''audit client'' because the definition of such term includes affiliates. A practitioner might then apply the control provision in amended Rule 2–01(f)(4)(i) to Parent 1 and deem Sister 1 an affiliate of the audit client, regardless of the dual materiality threshold. The practitioner would consider Sister 1 an affiliate because it is controlled by ''audit client'' Parent 1 without applying

the materiality analysis in the common control provision of amended Rule 2–01(f)(4)(ii).

Similarly, Entities A and B may be deemed affiliates of the audit client regardless of the materiality of Entity A, Entity B, or the entity under audit to Hold Co. based on the following application:

- Under the existing and amended rules, Hold Co. is an affiliate of the audit client (*i.e.,* Hold Co. has control over the entity under audit) and, as such, also is an audit client. A practitioner might then apply the control provision in amended Rule 2–01(f)(4)(i) to Hold Co. and deem both Entities A and B as affiliates of the audit client, regardless of the dual materiality threshold in amended Rule 2–01(f)(4)(ii). Again, the practitioner may deem Entities A and B to be affiliates because ''audit client'' Hold Co. controls both Entities A and B.[59]

Absent clarification, the above-illustrated application (*i.e.,* circular reading) of the final amendments could negate the Commission's objective to focus the common control provision on those relationships and services that are more likely to threaten the objectivity and impartiality of an auditor by introducing a dual materiality threshold. While the proposal did not use the term ''entity under audit'' in the rule text, we believe this modification is consistent with the proposal to separate out common control from existing Rule 2–01(f)(4)(i) and include a materiality provision within the definition. Now that the amended common control provision includes a dual materiality threshold, we believe the modification to use the term ''entity under audit'' in place of the term ''audit client'' in amended Rules 2–01(f)(4)(i) and (ii) is important to avoid any misunderstandings about how the common control provision should be applied in the final amendments.

While some commenters requested that we further amend our rules to incorporate more precise usage of the term ''entity under audit'' [60] in other paragraphs that currently refer to the ''audit client,'' those requests are beyond the scope of this rulemaking. We did not propose or seek comment on those particular amendments. Moreover, those additional amendments are not necessary to effectuate any aspect of the proposal. As such, we are not incorporating the term ''entity under audit'' into other paragraphs of the rule that currently refer to ''audit client,'' including the significant influence provisions of amended 17 CFR 210.2–01(f)(4)(iii) (''amended Rule 2–01(f)(4)(iii)'') and 17 CFR 210.2–01(f)(4)(iv) (''amended Rule 2–01(f)(4)(iv)''). However, the incorporation of ''entity under audit'' in amended Rules 2–01(f)(4)(i) and (ii), while leaving the term ''audit client'' within the significant influence provisions in amended Rules 2–01(f)(4)(iii) and (iv), does not imply a change from the historical practical application of these provisions, which has focused and should continue to focus on the entity under audit.

Assessing Materiality and Monitoring

Several commenters requested clarification and examples of the application of the proposed amendments, including the proposed materiality qualifier. In response, we are providing several examples to illustrate the application of the final amendments to particular fact patterns.

Auditors and their audit clients have a shared responsibility to monitor independence in order to satisfy, as applicable, the requirements of the federal securities laws, including Rule 2–01 and 17 CFR 210.2–02.[61] This shared responsibility between auditors and audit clients applies to all aspects of Rule 2–01, including the final amendments. This responsibility includes the monitoring of affiliates and obtaining information necessary to assess materiality. We believe this process works most effectively when management, audit committees, and audit firms work together to evaluate the auditor's compliance with the independence rules. For example, auditors and their audit clients may need to work together to identify and monitor potential affiliates based on the affiliate of the audit client definition in the independence rules. In this regard, it will be important for management to notify the auditor in a timely manner of changes in circumstances that may affect the population of potential affiliates, such as by notifying an auditor of acquisitions before the acquisitions are effective. Additionally, management should consider communicating to auditors as early as possible the intent of private companies to file a registration statement in order for the SEC and PCAOB independence rules to be considered in advance. Issuers and their audit committees may want to consider having their own policies and procedures to identify, consider, and monitor the provision of services by and relationships with the issuer's independent accountant, which may help supplement the audit firm's system of quality control.

The following are intended as illustrative examples only, and practitioners and audit clients should be aware that an assessment of materiality requires consideration of all relevant facts and circumstances, including quantitative and qualitative factors.

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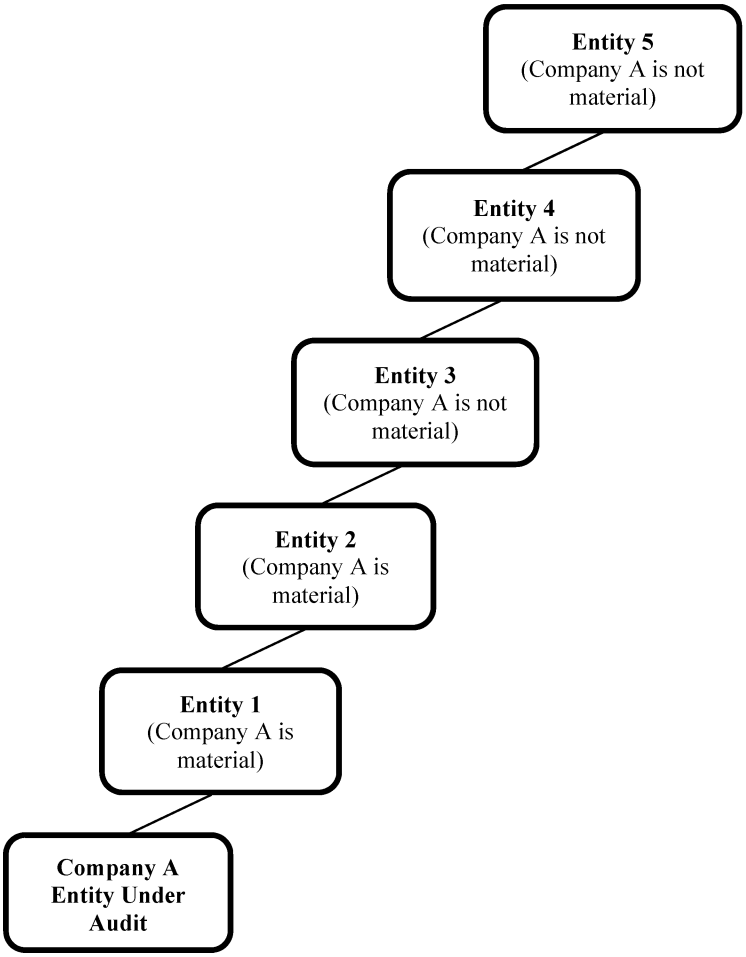
[59] Relatedly, when assessing whether Entities A and B are affiliates under amended Rule 2–01(f)(4)(ii), it may otherwise be unclear to a practitioner assessing materiality of the ''audit client'' whether such assessment applies to the entity under audit or an affiliate (such as Parent 1).

[60] *See supra* note 51.

[61] For an overview of the obligations of auditors and audit clients with respect to auditor independence under the federal securities laws, please *see* footnote 101 of the Loan Provision Adopting Release.

Example 1 – Assessing Materiality of Sister Entities



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In this example, Company A, the entity under audit, has five controlling entities, Entities 1 through 5, with Entity 5 as the ultimate parent. Since each of Entities 1 through 5 controls Company A, directly or indirectly, each of the entities is an affiliate of Company A regardless of materiality. For purposes of this example, assume that Company A is material to Entity 1 and Entity 2 and that Company A is not material to Entity 3, Entity 4, or Entity 5. Each of Entities 1 through 5 controls other entities (*i.e.,* sister entities) other than those listed in this example. In this example, the auditor must evaluate the materiality of the sister entities controlled by each of Entity 1 and Entity 2 to determine which sister entities are affiliates of the audit client. For a sister entity controlled by Entity 1, the auditor must assess the materiality of such sister entity to Entity 1. For a sister entity controlled by Entity 2, the auditor must assess the materiality of that sister entity to Entity 2.

Example 2—Controlling and Sister Entities and Monitoring Expectations

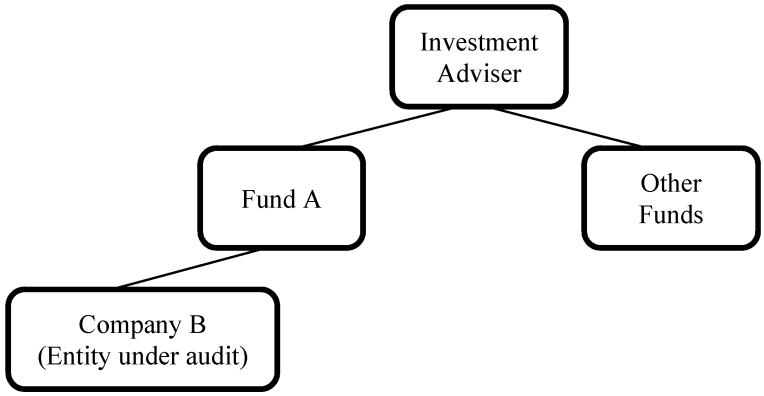
Assume the same facts as in Example 1. Company A and the controlling entities should provide the auditor with sufficient information to enable the auditor to appropriately monitor controlling entities and identify sister entities, even at the levels of Entities 3 through 5. We acknowledge the concerns raised by commenters that identifying sister entities that are not considered affiliates under the final amendments and re-assessing the materiality of the entity under audit and its sister entities may increase existing compliance burdens. However, identifying sister entities will be important for complying with the amended rules because there can be qualitative and quantitative changes that affect the materiality of such relationships, and audit firms will need to timely address when a sister entity becomes an affiliate. Such information also will be necessary for an audit firm to appropriately consider and apply Rule 2–01(b) on an ongoing basis.

After the initial materiality assessment is performed to identify potential affiliates, the auditor, with the assistance of and information provided by the audit client, should perform updated assessments based on, among other things, transactions, Commission filings, or other information that becomes known to the auditor and the audit client through reasonable inquiry. As a result, obtaining accurate organizational and financial information will be important to the auditor's and the audit client's ability to anticipate and plan for potential changes in materiality status that may lead to the identification of new affiliates at any point during the audit and professional engagement period. We understand that this likely will require additional compliance efforts and believe such efforts and the resultant costs are appropriate to ensure that an auditor is independent from its audit client for purposes of investor protection and investor confidence. To the extent the final amendments mitigate the compliance challenges associated with

independence violations or prohibitions, or allow an auditor to expand its audit or non-audit services or relationships, we expect that the auditor will weigh any related benefits against any additional monitoring and compliance costs. Also, auditors may already be familiar with the monitoring efforts related to a dual materiality threshold, as the AICPA and IESBA have analogous provisions. Where an auditor is unable to obtain the information needed to make reasonable determinations of affiliate status for sister entities, the auditor should treat such sister entities as affiliates of the audit client for the purpose of the Commission's independence requirements to avoid potentially impairing the auditor's objectivity and impartiality.

The final amendments do not include a transition framework, as requested by a commenter, to address changes in the materiality of the entity under audit or a sister entity to a controlling entity. As noted, above, we expect auditors and their clients to be able to anticipate and plan for changes in materiality and believe this approach fosters an auditor's objectivity and impartiality. To the extent that changes in materiality of the entity under audit or sister entities result in an independence violation, we encourage registrants and accountants to consult with the Commission's Office of the Chief Accountant.[62]

Example 3 – Identifying Affiliates of an Entity under Audit that is a Portfolio Company



Company B is the entity under audit and a portfolio company controlled by Fund A. Fund A is an investment company within an ICC. Company B's auditor will identify affiliates of the audit client by applying amended Rules 2–01(f)(4)(i) through (iv). While there are entities described in the ICC definition that are part of Company B's organizational structure, including Fund A and its investment adviser or sponsor, Company B's auditor, assuming it does not audit any entity described in the ICC definition, such as Fund A or the Investment Adviser, will not apply the ICC definition. Company B's auditor must apply amended Rules 2–01(f)(4)(i) through (iv) to identify affiliates, which may result in certain investment companies and investment advisers or sponsors being deemed an affiliate of the audit client.

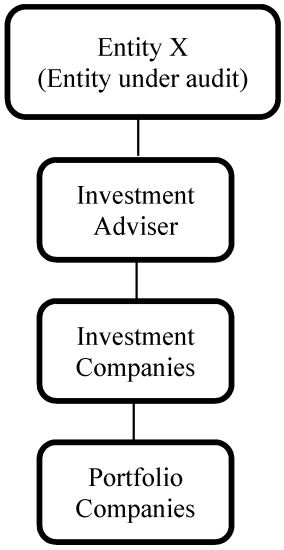
As noted above, we received a few comments related to the term ''controlling entity'' and the term ''control,''[63] which is defined in Rule 1–02(g). We are not amending Rule 1–02(g) to link the definition of ''control'' to the accounting literature as one commenter suggested. We believe the suggestion to define ''controlling entity'' solely as the overall private equity firm when assessing materiality of entities, including a portfolio company, in a private equity structure[64] could raise issues beyond the scope of the proposal that warrant further consideration. We are therefore not adopting this approach. Under Rule 1–02(g), whether the entity under audit is a subsidiary of an operating or holding company or a portfolio company within a private equity structure, all entities that are identified to have control over an entity under audit are controlling entities.

[62] *See* Section II.E.3 and amended introductory paragraph to Rule 2–01.

[63] *See supra* note 54.

[64] *Id.*

Example 4 – Application of the Affiliate of the Audit Client Definition When the Entity under Audit Controls Entities within an ICC



Entity X is the entity under audit and is not an investment company, an investment adviser, or sponsor. Entity X has a subsidiary that serves as an investment adviser to several investment companies. If the auditor is not engaged to audit the investment company or investment adviser or sponsor on a standalone basis, the auditor will apply amended Rules 2–01(f)(4)(i) through (iv) to determine the affiliates of the audit client.

We note that in determining the affiliates of Entity X, in the context of amended Rules 2–01(f)(4)(i) through (iv), it will be important to consider the relationships between the investment adviser and the investment companies it advises. Even where an investment company has an independent board that oversees the investment company's operations and approves the advisory contract, the services provided by the investment adviser are generally critical to the management of day-to-day operations and execution of policies for the investment company. Therefore, the investment adviser generally will have a controlling relationship over the investment company for purposes of Rule 1–02(g).

In this example, if the auditor audited Entity X and the investment adviser subsidiary on a standalone basis, then the auditor would have to apply both amended Rules 2–01(f)(4)(i) through (iv) as they relate to the audit of Entity X and amended Rule 2–01(f)(14) as it relates to the audit of the investment adviser.[65]

b. Proposing Release's Discussion of Rule 2–01(b)

As noted in the 2000 Adopting Release, ''[c]ircumstances that are not specifically set forth in our rule are measured by the general standard set forth in Rule 2–01(b).'' The general standard includes, in part, that the ''Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement.''

The Commission explained in the Proposing Release that relationships and services affected by the proposed amendments to the affiliate of the audit client definition remain subject to the general independence standard in Rule 2–01(b).[66] The Commission also noted that such relationships and services, individually or in the aggregate, could raise independence concerns pursuant to the general standard in Rule 2–01(b) due to the nature, extent, relative importance or other aspects of the service or relationship that may make the service or relationship a threat to an auditor's objectivity and impartiality. The Commission indicated that such services or relationships should be ''easily known'' due to the nature, extent, relative importance or other aspects of the services or relationships. Although the Commission did not propose amendments to Rule 2–01(b), a number of commenters provided feedback on the application of the general independence standard in light of the proposed amendments.

i. Comments on the Proposing Release's Discussion of Rule 2–01(b)

Several commenters agreed that relationships and services with entities that would no longer be deemed affiliates should still be evaluated under Rule 2–01(b).[67] However, one commenter recommended that the Commission consider whether Rule 2–01(b) is sufficient, or whether further clarification or rulemaking might be appropriate to address situations where relationships or non-attest services provided to a sister entity that is no longer an affiliate under the proposed definitions are of a magnitude that ''eclipse'' the attest services provided within a private equity or investment company complex.[68]

A few commenters raised concerns with the Proposing Release's discussion of Rule 2–01(b).[69] One commenter

[65] This is consistent with the discussion and example included in Section II.A.1.b.i of the Proposing Release.

[66] *See* Section II.A.1 of the Proposing Release.

[67] *See e.g.,* letters from Deloitte, EY, KPMG, GT, and Crowe. Some commenters also indicated that the general standard in Rule 2–01(b) is sufficient to mitigate the risks when relationships and services, individually or in the aggregate, with sister entities that are no longer deemed affiliates under the final amendments could impact an auditor's objectivity and impartiality. *See e.g.,* letters from Deloitte, EY, and KPMG.

[68] *See* letter from BDO.

[69] *See e.g.,* letters from RSM and PwC.

asserted that the statements were inconsistent with the 2000 Adopting Release, which stated that ''[c]ircumstances that are not specifically set forth in our rule are measured by the general standard set forth in Rule 2–01(b)'' [70] and expressed concern that the Proposing Release's discussion of Rule 2–01(b) could be applied more broadly than just to the entities captured by the affiliate of the audit client definition. Another commenter asserted that it ''may be understood in practice as a change in application and operation of Rule 2–01(b).'' [71] In voicing their concerns, these commenters noted that the consideration of Rule 2–01(b) would reduce the benefits expected to result from the proposed amendments as the auditor would continue to have to track relationships and services that are being provided to entities that are no longer affiliates.[72]

One commenter disagreed with the Proposing Release's reference to ''easily known'' when describing the types of services or relationships that should be evaluated under Rule 2–01(b) as 17 CFR 210.2–01(c) (''Rule 2–01(c)'') no longer specifically addresses such items.[73] A few commenters asserted that the Proposing Release's use of ''easily known'' appears to establish an expectation of continued monitoring that may reduce the benefits, efficiencies, and cost savings expected to result from the proposed amendments.[74] Two of these commenters requested further guidance on on-going monitoring obligations if Rule 2–01(b) continues to apply to non-affiliates and requested the Commission consider clarifying the reference to ''easily known'' in the Proposing Release's discussion of the general standard by utilizing the ''knows or has reason to believe'' approach of the AICPA ethics and independence rules.[75]

ii. Application of Rule 2–01(b) to the Final Amendments

After considering the public comments and recommendations received, we affirm our view that Rule 2–01(b) applies to those relationships and services that previously were, but are no longer, covered by Rule 2–01(c) as a result of the final amendments. We do not believe that this position broadens the scope of the ''all relevant facts and circumstances'' concept in the general standard. Nor are we persuaded that this scope should be narrowed in light of the amendments we are adopting. Otherwise, for example, an auditor could have any number or magnitude of relationships with or provide services to sister entities that are no longer deemed affiliates under the final amendments—even where, for example, the importance of such relationships or services to the auditor and the controlling entity threatens the auditor's objectivity and impartiality.

In response to commenters who noted that ''easily known'' is not a defined term and requested further explanation, we are clarifying that the types of relationships and services that must be evaluated under Rule 2–01(b) are those that are known or should be known to the auditor because of the nature, extent, relative importance or other relevant aspects of the relationships or services. Consistent with our discussion in Example 2 above, auditors, with the assistance of their audit clients, are expected to have sufficient information to be able to be aware of and prepare for changes in materiality that could lead to changes in affiliate status of entities in a large corporate or ICC structure. As such, we do not expect that identifying and monitoring relationships with and services provided to non-affiliate sister entities that are known or should be known would require significant additional effort by audit firms. For example, if audit firms are performing a high volume of services for or have a number of relationships with non-affiliate sister entities, the audit firm should already know that these relationships exist.

As noted in Section II.A.1.a.iii, the final amendments will more effectively focus the independence rules and reduce the time and attention that auditors and audit committees spend avoiding or addressing compliance challenges that arise under the existing rules and should permit auditors and audit committees to use their resources more effectively to the benefit of investors. Nothing in the final amendments is intended to change the application of the general independence standard in Rule 2–01(b). As the Commission noted in the 2000 Adopting Release and in the rule text for Rule 2–01(c), paragraph (c) is a ''non-exclusive'' specification of circumstances. As such, while Rule 2–01(c) enumerates specific circumstances that are inconsistent with Rule 2–01(b), the general standard of Rule 2–01(b) may encompass relationships and services that are not otherwise deemed independence-impairing by Rule 2–01(c).

c. Amendments to the Investment Company Complex Definition

i. Proposed Amendments

The Commission proposed to amend Rule 2–01(f)(4) to clarify that, with respect to an entity under audit that is an investment company or an investment adviser or sponsor, the auditor and the audit client should look to proposed Rule 2–01(f)(14) (*i.e.,* the ICC definition) to identify affiliates of the audit client and not to proposed Rule 2–01(f)(4).[76] The Commission also proposed to amend the ICC definition in Rule 2–01(f)(14) to provide additional clarity by incorporating the term ''entity under audit'' into Rule 2–01(f)(14) to focus the analysis from the perspective of the entity under audit and to explicitly define the term ''investment company'' to include unregistered funds for the purpose of the ICC definition.[77] In the Proposing Release, the Commission indicated that the proposed amendments were designed to more effectively focus the independence analysis on the entity under audit, including unregistered funds under audit, and align that analysis with the independence analysis required for all investment companies.

In addition to the proposed amendments to clarify certain aspects of the ICC definition, the Commission proposed to include a materiality qualifier in the common control provision of the ICC definition to align with the proposed amendments to the affiliate of the audit client definition.[78] To further align with the affiliate of the audit client definition, the Commission proposed including a significant influence provision in the ICC definition.[79] Both of these proposed

[70] *See* letter from RSM (citing to the 2000 Adopting Release at 65 FR 76030). *See infra* discussion in Section II.A.1.b.ii.

[71] *See* letter from PwC.

[72] *See e.g.,* letters from RSM and PwC.

[73] *See* letter from RSM.

[74] *See e.g.,* letters from PwC, RSM, and AIC.

[75] *See* letters from PwC and AIC.

[76] The proposed amendment would replace the existing ''and'' that appears at the end of existing Rule 2–01(f)(4)(iii) with an ''or'' in order to direct auditors of an investment company or an investment adviser or sponsor to the ICC definition. In the final amendments, the ''or'' now appears at the end of amended Rule 2–01(f)(4)(iv) and before amended 17 CFR 210.2–01(f)(4)(v).

[77] We use the term ''unregistered fund'' in this release to refer to entities that are not considered investment companies pursuant to the exclusions in Section 3(c) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)].

[78] *See* Proposed Rule 2–01(f)(14)(i)(D)(*1*).

[79] *See* Proposed Rule 2–01(f)(14)(i)(E). The existing definition of ''audit client'' in Rule 2–01(f)(6), for the purpose of Rule 2–01(c)(1)(i), excludes entities that are affiliates only by virtue of the significant influence provisions in existing Rules 2–01(f)(4)(ii) and (iii). To align the treatment of affiliates due to significant influence under proposed Rule 2–01(f)(14)(i)(E) with those in the affiliate of the audit client definition, the Commission proposed an amendment to the ''audit client'' definition in Rule 2–01(f)(6) to similarly exclude entities identified under proposed Rule 2–01(f)(14)(i)(E).

amendments were meant to provide consistency between the definitions of affiliate of the audit client and ICC in light of the proposed amendment specifying that auditors of an investment company or investment adviser or sponsor would apply proposed Rule 2–01(f)(14) to identify affiliates of such entity under audit.

The Commission explained in the Proposing Release that while it was introducing a materiality qualifier in the common control provision, it was retaining within the scope of the ICC definition any investment company that has an investment adviser or sponsor that is an affiliate of the audit client—regardless of whether such sister investment companies are material to the shared investment adviser or sponsor.[80]

The Commission also noted that while the proposed amendments to the ICC definition would alter the composition of entities that would be deemed affiliates of the audit client principally due to a materiality qualifier being added for sister entities, the general independence standard in Rule 2–01(b) would continue to apply.[81] The Commission stated its belief that the proposed amendments to the ICC definition would provide clarity and address certain compliance challenges, including challenges related to the number of related entities or the volume of acquisitions and dispositions in ICCs, and more effectively focus the ICC definition on those relationships and services that are more likely to threaten auditor objectivity and impartiality.[82]

ii. Comments Received

Comments on Overall Approach to ICC Definition

Commenters generally supported the Commission's proposal to clarify that with respect to an entity under audit that is an investment company or an investment adviser or sponsor, the auditor and the audit client should look solely to the ICC definition to identify affiliates of the audit client,[83] and no commenters specifically opposed the proposed approach.

Several commenters expressly agreed with the proposed references to ''entity under audit'' in Rule 2–01(f)(14),[84] and no commenters specifically opposed the proposed references.

Some commenters supported the Commission's proposal to include within the meaning of the term investment company, for the purposes of the ICC definition, entities ''that would be an investment company but for the exclusions provided by Section 3(c) of the Investment Company Act.'' [85] For example, one commenter stated that under the current rules, ''it was not clear if unregistered funds would be part of the [ICC] definition, which created uncertainty and inconsistency in practice.'' [86] Another commenter stated that, if adopted, the inclusion of unregistered funds within the ICC definition would enable ''the asset management industry holistically [to] serve the interests of investors and provide for more consistent treatment across fund businesses.'' [87] No commenters expressly opposed this proposed amendment.

Many commenters who were supportive of the proposed amendments also requested clarification on the application of the proposed definitions to specific fact patterns, including the following circumstances:

- An investment adviser is the entity under audit and is both an issuer and parent entity; [88]
- An operating company is the entity under audit and has sister entities that include an investment company or an investment adviser or sponsor,[89] or the operating company under audit has a subsidiary that is an investment adviser that manages investment companies; [90] and
- The entity under audit is an investment company with sister funds advised by the same investment adviser, and such sister funds control portfolio companies.[91]

Regarding other general aspects of the proposed ICC definition, one commenter sought clarification about whether the reference to investment adviser or sponsor in the proposed ICC definition also would include custodians.[92] A different commenter requested that we revise the ICC definition to separately address affiliates of an investment company and affiliates of an investment adviser or sponsor.[93]

Comments on Proposed Rule 2–01(f)(14)(i)(D)(*1*)—Common Control and Materiality

Many commenters supported the inclusion of a materiality qualifier within proposed Rule 2–01(f)(14)(i)(D)(*1*), the common control provision of the proposed ICC definition.[94] Consistent with feedback received in response to the proposed materiality qualifier for operating companies under common control,[95] some commenters expressed the view that the materiality qualifier would not increase the risk to auditor objectivity and impartiality.[96] A few commenters, consistent with their feedback on the affiliate of the audit client definition, also recommended that proposed Rule 2–01(f)(14)(i)(D)(*1*) include a dual materiality threshold that would include consideration of whether the entity under audit is material to the controlling entity.[97]

However, the two commenters that opposed the proposed materiality qualifier in the affiliate of the audit client definition also opposed, for similar reasons, the inclusion of such a qualifier in the proposed ICC amendments.[98]

While some commenters indicated that auditors would not experience significant challenges or burdens with

[80] *See* Proposed Rule 2–01(f)(14)(i)(F).

[81] *See* Section II.A.1.b of the Proposing Release.

[82] *See* Section II.A.1 of the Proposing Release.

[83] *See e.g.,* letters from NYSSCPA, CAQ, Deloitte, BDO, EY, KPMG, RSM, GT, Crowe, and ICI/IDC. One commenter recommended that the final amendments specify that the ICC definition applies when the entity obtains an audit ''for SEC reporting or compliance purposes.'' *See* letter from KPMG. We believe this concept is implied by the requirements to apply Rule 2–01 in certain applicable provisions of the Federal securities laws.

[84] *See e.g.,* letters from NYSSCPA, Deloitte, BDO, EY, KPMG, and GT.

[85] *See e.g.,* letters from Deloitte, EY, KPMG, Crowe, and RSM.

[86] *See* letter from Crowe.

[87] *See* letter from EY.

[88] *See e.g.,* letters from CAQ and ICI/IDC. Consistent with the discussion in Section II.A.1 of the Proposing Release, where an auditor is auditing only an investment company or investment adviser or sponsor, such auditor would look to the amended ICC definition to identify affiliates of the audit client. Even where the investment adviser under audit is an issuer and a parent entity, the final amendments dictate that the adviser's auditor look solely to the amended ICC definition to identify affiliates of the audit client.

[89] *See e.g.,* letters from CAQ and Deloitte. The discussion in Section II.A.1.a.iii, above, including Example 3, illustrates how to apply the amended definitions where an auditor audits only a portfolio company.

[90] *See* letter from EY. The discussion in Section II.A.1.a.iii, above, including Example 4, illustrates how to apply the amended definitions in response to this circumstance.

[91] *See e.g.,* letters from CAQ, BDO, EY, KPMG, Crowe, and AIC. The discussion in Section II.A.1.c.iii, including Example 5, below, illustrates how to apply the amended definitions in response to this circumstance. One commenter raised a related fact pattern and suggested aligning the proposed amendments with the recent amendments to the Loan Provision. *See* letter from PwC.

[92] *See* letter from EY; *see also infra* note 118.

[93] *See* letter from RSM. We do not see a compelling reason to adopt this approach and create separate provisions for these related entities within an ICC. Additionally, such an approach may be duplicative and add unnecessary complexity to the amended ICC definition.

[94] *See e.g.,* letters from CAQ, BDO, EY, KPMG, RSM, PwC, GT, Crowe, AIC, ICI/IDC, IBC, CCMC, and Charles E. Andrews, Audit Committee Chair, Washington Mutual Investors Fund, *et al* (Mar. 10, 2020) (''Fund AC Chairs'').

[95] *See* Section II.A.1.a.iii.

[96] *See e.g.,* letters from EY, RSM, and KPMG.

[97] *See e.g.,* letters from EY, AIC, and CCMC.

[98] *See* letters from CII and CFA.

assessing materiality in the ICC context,[99] other commenters voiced concerns or noted that additional guidance about the application of materiality would be helpful.[100] Some commenters noted the importance of access to current financial information of controlling entities and sister entities for auditors and their clients if the proposed amendments were adopted.[101] In this regard, some commenters requested that the Commission address the shared responsibility of auditors, their audit clients, and audit committees.[102]

In response to a request for comment regarding potential application challenges in the Proposing Release, one commenter indicated there may be challenges in applying the materiality qualifier because the current definition does not require an assessment of materiality of sister entities in the context of the ICC.[103] The commenter suggested that such challenges could be addressed by auditors, the Commission, and companies working together to develop consistent practices and protocols for providing the information needed by auditors to maintain compliance with the independence rules. Similarly, another commenter requested guidance on the timing and frequency of monitoring materiality in the ICC context. The commenter suggested the Commission clarify that, if the sister investment adviser or a fund advised by such sister investment adviser were not deemed material to the controlling entity after an initial assessment, then the auditor could satisfy its obligation to monitor materiality on an ongoing basis in response to significant transactions, SEC filings, or other information that becomes known to the auditor, or the audit client, through reasonable inquiry.[104]

Under the proposal, auditors and audit clients would have to assess the materiality of sister entities to their controlling entity even if the sister entities' investment advisers are not material to the entity that controls both the sister entities and the entity under audit. In response to a request for comment regarding whether auditors should have to assess the materiality of sister investment companies to a controlling entity even where the investment advisers for such sister investment companies are not material to a controlling entity, commenters generally thought requiring such assessment would be appropriate to account for instances when a controlling entity may have an investment in an investment company that would make the investment company material to the controlling entity even though the investment company's adviser is not material to the same controlling entity.[105]

Comments on Proposed Rule 2–01(f)(14)(i)(F)—Inclusion of Investment Companies Advised or Sponsored by an Affiliate Investment Adviser or Sponsor

In the Proposing Release, the Commission requested comment regarding whether proposed Rule 2–01(f)(14)(i)(F), which would include within an ICC any investment company that has any investment adviser or sponsor that is an affiliate of the audit client pursuant to proposed Rules 2–01(f)(14)(i)(A) through (D), should be adopted. Several commenters supported the continued inclusion of sister investment companies under proposed Rule 2–01(f)(14)(i)(F), regardless of the materiality of the sister investment companies once an investment adviser is deemed to be an affiliate under Rules 2–01(f)(14)(i)(A) through (f)(14)(i)(D).[106] However, one commenter stated that not including a materiality qualifier in proposed Rule 2–01(f)(14)(i)(F) renders the relief intended by the common control provision in the proposed ICC definition ''inconsequential.'' [107] Another commenter, while supportive of proposed Rule 2–01(f)(14)(i)(F), recommended that the reference to proposed Rule 2–01(f)(14)(i)(D) be removed from proposed Rule 2–01(f)(14)(i)(F) with respect to investment companies advised by sister investment advisers, because the proposed provision appeared to be inconsistent with other proposed provisions that would include a materiality qualifier for sister entity affiliates.[108]

Comments on Proposed Rule 2–01(f)(14)(i)(E)—the Significant Influence Provision

Some commenters expressly supported the proposed amendment to introduce a significant influence provision in proposed Rule 2–01(f)(14)(i)(E),[109] and no commenters specifically opposed the proposed amendment. One commenter, while not explicitly supporting or objecting, recommended that the Commission reiterate the statement from the Loan Provision Adopting Release that provides guidance on how to apply significant influence in an investment company context.[110]

Commenters that addressed this aspect of the proposal also supported the proposed conforming amendment to Rule 2–01(f)(6) to reference the proposed significant influence provision in the ICC definition.[111]

iii. Final Amendments

Overall Approach to ICC Definition

After considering the public comments and recommendations received, we are adopting, substantially as proposed, amendments to the ICC definition in amended 17 CFR 210.2–01(f)(14) (''amended Rule 2–01(f)(14)''), with modifications to address the concerns and suggestions raised by commenters and to align the ICC definition with the final amendment related to the dual materiality threshold in amended Rule 2–01(f)(4)(ii) discussed above.[112]

Consistent with the proposal, the final amendments to Rule 2–01(f)(4), the affiliate of the audit client definition, direct an auditor of an investment company or investment adviser or sponsor to apply the ICC definition in amended Rule 2–01(f)(14) to identify affiliates. As proposed, the amended ICC definition uses the term ''entity under audit'' as the starting point for the analysis of entities included within the ICC definition.[113] We also are adopting

[99] *See e.g.,* letters from Fund AC Chairs, EY, and RSM.

[100] *See e.g.,* letters from NYSSCPA, GT, RSM, KPMG, PwC and ICI/IDC.

[101] *See e.g.,* letters from RSM, GT, KPMG, PwC, ICI/IDC, and Fund AC Chairs.

[102] *See e.g.,* letters from PwC and EY.

[103] *See* letter from KPMG.

[104] *See* letter from ICI/IDC. *See also* letters from Deloitte (expressing a similar view as it relates to both Rule 2–01(f)(4) and Rule 2–01(f)(14)) and PwC (suggesting a transition framework to address inadvertent independence violations that arise out of an unexpected change in the population of affiliates for reasons other than a merger or acquisition).

[105] *See e.g.,* letters from EY, KPMG, and RSM. One commenter noted that this situation is ''not likely to be common.'' *See* letter from EY. Another commenter requested additional guidance to foster consistent application. *See* letter from KPMG.

[106] *See e.g.,* letters from BDO, EY, KPMG, and ICI/IDC.

[107] *See* letter from RSM. Specifically, the commenter stated that all entities with a common investment adviser or sponsor should not automatically be deemed affiliates when other common control entities that are not material to the controlling entity are not deemed affiliates.

[108] *See* letter from KPMG.

[109] *See e.g.,* letters from CAQ, BDO, EY, KPMG, and RSM.

[110] *See* letter from ICI/IDC.

[111] *See e.g.,* letters from EY, KPMG, and RSM.

[112] *See* Section II.A.1.a.iii.

[113] In addition, the final amendments make conforming technical amendments to amended 17 CFR 210.2–01(f)(14)(i) to incorporate the term ''entity under audit.'' Using the term ''entity under audit'' in those subparagraphs alleviates the need to refer to each subparagraph separately, which makes the subparagraphs more concise. The conforming amendments to the subparagraphs of amended 17 CFR 210.2–01(f)(14)(i) retain the application of the

Continued

as proposed a definition of ''investment company'' for the purpose of amended Rule 2–01(f)(14) that includes unregistered funds.[114]

Similarly, the final amendments to the ICC definition include the significant influence provision of new 17 CFR 210.2–01(f)(14)(i)(E) (''Rule 2–01(f)(14)(i)(E)'') substantially as proposed but modified to incorporate the term ''entity under audit.''

New 17 CFR 210.2–01(f)(14)(i)(D)—Common Control and Materiality

After considering the public comments and recommendations received, we are adopting, with modification, new 17 CFR 210.2–01(f)(14)(i)(D) (''Rule 2–01(f)(14)(i)(D)'') to incorporate the dual materiality threshold in the common control provision, consistent with the modification to the common control provision we are adopting for the affiliate of the audit client definition.[115]

We were persuaded by commenters that the dual materiality threshold for identifying common control affiliates will be equally helpful in reducing compliance challenges in the ICC context as in the operating company context.[116] Such alignment also provides internal consistency within Rule 2–01, which should facilitate compliance efforts by reducing the potential for confusion and inconsistency when assessing common control affiliates.

Although some commenters objected to including a materiality threshold in the ICC amendments, we do not believe the adopted approach increases the risk to auditor independence. When an entity under audit is under common control with an investment company, or an investment adviser or sponsor, and the adopted dual materiality threshold is not met, we believe there is less risk to an auditor's objectivity and impartiality from the auditor's services to or relationships with such sister entity, for the reasons discussed regarding the dual materiality threshold for the common control provision in the affiliate of the audit client definition.[117] Further, we believe any threats to independence that may exist when the entity under audit is not material to the controlling entity will be sufficiently mitigated by the general independence standard in Rule 2–01(b).[118]

In response to commenters' request for guidance, consistent with the discussion in Section II.A.1.a.iii above, we remind auditors and their audit clients of their shared responsibility to monitor independence, including monitoring affiliates and obtaining information necessary to assess materiality. We are not providing any specific guidance on materiality at this time because we understand that auditors and their audit clients have developed approaches to determine materiality in compliance with current rules, and we expect those approaches would continue to be applicable under the final amendments. Auditors, working together with their audit clients, should assess materiality for the purpose of complying with Rule 2–01, as amended, including consideration of relevant qualitative and quantitative factors. Depending on the circumstances, it may be reasonable to use certain measures, such as assets under management, when evaluating a potential affiliate in one instance, but not when evaluating a different potential affiliate. The assessment also should be attentive to the nature of the relationship, the governance structure of the entity, certain business and financial relationships, and other relevant qualitative considerations.

As noted in Section II.A.1.a.iii, understanding the organizational structure of an audit client is important when considering the general standard under Rule 2–01(b). We believe that after the initial materiality assessment to identify potential affiliates, the auditor and the audit client should conduct updated assessments based on any transactions, Commission filings, or other information that become known to the auditor or the audit client through reasonable inquiry.

New 17 CFR 210.2–01(f)(14)(i)(F)—The Provision To Include Investment Companies Advised or Sponsored by an Affiliate Investment Adviser or Sponsor

After considering the public comments and recommendations received, we are adopting, as proposed, new 17 CFR 210.2–01(f)(14)(i)(F) (''Rule 2–01(f)(14)(i)(F)''), which includes certain sister investment companies within the ICC definition regardless of materiality. We believe that this paragraph, together with the amendments to the common control provision in Rule 2–01(f)(14)(i)(D), as discussed above, will focus the scope of our independence rules on entities where relationships and services are more likely to threaten an auditor's objectivity and impartiality.

Specifically, under the existing ICC definition, sister investment advisers or sponsors and, as a result, their funds, regardless of whether the sister investment advisers or sponsors are material to the applicable controlling entities, would be included in the ICC of an investment company under audit.[119] Rule 2–01(f)(14)(i)(F) includes within the ICC definition investment advisers or sponsors identified by amended Rules 2–01(f)(14)(i)(A) through (D), which will include sister investment advisers or sponsors where a dual material relationship exists pursuant to Rule 2–01(f)(14)(i)(D) and exclude sister investment advisers or sponsors where a dual material relationship does not exist. While some commenters indicated that Rule 2–01(f)(14)(i)(F) should include a materiality qualifier, we believe that such an approach risks excluding entities where an auditor's services to or

ICC definition as described in the Proposing Release.

[114] One commenter suggested that the Commission clarify whether commodity pools are included within the meaning of the term investment company for the purpose of applying amended Rule 2–01(f)(14). *See* letter from PwC. The term investment company, for the purpose of amended Rule 2–01(f)(14), does not include a commodity pool unless that commodity pool is an investment company or would be an investment company but for the exclusions provided by Section 3(c) of the Investment Company Act of 1940.

[115] *See* Section II.A.1.a.iii.

[116] *See e.g.,* letters from EY, AIC, and CCMC. For example, CCMC expressed the view that Rule 2–01(f)(14)(i)(D) should be amended to include sister investment advisers and investment companies only when both the sister entity and the investment adviser under audit, or the investment adviser or sponsor of an investment company under audit, are material to the controlling entity.

[117] Rule 2–01(f)(14)(i)(D) retains the existing provision that includes sister entities engaged in the business of providing administrative, custodian, underwriting, or transfer agent services to any entity identified by amended 17 CFR 210.2–01(f)(14)(i)(A) (''amended Rule 2–01(f)(14)(i)(A)'') and amended 17 CFR 210.2–01(f)(14)(i)(B), regardless of materiality.

[118] One commenter sought clarification about whether Rule 2–01(f)(14) would apply to engagements required by Rule 206(4)–2(a)(6) under the Investment Advisers Act of 1940 (the ''Advisers Act Custody Rule''). *See* letter from EY; 17 CFR 275.206(4)–2(a)(6). The Advisers Act Custody Rule requires that when an investment adviser or a related person acts as a qualified custodian for client funds and securities, the investment adviser, in addition to the independent verification requirement, must annually obtain, or receive from the related person, an internal control report prepared by an independent public accountant. The Advisers Act Custody Rule defines a ''related person'' as ''any person, directly or indirectly, controlling or controlled by [the investment adviser], and any person that is under common control with [the investment adviser].'' 17 CFR 275.206(4)–2(d)(7). For purposes of this engagement, the related person qualified custodian would be the ''entity under audit'' under the final rule. Accordingly, the auditor engaged would apply amended Rule 2–01(f)(4)—not amended Rule 2–01(f)(14)—to determine the affiliates of the audit client, which would require the auditor to assess the investment adviser's materiality if under common control. In these circumstances, however, the accountant would be required to be independent of the adviser under Rule 2–01(b) regardless of the results of this materiality determination.

[119] *See* Rule 2–01(f)(14).

relationships with a sister investment company could impair an auditor's objectivity and impartiality because the sister investment company is advised or sponsored by an affiliate investment adviser or sponsor.

Where a sister investment company shares the same adviser or sponsor as an investment company under audit, we continue to believe that these entities should be included as part of the ICC in evaluating the auditor's independence, regardless of whether such sister investment company is material to the shared investment adviser or sponsor. In our view, the nature of the relationship between the investment adviser and the entity under audit that it advises presents risks to an auditor's objectivity and impartiality when the auditor has relationships with or provides services to investment companies advised by such investment adviser.

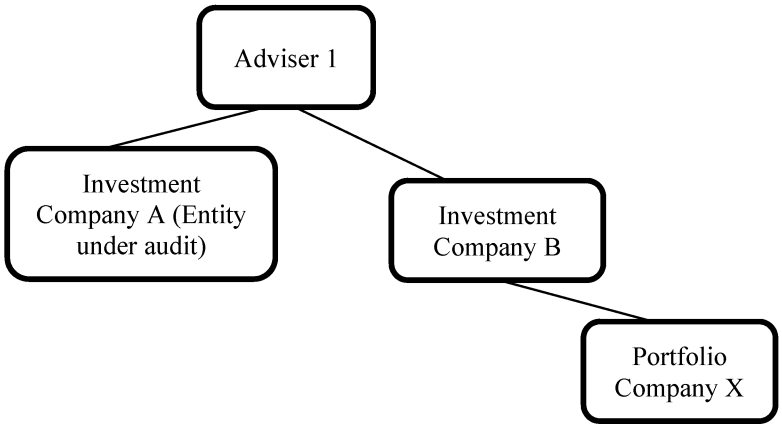
Similarly, when a sister investment adviser or sponsor is included under the dual materiality threshold, we believe that the investment companies advised or sponsored by the sister investment adviser or sponsor should be included as part of the ICC in evaluating the auditor's independence, regardless of whether such sister investment companies are material to the applicable controlling entities. Once the sister investment adviser or sponsor is included in the ICC due to the dual materiality threshold, relationships with and services to investment companies advised or sponsored by the sister investment adviser or sponsor also are more likely to pose a threat to an auditor's objectivity and impartiality.

Amended 17 CFR 210.2–01(f)(14)(i)(C)—Application to Portfolio Companies Controlled by Sister Investment Companies

As noted above, we received several comments regarding how the control provision in proposed Rule 2–01(f)(14)(i)(C) applies to portfolio companies of an affiliate sister investment company when an investment company is under audit.[120] We are mindful of the concerns raised by commenters and are adopting the control provision in amended 17 CFR 210.2–01(f)(14)(i)(C) (''amended Rule 2–01(f)(14)(i)(C)'') with modifications to apply a dual materiality threshold for portfolio companies of sister investment companies that are controlled by the investment adviser or sponsor unless the portfolio companies are engaged in the business of providing administrative, custodial, underwriting, or transfer agent services to any entity identified by amended Rules 2–01(f)(14)(i)(A) or (B). As illustrated by Example 5 below, this modification will affect only the application of the rule for portfolio companies because Rule 2–01(f)(14)(i)(F), as discussed above, will dictate when sister investment companies are included within the ICC definition.

Under a scenario where neither the investment company under audit nor the portfolio company is material to the shared investment adviser or sponsor, there is less risk to the auditor's objectivity and impartiality. The modification in amended Rule 2–01(f)(14)(i)(C) does not alter the application of the ICC definition to portfolio companies controlled by an investment company under audit, as such portfolio companies will always be included in the ICC pursuant to amended 17 CFR 210.2–01(f)(14)(i)(C)(*1*) (''amended Rule 2–01(f)(14)(i)(C)(*1*)''). The following is intended as an illustrative example only, and practitioners and audit clients should be aware that an assessment of materiality requires consideration of all relevant facts and circumstances, including quantitative and qualitative factors.

Example 5 – Application of New 17 CFR 210.2-01(f)(14)(i)(C)(*2*)



Investment Company A, the entity under audit, is advised by Adviser 1, which also advises Investment Company B. Investment Company B controls Portfolio Company X and, as a result, Adviser 1 is deemed to control Portfolio Company X. Pursuant to amended Rule 2–01(f)(14)(i)(C)(*1*), Investment Company A's auditor would include in the ICC any portfolio company controlled by Investment Company A even if the portfolio company is not material to Adviser 1. Pursuant to Rule 2–01(f)(14)(i)(F), the auditor also would include in the ICC Investment Company B even if Investment Company B is not material to Adviser 1. However, the auditor would apply the dual materiality threshold in new 17 CFR 210. 2–01(f)(14)(i)(C)(*2*) (''Rule 2–01(f)(14)(i)(C)(*2*)'') to determine if Portfolio Company X is included in the ICC in connection with Investment Company A's audit. If neither Portfolio Company X nor Investment Company A is material to Adviser 1 and Portfolio

[120] *See e.g.,* letters from CAQ, BDO, EY, KPMG, Crowe, and AIC.

Company X is not engaged in the business of providing administrative, custodial, underwriting, or transfer agent services to any entity identified by amended Rules 2–01(f)(14)(i)(A) and (B), Portfolio Company X would not be included in the ICC in connection with the audit of Investment Company A.

2. Amendment to the Definition of Audit and Professional Engagement Period

Rules 2–01(c)(1) through (5) prescribe certain circumstances the occurrence of which during the ''audit and professional engagement period'' are inconsistent with the general standard under Rule 2–01(b).[121] Under the current rule, the term ''audit and professional engagement period'' is defined differently for domestic issuers and foreign private issuers (''FPIs'')[122] that are filing, or required to file, a registration statement or report with the Commission for the first time (''first-time filers''). Specifically, 17 CFR 210.2–01(f)(5)(i) and (ii) define the audit and professional engagement period as including both the ''period covered by any financial statements being audited or reviewed'' and the ''period of the engagement to audit or review the . . . financial statements or to prepare a report filed with the Commission . . .'' (the ''look-back period''). However, 17 CFR 210.2–01(f)(5)(iii) (''Rule 2–01(f)(5)(iii)'') of the definition narrows the audit and professional engagement period for audits of the financial statements of foreign private issuers to the ''first day of the last fiscal year before the foreign private issuer first filed, or was required to file, a registration statement or report with the Commission, provided there has been full compliance with home country independence standards in all prior periods covered by any registration statement or report filed with the Commission.''

a. Proposed Amendments

The Commission proposed to amend Rule 2–01(f)(5)(iii) so that the one year look-back period for first-time filers will apply to all such filers, which would result in treating all first-time filers (*i.e.,* domestic issuers and FPIs) similarly for purposes of the independence requirements under Rule 2–01.[123]

In the Proposing Release, the Commission explained that the proposed amendment would provide parity between domestic issuers and FPIs and noted feedback that such parity may also benefit capital formation.[124] The Commission stated its belief that the proposed requirement to comply with applicable independence standards in all prior periods included in the first-time filing sufficiently mitigates the risk associated with shortening the look-back provision for domestic first-time filers. In addition, as it relates to relationships and services in prior years that would not be included in the look-back period as a result of the proposed amendment, the Commission noted that such relationships and services still would be considered under the general independence standard of Rule 2–01(b), either individually or in the aggregate.

b. Comments Received

Many commenters supported the proposed amendment to shorten the domestic company look-back period for evaluating independence compliance to the most recent year to be included in the first filing with the Commission.[125] Several commenters stated that the current requirement can result in challenges, cost, or delays to an initial public offering (''IPO'').[126] One commenter indicated that these challenges are especially relevant in the private equity environment where strategies change within a one- or two-year time frame.[127] Some commenters also noted that the current provision puts domestic issuers at a disadvantage relative to FPIs.[128]

Some commenters opposed the proposed amendment and, instead, suggested the Commission lengthen the look-back period for FPIs.[129] One of these commenters posited that entities contemplate going public for years before an IPO and, as such, the current domestic look-back period is not an ''egregious'' burden.[130] Another commenter cited the increased risk associated with ''unicorn'' IPOs and asserted that this proposed amendment would weaken the applicable independence rules when serious questions ''have arisen around accounting practices at some of the largest private companies.''[131]

A few commenters supported the Commission's view that all relationships and services in prior periods should still be evaluated under Rule 2–01(b) and that these relationships and services should be easily known.[132]

Several commenters also requested that the Commission clarify how the proposed amendment would apply to specific situations such as:

- Reverse mergers or special purpose acquisition companies, if such a transaction is being considered by an audit client that is currently an issuer;[133]
- An existing and a new audit relationship;[134] and
- When a registration statement is withdrawn and a new registration statement subsequently is filed.[135]

c. Final Amendments

After considering the public comments and recommendations received, we are adopting amended 17 CFR 210.2–01(f)(5)(iii) (''amended Rule 2–01(f)(5)(iii)'') as proposed. As noted in the Proposing Release, the staff has observed, from its independence consultation experience related to potential filings of initial registration statements, that often one factor, among many, in the auditor's objectivity and impartiality analysis is how long ago the service or relationship ended. If the service or relationship ended in the early years of the financial statements included in the initial registration statement, that fact may support a conclusion that the auditor is objective and impartial under Rule 2–01 at the time the IPO is consummated. As discussed above, a number of commenters supported the Commission's reasoning for the proposal.

We were not persuaded by the commenters who opposed the proposal and who recommended lengthening the look-back period for FPIs instead. As a general matter, we believe that lengthening the look-back period would unnecessarily increase the burden on

[121] *See* Preliminary Note 2 and Rules 2–01(c)(1) through (5).

[122] 17 CFR 240.3b–4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents; and (2) any of the following: (i) A majority of its executive officers or directors are citizens or residents of the United States; (ii) more than 50% of its assets are located in the United States; or (iii) its business is principally administered in the United States. *See* 17 CFR 240.3b–4(c).

[123] The proposed amendment would not impact the compliance analysis related to the partner rotation provisions in 17 CFR 210.2–01(c)(6).

[124] *See* Section II.A.2 of the Proposing Release.

[125] *See e.g.,* letters from NASBA, CAQ, AICPA, Deloitte, BDO, EY, KPMG, RSM, PwC, Crowe, AIC, EQT, FEI, GT, CCMC, and Parrett.

[126] *See e.g.,* letters from CAQ, Deloitte, EY, EQT, GT, PwC, and AIC.

[127] *See* letter from BDO.

[128] *See e.g.,* letters from EQT and FEI.

[129] *See e.g.,* letters from NYSSCPA, CII, and CFA.

[130] *See* letter from NYSSCPA.

[131] *See* letter from CFA.

[132] *See e.g.,* letters from Deloitte and KPMG. *But see* letters from RSM and PwC. The view expressed by RSM and PwC regarding the application of Rule 2–01(b) also applies to the discussion of its applicability in this context.

[133] *See* letter from GT.

[134] *See* letter from KPMG.

[135] *See* letters from GT and Crowe.

capital formation and impose new regulatory costs on FPIs without significantly enhancing investor protection. With respect to the comment regarding the impact of shortening the look-back period for ''unicorn'' IPOs,[136] it is not clear that financial reporting quality would be undermined or concerns, such as ''inadequate corporate governance and lax accounting practices,'' would be exacerbated by the shorter look-back period for domestic issuers. Moreover, the final amendments do not affect the auditing standards to which a company undergoing an IPO is subject. Additionally, we continue to believe that applying Rule 2–01 to the most recent fiscal year, together with the application of the general independence standard in Rule 2–01(b) and the requirement to comply with applicable independence standards for the earlier years, mitigate the risk to an auditor's objectivity and impartiality associated with the shorter look-back period.[137]

In response to some commenters' request for clarification or guidance, we note that the final amendment applies to both existing and new audit relationships. We see no proportionate investor protection benefit to introducing complexity to a first-time filer's decision whether to retain or select a new auditor by applying different standards. Where a registrant is undergoing a reverse merger that is in substance similar to an IPO, the audit client and auditor should not apply the transition framework discussed in Section II.D, but may apply the shorter look-back period under the final amendments.[138] Finally, consistent with the position taken by the staff in consultations, we are clarifying that where an issuer withdraws an initial registration statement, the re-filing of a new registration statement would be considered the issuer's first-time filing.

B. Amendments to Loans or Debtor-Creditor Relationships

1. Amendment To Except Student Loans

a. Proposed Amendment

The Loan Provision in Rule 2–01(c)(1)(ii)(A) provides that an accountant is not independent if it has any loan to or from an audit client and certain other persons related to the audit client. The Loan Provision also excepts four types of loans from its scope.[139] The Commission proposed to add an exception to 17 CFR 210. 2–01(c)(1)(ii)(A)(*1*) (''Rule 2–01(c)(1)(ii)(A)(*1*)'') for student loans obtained from a financial institution under its normal lending procedures, terms, and requirements for a covered person's educational expenses, provided the loan was obtained by the individual prior to becoming a covered person in the firm as defined in 17 CFR 210.2–01(f)(11).[140]

In the Proposing Release, the Commission indicated that limiting the exception to student loans ''not obtained while the covered person in the firm was a covered person'' would provide a familiar compliance principle as it is consistent with the limitation to the primary mortgage loan exception in current 17 CFR 210.2–01(c)(1)(ii)(A)*(1)(iv)* (''Rule 2–01(c)(1)(ii)(A)*(1)(iv)*''). The Commission also expressed the belief that obtaining a student loan as a covered person poses a higher risk to the auditor's objectivity and impartiality and creates, at a minimum, an independence appearance issue that is not present when a non-covered person obtained a similar student loan from such audit client.

The proposed amendment also limited the exclusion to student loans obtained for the covered person's educational expenses. The Commission did not propose to extend the exception to a covered person's immediate family members due to concerns, at that time, that the amount of student loan borrowings could be significant when considering student loans obtained for multiple immediate family members and thus could impact an auditor's objectivity and impartiality.

b. Comments Received

Commenters generally supported adding student loans to the list of excepted loans.[141] Many commenters recommended that the Commission expand the exception to include student loans of the covered person's immediate family members under the same terms as the proposed amendment.[142] For example, one commenter questioned the Commission's argument that ''the amount of student loan borrowings could be significant when considering student loans obtained for multiple immediate family members and thus could impact an auditor's objectivity and impartiality'' when considering that there is no similar proscription with respect to a mortgage loan, which could be substantially more significant than student loan debt in terms of absolute dollars.[143] However, another commenter agreed with the proposal not to include student loans of immediate family members in the proposed amendment.[144]

In the Proposing Release, the Commission requested comment on whether student loans of a covered person's immediate family members also should be excluded. Some commenters indicated that even if the proposed amendment were expanded to include student loans of immediate family members, there should be no limit on the amount outstanding.[145] One commenter suggested that the materiality of the loan to the covered person's net worth should be considered.[146] A few commenters indicated that Rule 2–01(b) should mitigate the risks of the amount of student loans impairing an auditor's objectivity and impartiality.[147] Without addressing immediate family members' loans, some commenters asserted that there should be no limit on the amount outstanding, similar to the existing primary residence mortgage exception.[148] We also note that certain commenters requested that the Commission clarify the scope of the term ''educational expenses'' and whether it includes expenses for room and board, tuition, books, and other educational supplies.[149]

c. Final Amendment

After considering the public comments and recommendations received, we are adopting amendments to except certain student loans from the Loan Provision with two modifications from the proposed amendments. Consistent with the recommendation of many commenters, the final amendment also will except student loans obtained by a covered person's immediate family members, as that term is defined in 17 CFR 210.2–01(f)(13). We are persuaded that there is no need to include such a limitation, especially in light of the fact that similar exclusions, such as the one

[136] *See* letter from CFA.

[137] For additional guidance regarding the application of Rule 2–01(b) to the final amendments, see Section II.A.1.a.iii, above.

[138] *See* Section II.D.3.

[139] *See* Rule 2–01(c)(1)(ii)(A)(*1*)(*i*) through (*iv*), which lists as excepted loans those that are collateralized by automobiles, insurance policies, cash deposits, and primary residences.

[140] *See* 17 CFR 210.2–01(f)(11), defining which partners, principals, shareholders, and employees of an accounting firm are considered covered persons.

[141] *See e.g.,* letters from NASBA, NYSSCPA, CAQ, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Crowe, CII, ICI/IDC, IBC, FEI, Fund AC Chairs, and CCMC.

[142] *See e.g.,* letters from NASBA, NYSSCPA, CAQ, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Crowe and ICI/IDC.

[143] *See* letter from NYSSCPA.

[144] *See* letter from CII.

[145] *See e.g.,* letters from RSM, Deloitte, and EY.

[146] *See* letter from NASBA.

[147] *See e.g.,* letters from Deloitte and EY.

[148] *See e.g.,* letters from NYSSCPA, BDO, and KPMG.

[149] *See e.g.,* letters from CAQ, BDO, PwC, Crowe, and GT.

for mortgage loans, are not similarly proscribed. Also, in response to comments seeking guidance on the term ''educational expenses,'' we believe the entire balance for loans that qualify as a student loan under the applicable terms, conditions, and requirements should be within the scope of the final amendments.

The proposed amendment's reference to student loans ''obtained for a covered person's or his or her immediate family members' educational expenses'' was intended to make explicit that it is only student loans for the covered persons' and their immediate family members' educational expenses that should be covered and not loans that they undertake to pay for another person's educational expenses. That limitation continues to apply. However, we are modifying the rule text to delete this phrase to avoid potential confusion about whether ''educational expenses'' is meant as a limitation on the amount of student loans excepted.[150] The remaining terms of the exclusion are consistent with the proposal.

We are not specifying a numerical limit to the amount of outstanding student loans held by a covered person or a covered person's immediate family members that would be excepted. In light of comments received, we are persuaded that the purpose for which student loans are incurred and the standard terms associated with such loans set them apart from other debtor/creditor relationships not excepted from the Loan Rule and are less likely to threaten an auditor's objectivity and impartiality. We believe the nature of student loans and the requirement that the loans are obtained from a financial institution under its normal lending procedures, terms, and requirements mitigate the risk such loans would pose to an auditor's objectivity and impartiality. Not including a numerical limit also is consistent with the exception for mortgage loans in Rule 2–01(c)(1)(ii)(A)*(1)(iv)*.

2. Amendment To Clarify the Reference to ''A Mortgage Loan''

a. Proposed Amendment

The Commission proposed a clarifying amendment to the reference to ''a mortgage loan'' in Rule 2–01(c)(1)(ii)(A)(*1*)(*iv*) to refer to ''mortgage loans'' in the plural. As noted in the Proposing Release, Rule 2–01(c)(1)(ii)(A)(*1*)(*iv*) was not intended to exclude just one outstanding mortgage loan on a borrower's primary residence, and the Commission staff has previously provided guidance consistent with the proposed amendment.[151]

b. Comments Received

Commenters supported the proposed amendment.[152] We received no comments specifically opposing this proposed amendment. One commenter requested examples of how the proposed amendment applies to different types of mortgage loans, such as home equity or home improvement loans.[153] Another commenter suggested that the Commission consider extending the exemption to include mortgages collateralized by property other than primary residences.[154] One commenter requested that the Commission include in the adopting release the guidance discussed in Section II.B.2 of the Proposing Release regarding the situation where a borrower becomes a covered person only because of a change in the ownership in the loan.[155]

c. Final Amendment

After considering the public comments and recommendations received, we are adopting as proposed the amendment to Rule 2–01(c)(1)(ii)(A)(*1*)(*iv*) to refer to ''mortgage loans'' instead of ''a mortgage loan.'' In response to the commenter who requested examples or guidance on the application of the mortgage loan exception when a borrower has obtained different types of loans collateralized by a primary residence, we note that the Commission has previously clarified that the rationale for the mortgage loan exception focuses on the status of the covered person at the time of the loan origination.[156] The same focus applies to second mortgages, home improvement loans, equity lines of credit, and similar mortgage obligations collateralized by a primary residence obtained from a financial institution under its normal lending procedures, terms and requirements and while the borrower is not a covered person in the firm.

Also, as noted in the Proposing Release,[157] where the borrower becomes a covered person only because of a change in the ownership in the loan, and provided there is no modification in the original terms or conditions of the loan or obligation after the borrower becomes, or in contemplation of the borrower becoming, a covered person, the loan would be included within this exception.

Regarding a commenter's suggestion to extend the mortgage loan exception to loans collateralized by a non-primary residence (*e.g.,* a secondary or vacation home), we believe excepting loans on non-primary residences, which may be held for investment, would introduce increased risk to an auditor's objectivity and impartiality. As such, we do not see a compelling reason to expand the exception as suggested.

3. Amendment To Revise the Credit Card Rule To Refer to ''Consumer Loans''

a. Proposed Amendment

The Commission proposed revising 17 CFR 210.2–01(c)(1)(ii)(E) (''Rule 2–01(c)(1)(ii)(E)'') (the ''Credit Card Rule'') to replace the reference to ''credit cards'' with ''consumer loans'' and revise the provision to reference any consumer loan balance owed to a lender that is an audit client that is not reduced to $10,000 or less on a current basis taking into consideration the payment due date and available grace period. The Proposing Release set forth the Commission's view that a limited amount of debt that is routinely incurred by a covered person or any of his or her immediate family members for personal consumption, even if the audit client is the lending entity, would typically not impair an auditor's objectivity and impartiality. The proposed amendment would expand the current Credit Card Rule to encompass the types of consumer financing borrowers routinely obtain for personal consumption, such as, for example, retail installment loans, cell phone installment plans, and home improvement loans that are not secured by a mortgage on a primary residence. The Proposing Release explained that the types of consumer loans contemplated, like credit cards, would typically have a payment due date (*e.g.,* monthly).[158]

[150] With ''educational expenses'' deleted, the reference to covered persons and their immediate family members would be duplicative of the same references in 17 CFR 210.2–01(c)(1)(ii).

[151] *See* Section B. Question 1 Office of the Chief Accountant: Application of the Commission's Rules on Auditor Independence Frequently Asked Questions (June 27, 2019) (originally issued August 6, 2007) (''Auditor Independence FAQs'') (indicating the staff's view that the rationale for a mortgage on a primary residence also applies to second mortgages, home improvement loans, equity lines of credit and similar mortgage obligations collateralized by a primary residence obtained from a financial institution under its normal lending procedures, terms and requirements and while not a covered person in the firm).

[152] *See e.g.,* letters from NASBA, NYSSCPA, CAQ, BDO, EY, KPMG, RSM, PwC, GT, FEI, and Crowe.

[153] *See* letter from FEI.

[154] *See* letter from Crowe.

[155] *See* letter from EY.

[156] *See* 2000 Adopting Release.

[157] Section II.B.2 of the Proposing Release.

[158] Section II.B.3 of the Proposing Release.

b. Comments Received

All commenters that addressed this proposed amendment expressed their support.[159] We received no comments that specifically opposed this proposed amendment. Some commenters supported the proposed $10,000 limit,[160] while other commenters recommended raising the limit to $20,000 to account for inflation.[161] One commenter suggested an increase to $20,000 or $25,000 while citing to recent studies about consumer finances.[162] Some commenters encouraged the Commission to consider adjustments of the dollar threshold to account for inflation.[163] A few commenters requested that the Commission reconsider the limit, but did not suggest an alternative amount.[164]

In the Proposing Release, the Commission requested comment on whether further guidance was needed with respect to the reference to current basis. Some commenters indicated that the term ''current basis'' does not require further guidance.[165] A few commenters stated that the term ''consumer loans'' is well understood and does not require further defining,[166] while other commenters stated that further guidance is needed.[167] One commenter recommended that the Commission define the term ''consumer loan'' along the lines of the discussion in the Proposing Release and suggested that the rule retain a reference to ''credit cards'' for additional clarity.[168] Another commenter suggested the Commission use the term ''other consumer loans'' because, in its view, consumer loans commonly include auto, home equity, and student loans and mortgages.[169] Some commenters requested that the Commission consider whether similar exclusions should be applied to other consumer financial arrangements, such as digital payment application balances,[170] deposit overdraft protections,[171] insurance policies, leases, and deposit account balances that exceed FDIC insurance limits or are not subject to FDIC or similar insurance.[172]

c. Final Amendment

After considering the public comments and recommendations received, we are adopting as proposed amended 17 CFR 210.2–01(c)(1)(ii)(E). The amendment is intended to broaden this provision so that credit card debt and other forms of consumer financing, such as retail installment loans, cell phone installment plans, and home improvement loans that are not secured by a mortgage on a primary residence, would be excluded if the outstanding balance is $10,000 or less on a current basis. Consistent with the payment terms in the current Credit Card Rule, in assessing the current basis of a consumer loan balance, the borrower would consider the payment due date, plus any available grace period, which is typically monthly for credit cards. We considered inflationary adjustments in light of comments received asking for an increase from the proposed $10,000 outstanding balance limit. However, we are not modifying the proposed outstanding balance limit because we believe $10,000 remains a significant amount of money for an individual covered by the final amendment (*i.e.,* any covered person or his or her immediate family members). In particular, we believe that when an individual covered by the final amendment has outstanding consumer loan(s) with an audit client in excess of this amount, the auditor's objectivity and impartiality could be impaired.

The additional exclusions suggested by commenters for other consumer financial arrangements, such as digital payment application balances, among others, were not included as part of the proposal and may involve their own unique set of issues. Accordingly, the final amendment does not cover such arrangements. Also, we believe including many enumerated types of consumer loans in the rule will increase complexity of the rule and may become outdated as consumer lending arrangements evolve. As such, we have not included within Rule 2–01(f) a definition of the term ''consumer loan.'' We also did not adopt commenters' suggestions to use a term other than ''consumer loans,'' such as to retain the current reference to ''credit cards'' or to add ''other,'' as we believe the rule is sufficiently clear as to what types of loans are covered under this exception.

C. Amendments to the Business Relationships Rule

1. Proposed Amendment to the Reference to ''Substantial Stockholder''

The Commission proposed to replace the term ''substantial stockholders'' in the Business Relationships Rule with the phrase ''beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence over the audit client.'' Currently, Rule 2–01(c)(3) prohibits, at any point during the audit and professional engagement period, the accounting firm or any covered person from having ''any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or *substantial stockholders* . . . .'' (emphasis added).

In the Proposing Release, the Commission expressed its belief that referring to ''beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence over the audit client'' instead of ''substantial stockholders'' would improve the rule by making it clearer and less complex. In this regard, the Commission noted that ''substantial stockholder'' is not currently defined in Regulation S–X, whereas the concept of significant influence is used in the Loan Provision [173] and other aspects of the auditor independence rules.[174]

The Proposing Release also included additional guidance to explain that regardless of whether the beneficial owner owns equity securities of an audit client, including an affiliate of the audit client, the independence analysis should focus on whether the beneficial owner has significant influence over the entity under audit, as business relationships with persons with such influence could be reasonably expected to affect an auditor's objectivity and impartiality.[175]

[159] *See e.g.,* letters from NASBA, NYSSCPA, CAQ, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Crowe, ICI/IDC, IBC, FEI, Fund AC Chairs, and Law Office of Edward B. Horahan III (Mar. 12, 2020) (''Horahan'').

[160] *See e.g.,* letters from NYSSCPA and Crowe.

[161] *See e.g.,* letters from BDO and EY.

[162] *See* letter from Horahan.

[163] *See e.g.,* letters from CAQ, PwC, and RSM.

[164] *See e.g.,* letters from KPMG and IBC.

[165] *See e.g.,* letters from BDO, KPMG, RSM, and EY.

[166] *See e.g.,* letters from BDO and EY.

[167] *See e.g.,* letters from KPMG, RSM, IBC, and PwC.

[168] *See* letter from PwC.

[169] *See* letter from RSM.

[170] *See* letter from FEI.

[171] *See e.g.,* letters from PwC, KPMG, and FEI.

[172] *See* letter from PwC.

[173] Consistent with the recently adopted amendments discussed in the Loan Provision Adopting Release, the Commission indicated that use of ''significant influence'' in the proposed amendments is intended to refer to the principles in the Financial Accounting Standards Board's (''FASB's'') ASC Topic 323, Investments—Equity Method and Joint Ventures. *See* Section II.C.3 of the Loan Provision Adopting Release.

[174] *See e.g.,* Rules 2–01(f)(4)(ii) and (iii).

[175] *See* Section II.C.2 of the Proposing Release. This guidance was limited to the analysis related to associated persons in a decision-making capacity of an audit client. This guidance was not intended to change the analysis when evaluating ''any direct or material indirect business relationships with an audit client.'' Under the current, proposed, and

Continued

2. Comments Received

Many commenters supported the proposal to use the significant influence concept from the Loan Provision to replace the reference to substantial stockholder in the Business Relationships Rule.[176] Commenters stated that this approach would facilitate compliance by applying a concept that is well understood.[177] Some commenters indicated the proposal would more appropriately identify those relationships that are more likely to impair an auditor's objectivity and impartiality[178] and would increase the number of qualified firms from which an issuer may choose.[179]

One commenter opposed the proposed amendment.[180] This commenter reiterated concerns regarding the concept of beneficial owner with significant influence, which the commenter previously expressed with respect to the recent amendments to the Loan Provision.[181]

Several commenters recommended that the Commission consider aligning the guidance in the Proposing Release with the Loan Provision Adopting Release to clarify that entities under common control with, or controlled by, the beneficial owner of the audit client's equity securities that has significant influence over the audit client would be excluded from the scope of the Business Relationships Rule.[182]

One commenter requested that the Commission provide examples of the types of business relationships that would be ''problematic'' based on consultations received.[183]

In the Proposing Release, the Commission requested comment on whether additional amendments are needed to address multi-company relationships. Commenters provided their views concerning multi-company relationships, including, for some, the application of Rule 2–01(b) to these situations.[184] These commenters suggested that the Commission consider these discussions and examples when considering whether to provide future guidance in this area. Some commenters explicitly noted that they do not believe further amendments are required to identify whether the auditor's objectivity and impartiality would be impaired.[185]

One commenter suggested a broad re-examination of the Business Relationships Rule due to the changes in the business environment and multi-company relationships.[186] Another commenter stated that Rule 2–01(c)(3) currently precludes many private equity firms from investing in certain multi-company relationships and that the proposed amendments do not address this issue.[187] This same commenter also noted that its recommendation to apply a dual materiality threshold in determining if a sister entity is an affiliate of the audit client would significantly alleviate the concerns around the Business Relationships Rule.

With respect to the additional guidance in the Proposing Release, many commenters expressed their support for the clarification that the focus of the significant influence analysis, as it relates to persons in a decision-making capacity, should be on the entity under audit.[188] Commenters also recommended that the Commission reiterate this guidance in the adopting release or revise the rule text to incorporate it.[189]

Two commenters requested that the Commission clarify whether this ''entity under audit'' guidance applies to officers and directors as referenced in the Business Relationships Rule.[190]

3. Final Amendments

After considering the public comments and recommendations received, we are adopting amendments to the Business Relationships Rule substantially as proposed with one modification. We are modifying the proposal to incorporate the guidance in the Proposing Release regarding the reference to ''audit client'' when identifying associated persons in a decision-making capacity, including beneficial owners. Under this approach, the independence analysis focuses on whether the associated person has decision-making capacity over the entity under audit rather than the audit client. We continue to believe that providing internal consistency between the Loan Provision and the Business Relationships Rule by leveraging the concept of ''beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence'' will foster compliance and consistency in application.

Regarding the comments seeking consistency with the Loan Provision in other areas, we do not agree with the recommendation that entities controlled by or under common control with the beneficial owner of the audit client's equity securities, where such beneficial owner has significant influence over the entity under audit, should be excluded from the scope of the Business Relationships Rule. We view business relationships as presenting different threats to an auditor's objectivity and impartiality than those presented by lending relationships. We also believe the focus on beneficial owners having significant influence over the entity under audit instead of the audit client properly focuses the independence analysis on the significant threats to an auditor's objectivity and impartiality—and identifying associated persons with such influence should not impose an undue compliance burden.

We agree with commenters that requested we codify the additional guidance from the Proposing Release to provide more certainty regarding the application of the final amendment to beneficial owners of equity securities of an affiliate of the audit client. As such, the final amendment to the Business Relationships Rule has been modified to refer to ''beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence over the *entity under audit*'' (emphasis added). Further, in response to comments seeking clarification regarding the application of the Business Relationships Rule to officers and directors, we are also amending the Business Relationships Rule to refer to ''an audit client's officers or directors that have the ability to affect decision-

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adopted rule, any direct or material indirect business relationships with an audit client, which includes any affiliates of the audit client, would be deemed independence-impairing.

[176] *See e.g.,* letters from NASBA, CAQ, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Parrett, AIC, ICI/IDC, IBC, FEI, CCMC and Crowe.

[177] *See e.g.,* letters from CAQ, Deloitte, EY, KPMG, PwC, ICI/IDC, and Crowe.

[178] *See e.g.,* letters from CAQ, Deloitte, ICI/IDC, EY, FEI, KPMG, RSM, PwC, and Crowe.

[179] *See* letter from EY.

[180] *See* letter from CII.

[181] *See* letter from CII (June 28, 2018), *available at https://www.sec.gov/comments/s7-10-18/s71018-3969965-167120.pdf.*

[182] *See e.g.,* letters from CAQ, Deloitte, EY, AIC, CCMC, PwC, and Parrett. FEI also requested alignment with the Loan Provision Adopting Release, but did not specify the common control issue.

[183] *See* letter from GT. We have not provided examples of problematic business relationships as requested by the commenter. The changes to the Business Relationships Rule set forth in this release are narrow and consistent with the Loan Provision. Providing examples or additional guidance on the broader application of Rule 2–01(c)(3) is beyond the scope of this rulemaking. As noted in Section II.A.1.a.iii and consistent with the introductory paragraph to amended Rule 2–01, registrants and auditors may consult with the Commission's Office of the Chief Accountant.

[184] *See e.g.,* letters from CAQ, Deloitte, EY, KPMG, RSM, and PwC.

[185] *See e.g.,* letter from EY and KPMG.

[186] *See* letter from PwC.

[187] *See* letter from AIC.

[188] *See e.g.,* letters from NASBA, CAQ, Deloitte, BDO, EY, KPMG, PwC, GT, CCMC, and Crowe.

[189] *See e.g.,* letters from CAQ, Deloitte, KPMG, Crowe, CCMC, PwC, and GT.

[190] *See* letters from EY and PwC.

making at the entity under audit.'' This amendment clarifies that the Business Relationships Rule applies to relationships with officers or directors at an affiliate of the audit client when such person has the ability to affect decision-making at the entity under audit. This amendment does not change the application of the rule as it applies to the officers or directors of the entity under audit. Such persons are deemed to have the ability to affect decision-making at the entity under audit.

Although we requested comment on the need to address multi-company arrangements, after further consideration, we have determined that addressing such arrangements is beyond the scope of this rulemaking, which is focused on aligning the Business Relationships Rule with the Loan Provision and providing clarification regarding persons in a decision-making capacity. For similar reasons, we are not providing examples of problematic business relationships, as requested by one commenter. We also agree with the commenter that indicated that the proposed amendments to the affiliate of the audit client definition should significantly alleviate concerns around the Business Relationships Rule.[191] If auditors or their clients have specific questions related to multi-company arrangements, as noted in the introductory paragraph to amended Rule 2–01, they may consult with the Commission's Office of the Chief Accountant.

4. Conforming Amendments to the Loan Provision

The additional guidance provided in the Proposing Release regarding beneficial owners with significant influence set forth the Commission's view of the appropriate application of the Loan Provision. For clarity, we are adopting conforming amendments to the Loan Provision to reflect our view of how it applies to loans to or from officers or directors of affiliates of the audit client and beneficial owners of an affiliate of the audit client's equity securities.

D. Amendments for Inadvertent Violations for Mergers and Acquisitions

1. Proposed Amendment

For the reasons discussed in the Proposing Release,[192] the Commission introduced a transition framework to address inadvertent independence violations where the independence violation arises as a result of a corporate event, such as a merger or acquisition, and the services or relationships that are the basis for the violation would not have run afoul of applicable independence standards prior to the corporate event. The proposed amendments would require an auditor to:

- Be in compliance with the applicable independence standards related to the services or relationships when the services or relationships originated and throughout the period in which the applicable independence standards apply;
- Correct the independence violations arising from the merger or acquisition as promptly as possible under relevant circumstances associated with the merger or acquisition; and
- Have in place a quality control system as described in 17 CFR 210.2–01(d)(3) (''Rule 2–01(d)(3)'') that has the following features:
  - Procedures and controls that monitor the audit client's merger and acquisition activity to provide timely notice of a merger or acquisition; and
  - Procedures and controls that allow for prompt identification of potential violations after initial notification of a potential merger or acquisition that may trigger independence violations, but before the transaction has occurred.

2. Comments Received

Many commenters supported the proposed transition framework to allow audit firms and their clients to transition out of services or relationships that will become violations due to a merger or acquisition.[193] Commenters indicated that these inadvertent violations would not typically impair an auditor's objectivity and impartiality.[194] Some commenters also noted the potential for significant disruption when these situations arise through no action of the audit firm.[195] One commenter discussed disruption in the context of the private equity space.[196] Another commenter stated that the proposed transaction framework may increase the number of auditors a potential audit client may select or retain.[197]

A few commenters opposed the proposed transition framework.[198] One commenter indicated that it generally does not view a delay in mergers and acquisitions due to independence matters as a ''possible detriment'' to investors because auditor independence is critical to investor protection and investor confidence and it believes that ''many, if not most, mergers and acquisitions ultimately do not enhance long-term shareholder value.'' [199] Another commenter indicated that it could not support the proposal ''without additional guardrails.'' [200] This commenter suggested that the relationship or service triggering the inadvertent violation should either be terminated before the merger or acquisition is effective, or within a specified period of time (*e.g.,* three months) from the announcement date of the merger or acquisition. The commenter further stated that the ''as promptly as possible'' provision is susceptible to abuse and that these situations are better addressed by the staff on a case by case basis as the issue arises.''

One commenter recommended that the proposed transition framework should be applicable to all financial statement periods subject to compliance with Rule 2–01, such as where an entity anticipating an IPO makes an acquisition in the year subject to the one-year look-back provision as proposed.[201] The commenter's recommendation would allow a private company that engages in a merger or acquisition transaction to be able to rely on the transition framework to satisfy its independence requirements when it engages in an IPO in the following year.

Commenters generally supported the proposed quality control criteria or noted that they are sufficiently clear.[202] One commenter stated that the quality control requirement should acknowledge the applicability of the general standard with respect to the independence evaluation of the services and relationships with the new affiliate—both individually and in the aggregate.[203] Another commenter recommended that the Commission provide further guidance on the terms ''timely notice'' and ''prompt identification'' and its expectations of the procedures and controls that audit clients should have in place to inform auditors of pending transactions.[204]

In the Proposing Release, the Commission requested comment on whether certain services or relationships

[191] *See* letter from AIC.

[192] *See* Section II.D of the Proposing Release.

[193] *See e.g.,* letters from NASBA, CAQ, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, Parrett, AIC, ICI/IDC, IBC, FEI, CCMC, and Crowe.

[194] *See e.g.,* letters from Deloitte, KPMG, Crowe, AIC, and GT.

[195] *See e.g.,* letters from CAQ, Deloitte, EY, ICI/IDC, FEI, and AIC.

[196] *See* letter from AIC.

[197] *See* letter from KPMG.

[198] *See e.g.,* letters from CII and NYSSCPA.

[199] *See* letter from CII.

[200] *See* letter from NYSSCPA.

[201] *See* letter from KPMG.

[202] *See e.g.,* letters from Deloitte, BDO, KPMG, and RSM.

[203] *See* letter from KPMG.

[204] *See* letter from EY.

should continue to be deemed independence-impairing, for example, if they result in the auditor auditing its own work. Some commenters indicated that Rule 2–01(b) appropriately addresses any threat to an auditor's objectivity and impartiality in situations where an inadvertent violation from a merger or acquisition could result in an audit firm auditing its own work.[205] Another commenter stated that the threat of auditing one's own work is mitigated by the proposed requirement to comply with applicable independence standards prior to the transaction and because periods prior to the transaction are not included in the accounting acquirer's financial statements.[206] However, several commenters expressed the view that ''under no circumstances should the auditor be permitted'' to audit its own work.[207]

Some commenters stated that a merger or acquisition that is in substance more like an IPO should be addressed by the proposed change to the definition of the ''audit and professional engagement period,'' as the compliance challenges are similar to an IPO situation.[208] However, other commenters asserted that all mergers or acquisitions should be covered by the proposed transition framework, including transactions in which private companies merge into a public shell, as these types of reverse mergers can occur with much less notice than a traditional IPO.[209]

In the Proposing Release, the Commission requested comment on the requirement to correct inadvertent violations as ''promptly as possible'' and indicated that such correction should not occur more than six months after the consummation of the merger or acquisition. Many commenters supported the maximum six-month transition period.[210] A few commenters recommended that the final rule expressly reference the six-month transition period.[211] One commenter expressed concern that the ''maximum six-month transition period will become the acceptable standard in practice.'' [212] One commenter suggested a 12- to 18-month maximum [213] while another commenter stated that a maximum period of time should not be specified.[214]

Several commenters suggested the Commission clarify that the framework applies where the triggering relationship or service is identified at or after the transaction closing but still addressed within the six-month window.[215] A few of these commenters noted that the quality control systems described in Rule 2–01(d)(3) may not, at times, identify independence-impairing relationships or services until after the close of a merger or acquisition.[216] Relatedly, some commenters indicated that there are challenges in obtaining relevant information prior to the closing of mergers or acquisitions.[217]

Several commenters questioned whether compliance with the proposed transition framework should still result in an independence violation, and stated their belief that parties that adhere to the framework should not be viewed as having incurred an independence violation.[218] Some of these commenters requested that the Commission use terms other than ''violation'' and ''lack of independence'' when discussing potentially independence-impairing relationships or services prior to the closing of a transaction.[219] One of these commenters noted that since the relationships or services are identified before the closing, it does not appear they should be called violations, since they are not technically violations until the merger or acquisition closes.[220]

A few commenters requested guidance on how matters covered by the proposed transition framework should be communicated to an audit committee.[221] One commenter indicated that if these matters are not deemed violations, then the matters would not be communicated to the audit committee.[222] However, other commenters asserted that even if these matters are not deemed violations, the matters should still be communicated to the audit committee.[223]

3. Final Amendments

After considering the public comments and recommendations received, we are adopting amended 17 CFR 210.2–01(e) (''amended Rule 2–01(e)'') substantially as proposed to include a transition provision for inadvertent independence violations where the independence violation arises as a result of a corporate event, such as a merger or acquisition, involving audit clients. We are adopting modifications from the proposed amendments to address comments received regarding the reference to ''lack of independence'' and ''violation'' in the proposed amendment that we found persuasive. For clarity, we also are replacing ''before the transaction has occurred'' with ''before the effective date of the transaction.'' The effective date of a merger or acquisition is typically identified in the transaction documents and often made public. This change is not intended to alter the application of the rule from the proposal, but only to provide clarity and consistency with commonly used terms.

We continue to believe it is appropriate to provide, in a manner consistent with investor protection, a transition framework for mergers and acquisitions to address inadvertent violations as a result of such transactions so the auditor and its audit client can transition out of services and relationships that would currently trigger an independence violation in an orderly manner. As stated in the Proposing Release, the transition framework follows the consideration of the audit firm's quality controls similar to Rule 2–01(d)(3).[224] As proposed, we are adopting the requirements associated with the transition framework.

As noted above, the Commission requested comment regarding mergers and acquisitions that are similar to IPOs. After considering the feedback received, we believe that the adopted transition framework should not apply to merger or acquisition transactions that are in substance similar to IPOs. For example, where a shell company, reporting pursuant to Sections 13 or 15(d) of the Exchange Act, engages in a merger with a private operating company, the auditor of the financial statements to be included in a Commission filing resulting from such transaction will not be able to rely on the transition framework in amended Rule 2–01(e).

[205] *See e.g.,* letters from Deloitte, EY, and KPMG.

[206] *See* letter from RSM.

[207] *See e.g.,* letters from NASBA and CII.

[208] *See e.g.,* letters from Deloitte and RSM.

[209] *See e.g.,* letters from EY and KPMG.

[210] *See e.g.,* letters from CAQ, Deloitte, BDO, EY, KPMG, PwC, GT, AIC, ICI/IDC, and Crowe.

[211] *See e.g.,* letters from PwC and EY.

[212] *See* letter from NASBA.

[213] *See* letter from IBC.

[214] *See* letter from RSM.

[215] *See e.g.,* letters from CAQ, EY, PwC, GT, Crowe, AIC, ICI/IDC, FEI, CCMC, and KPMG.

[216] *See e.g.,* letters from EY and KPMG.

[217] *See e.g.,* letters from PwC, GT, and FEI.

[218] *See e.g.,* letters from CAQ, Deloitte, BDO, EY, CCMC, KPMG, Crowe, and PwC.

[219] *See e.g.,* letters from Crowe and KPMG.

[220] *See* letter from KPMG.

[221] *See e.g.,* letters from GT and Crowe.

[222] *See* letter from PwC.

[223] *See e.g.,* letters from EY and CCMC.

[224] The Commission adopted 17 CFR 210.2–01(d) (''Rule 2–01(d)'') as a limited exception to address a covered person's violations in certain circumstances that would be attributed to an entire firm. The effect of Rule 2–01(d) is that an accounting firm with ''appropriate quality controls will not be deemed to lack independence when an accountant did not know of the circumstances giving rise to the impairment, and upon discovery, the impairment is quickly resolved.'' *See* 2000 Adopting Release, at 65 FR 76052.

Instead, such auditor should evaluate independence compliance using the look-back period contained within the ''audit and professional engagement period'' definition, as amended.[225] Consistent with the introductory paragraph in amended Rule 2–01, registrants and auditors may also consult with the Commission's Office of the Chief Accountant.

a. Amended Rule 2–01(e)(1)—Compliance With All Applicable Independence Standards

Regarding this first provision, amended 17 CFR 210.2–01(e)(1) (''amended Rule 2–01(e)(1)''), the auditor must be in compliance with any independence standards that are applicable to the entities involved in the merger or acquisition transaction from the origination of the relationships or services in question and throughout the period in which the applicable independence standards apply.

b. Amended 17 CFR 210.2–01(e)(2)—Prompt Transition

We expect that the independence-impairing service or relationship, in most instances, should and could be addressed before the effective date of the merger or acquisition. However, we understand there may be situations where it might not be possible for the audit client and the auditor to transition the independence-impairing service or relationship in an orderly manner without causing significant disruption to the audit client. In those situations, we expect the relationship or service to be addressed promptly after the effective date of the merger or acquisition.

Whether a post-transaction transition occurs promptly will depend on all relevant facts and circumstances. However, as stated in the Proposing Release, we expect any necessary actions would be taken no later than six months after the effective date of the merger or acquisition. We have not included a reference to the six-month maximum transition period in amended Rule 2–01(e), as suggested by some commenters, because we do not intend, nor do we believe it would be appropriate, for audit clients and audit firms to apply this timeline to address such services or relationships in every merger or acquisition scenario. In this regard, we agree with the commenter who suggested that specifying such a timeline in the final rule could result in it becoming the standard practice in all situations, even when a shorter transition may be reasonably attainable and more appropriate.

We also are not specifying a longer maximum transition period as several commenters recommended. We continue to believe that six months is an appropriate limit for transitioning to compliance with our independence rules, which as noted above, are important for investor protection and to promote investor confidence. As stated in the Proposing Release, audit firms and audit clients already manage to this timeline as it is consistent with international ethics and independence standards for accountants.[226]

In response to comments, we are removing references to the services and relationships identified as a result of a merger or acquisition as a ''lack of independence'' or ''violation.'' We agree that if the requirements in amended Rule 2–01(e) are met, then the relationships and services are not independence violations. As such, referring to independence violations or lack of independence may be confusing. The transition framework is intended to allow an auditor and its audit client sufficient opportunity to transition out of services and relationships in an orderly manner without impairing the auditor's independence. With respect to comments regarding whether these services or relationships should be communicated to the audit committee, auditors should follow PCAOB Rule 3526, *Communication with Audit Committees Concerning Independence*. PCAOB Rule 3526 requires communications of all relationships that may reasonably be thought to bear on independence.

c. New 17 CFR 210.2–01(e)(3)—Quality Control System

We considered comments received requesting elimination of the proposed requirement for an accounting firm to have procedures and controls to identify independence-impairing services and relationships before the transaction has occurred in order to allow for post-transaction identification. We are not adopting this suggestion. The Commission continues to stress that having a robust quality control system is paramount to maintaining auditor independence and, ultimately, investor protection.

We believe that it is reasonable to expect that an auditor and an audit client intending to rely on the benefits of the transition framework have in place robust procedures and controls that will identify services and relationships that would result in an independence violation prior to the effective date of the triggering transactions. As such, we are adopting the transition framework, as proposed, with a slight modification regarding the reference to ''effective date'' discussed above, so that it applies to services and relationships that are identified prior to the effective date of a merger or acquisition transaction.

In situations where a service or relationship resulting in an independence violation is identified subsequent to the effective date of the transaction, an audit firm and the audit client's audit committee will need to take into account all relevant facts and circumstances in their evaluation of the auditor's objectivity and impartiality in carrying out an audit of the financial statements of the combined entity. Consistent with the introductory paragraph in amended Rule 2–01, registrants and auditors may also consult with the Commission's Office of the Chief Accountant.

Regarding the suggestion that the quality control requirement acknowledge the applicability of Rule 2–01(b), we do not feel this is necessary. Rule 2–01(b) applies in all cases and expressly requires the consideration of all relevant facts and circumstances. As a result, if the transition framework is followed but the nature, extent, relative importance, or other aspect of the service or relationship impairs the auditor's objectivity and impartiality, then that service or relationship would be considered an independence violation. For example, if an auditor is found to be auditing its own work over a significant amount of the acquired business as part of the audit of the financial statements, that fact most likely would affect the auditor's independence under Rule 2–01(b).

E. Miscellaneous Amendments

1. Proposed Miscellaneous Amendments

As discussed in Section II.E of the Proposal, the Commission proposed three miscellaneous amendments to:

- Make conforming amendments throughout Rule 2–01 to replace references to ''concurring partner'' with the term ''Engagement Quality Reviewer'' to be consistent with current auditing standards that use the term ''Engagement Quality Reviewer'' or

[225] *See* Section II.A.2.c.

[226] *See* The International Code of Ethics for Professional Accountants (including International Independence Standards), section titled, ''Mergers and Acquisitions'' under, ''Part 4A-Independence for Audit and Review Engagements'' available at *https://www.ifac.org/system/files/publications/files/Final-Pronouncement-The-Restructured-Code_0.pdf*.

''Engagement Quality Control Reviewer;''

- Convert the existing Preliminary Note to § 210.2–01 into introductory text to Rule 2–01, consistent with **Federal Register** drafting requirements; and
- Delete the outdated transition provisions in existing Rule 2–01(e), which were added as part of the Commission's 2003 amendments [227] to address the existence of relationships and arrangements that predated those amendments.

2. Comments Received

Commenters that addressed this aspect of the proposal supported the proposed miscellaneous amendments.[228] No commenters expressed opposition to any of the three proposed miscellaneous amendments. Related to our technical amendment to re-designate the Preliminary Note to § 210.2–01, one commenter requested we repeat at the adopting stage our discussion in the Proposing Release that the amendment does not affect the application of the auditor independence rules.[229]

3. Final Amendments

We are adopting the three miscellaneous amendments as proposed. As noted in the Proposing Release,[230] the final amendment to convert the existing Preliminary Note to § 210.2–01 into introductory text does not affect the application of the auditor independence rules and is simply a change in rule text format.

F. Other Comments Received

Several commenters requested that the Commission collaborate with the PCAOB to evaluate and update the PCAOB independence rules and standards in light of the proposed amendments if the proposed amendments are adopted.[231] For example, PCAOB Rule 3500T provides that registered public accounting firms must comply with the more restrictive independence rule if there are differences between the SEC and PCAOB independence rules. As a result of the final amendments, there will be differences between the SEC and PCAOB independence rules. The PCAOB has publicly disclosed a plan to conform its independence rules in response to the final amendments.[232]

G. Transition

Auditors currently subject to the independence requirements of Rule 2–01 are not required to apply the final amendments until June 9, 2021 in order to have sufficient time to develop and implement processes and controls based on the final amendments. Voluntary early compliance is permitted after the amendments are published in the **Federal Register** in advance of the effective date provided that the final amendments are applied in their entirety from the date of early compliance.[233]

Compliance with the final amendments is required on a prospective basis from the earlier of the effective date or early compliance date if selected by an audit firm. Auditors are not permitted to retroactively apply the final amendments to relationships and services in existence prior to the effective date or the early compliance date if selected by an audit firm. Regarding the final amendments in Rule 2–01(c)(1)(ii)(A) and (E) and loans that were originated before the effective date or the early compliance date, but that comply with the conditions of the final amendments as of the effective date or early compliance date, an auditor may rely on the final amendments; such loans would not be considered independence violations provided the conditions for excepting such loans continue to be met.

III. Other Matters

If any of the provisions of these amendments, or the application of these provisions to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application. Pursuant to the Congressional Review Act,[234] the Office of Information and Regulatory Affairs has designated these amendments as [not] a ''major rule,'' as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

A. Introduction

We are adopting amendments to the auditor independence requirements in Rule 2–01 that will: (1) Amend the definition of an affiliate of the audit client to address certain affiliate relationships in common control scenarios and the ICC definition; (2) shorten the look-back period for domestic first-time filers in assessing compliance with the independence requirements; (3) add certain student loans and de minimis consumer loans to the categorical exclusions from independence-impairing lending relationships; (4) replace the reference to ''substantial stockholders'' in the Business Relationships Rule with the concept of beneficial owners with significant influence; (5) introduce a transition framework for merger and acquisition transactions to consider whether an auditor's independence is impaired; and (6) make certain miscellaneous amendments.

We are mindful of the costs and benefits of the final amendments. The discussion below addresses the potential economic effects of the final amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition, and capital formation.[235]

We note that, where possible, we have attempted to quantify the benefits, costs, and effects on efficiency, competition, and capital formation expected to result from the final amendments. In many cases, however, we are unable to quantify the economic effects because we lack information necessary to provide a reasonable estimate. For example, we are unable to quantify, with precision, the costs to auditors and audit clients of complying with the particular aspects of the auditor independence rules and the potential compliance cost savings, increase in the number of eligible auditors and potential clients, and changes in audit

[227] *See supra* note 6.

[228] *See e.g.,* letters from NASBA, Deloitte, BDO, EY, KPMG, RSM, PwC, GT, and CCMC.

[229] *See* letter from KPMG.

[230] *See* Section II.E.2 of the Proposing Release.

[231] *See e.g.,* letters from CAQ, EY, GT, PwC, RSM, AIC, and CCMC.

[232] *See https://pcaobus.org/Standards/research-standard-setting-projects/Pages/auditor-independence.aspx.*

[233] To the extent that auditors or audit clients have questions about application of the rules in connection with early compliance, they may contact staff in the Office of the Chief Accountant for additional transition guidance.

[234] 5 U.S.C. 801 *et seq.*

[235] Section 2(b) of the Securities Act [15 U.S.C. 77b(b)], Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)], Section 2(c) of the Investment Company Act [15 U.S.C. 80a–2(c)], and Section 202(c) of the Investment Advisers Act [15 U.S.C. 80b–2(c)] require the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

quality that may arise from the amendments to Rule 2–01. In the Proposing Release, we requested data to help us quantify the economic effects of the amendments, but none of the commenters provided any data or quantitative estimates.

The remainder of the economic analysis presents the baseline, anticipated benefits and costs from the final amendments, potential effects of the amendments on efficiency, competition and capital formation, and reasonable alternatives to the amendments.

B. Baseline and Affected Parties

Under current Rule 2–01, the term ''affiliate of the audit client'' includes ''an entity that has control over the audit client or over which the audit client has control'' and entities ''under common control with the audit client, including the audit client's parents and subsidiaries.'' [236] Under this definition, affiliates of the audit client include all sister entities without regard to the materiality of the sister entity or the entity under audit to the controlling entity. The term ''affiliate of the audit client'' also includes each entity in an ICC when the audit client is part of the ICC.[237] In complex organizational structures, such as large ICCs, the requirement to identify and monitor for potential independence-impairing relationships and services currently applies to affiliated entities, including sister entities, regardless of whether the affiliated entities are material to the controlling entity. The current inclusion of sister entities that are not material to the controlling entity in the auditor independence analysis creates practical challenges and imposes compliance costs on both auditors and audit clients, especially those within complex organizational structures.

Currently, ''audit and professional engagement period'' is defined differently for first-time filers, depending on whether they are domestic issuers or FPIs.[238] Specifically, when a domestic IPO registration statement includes either two or three years of audited financial statements, the auditor of a domestic first-time filer must comply with Rule 2–01 for all audited financial statement periods included in such registration statement.[239] For FPIs, the corresponding ''audit and professional engagement period'' includes only the fiscal year immediately preceding the initial filing of the registration statement or report. As a result, domestic issuers may have a higher compliance cost relative to FPIs in applying this rule.

Pursuant to Rule 2–01(c), an accountant is not independent if the accounting firm, any covered person in the firm, or any of his or her immediate family members has any loans (including any margin loans) to or from an audit client, or certain other entities or persons related to the audit client.[240] Those loans include, among others, student loans, certain mortgage loans, and credit card balances. In addition, under current rules, a business relationship between a substantial stockholder of the audit client, among others, and the auditor or covered person would be considered independence-impairing.[241]

Certain aspects of Rule 2–01 require auditor independence compliance during the audit and professional engagement period, which may include periods before, during, and after merger and acquisition transactions.[242] As a result, certain merger and acquisition transactions could give rise to inadvertent violations of the auditor independence requirements. For example, an auditor may provide management functions to a target firm and auditing services to an acquirer prior to the occurrence of an acquisition. Consequently, the acquisition may result in an auditor independence violation that had not existed prior to the acquisition.

The amendments will update the auditor independence requirements, which will affect auditors, audit clients, and any other entity that is currently or may become an affiliate of the audit client. Other parties that may be affected by the amendments include ''covered persons'' of accounting firms and their immediate family members. As discussed further below, the amendments will affect investors indirectly.

We are not able to reasonably estimate the number of current audit engagements that will be immediately affected by the amendments as we lack relevant data about such engagements. We also do not have precise data on audit clients' ownership and control structures. With respect to the amendments relating to treatment of student loans and consumer loans, there is no data readily available to us relating to how ''covered persons'' and their immediate family members arrange their financing. Similarly, there is no readily available data to quantify the number of business relationships that audit firms have with beneficial owners of an audit client's equity securities where the beneficial owner has significant influence over the audit client. As such, we are not able to identify those auditor-client relationships that would be impacted by the amendments to the Business Relationships Rule. We therefore are not able to quantify the effects of these aspects of the amendments. In the Proposing Release, we requested data in connection with the request for comment on all aspects of the economic analysis,[243] but none of the commenters provided any data or quantitative estimates with respect to these aspects of the amendments.

We have relied on information from PCAOB Forms 2 to approximate the potential universe of auditors that will be affected by the amendments.[244] According to aggregated information from PCAOB Forms 2, as of August 3, 2020, there were 1,729 audit firms registered with the PCAOB (of which 876 are domestic audit firms, with the remaining 853 audit firms located outside the United States). According to a report provided by Audit Analytics in 2020, the four largest accounting firms audit about 73% of accelerated and large accelerated filers [245] and about 49.2% of all registrants.[246]

We estimate that approximately 6,792 issuers filing on domestic forms [247] and 849 FPIs filing on foreign forms would be affected by the amendments.[248]

[236] Rule 2–01(f)(4)(i).

[237] *See* Rule 2–01(f)(4)(iv).

[238] *See* Rule 2–01(f)(5)(iii).

[239] For example, an auditor may be excluded from consideration if the auditor provided a non-audit service (*e.g.,* management functions) to a domestic filer in the third year before the firm files the registration statement for the first time. Even though the auditor has stopped providing such service to the filer starting two years prior to the firm's filing the registration statement, under the current definition, the auditor will not qualify as ''independent'' under Rule 2–01.

[240] Rule 2–01(c)(1)(ii)(A).

[241] *See* Rule 2–01(c)(3).

[242] *See* Rule 2–01(f)(5).

[243] *See* Section III.F of the Proposing Release.

[244] All registered public accounting firms must file annual reports on Form 2 with the PCAOB. To determine the number of audit firms registered with the PCAOB, we aggregated the total number of entities who filed a Form 2 with the PCAOB.

[245] Accelerated filers and large accelerated filers are defined in Rule 12b–2 of the Exchange Act of 1934 [17 CFR 240.12b–2].

[246] *See Who Audits Public Companies-2020 Edition, available at https://blog.auditanalytics.com/who-audits-public-companies-2020-edition; see also* Daniel Hood, ''Top firms' share of public co. audits creeps up,'' Accounting Today (June 5, 2020), available at: *https://www.accountingtoday.com/news/top-firms-share-of-public-co-audits-creeps-up.*

[247] This number includes fewer than 25 foreign issuers that file on domestic forms and approximately 100 business development companies.

[248] The number of issuers that file on domestic forms is estimated as the number of unique issuers, identified by Central Index Key (CIK), that filed Forms 10–K, or an amendment thereto, with the

Continued

Among the issuers that file on domestic forms, approximately 31% are large accelerated filers, 19% are accelerated filers, and 50% are non-accelerated filers.[249] In addition, we estimate that approximately 19.1% of domestic issuers are emerging growth companies,[250] and 42.5% are smaller reporting companies.[251]

The amendment related to the ''look-back'' period for assessing independence compliance will affect future domestic first-time filers, but not future FPI first-time filers. To assess the effects of this amendment, we utilized historical data for domestic IPOs. According to Thompson Reuters' Security Data Company (''SDC'') database, there were approximately 543 domestic IPOs during the period between January 1, 2017, and December 31, 2019.

The amendment related to a transition framework for merger and acquisition transactions will affect issuers that might engage in mergers and acquisitions. To assess the overall market activity for mergers and acquisitions, we examined mergers and acquisitions data from SDC. During the period from January 1, 2017, to December 31, 2019, there were 6,057 mergers and acquisitions entered into by publicly listed U.S. firms.

The amendments to the ICC definition would potentially affect registered investment companies and unregistered funds.[252] As of September 2020, there were 2,763 registered investment companies that filed annual reports on Form N–CEN. As of July 2020, there were 10,092 mutual funds (excluding money market funds) with $19,528 billion in total net assets, 2,142 exchange traded funds (''ETFs'') organized as an open-end fund or as a share-class of an open-end fund with $3,462 billion in total net assets, 666 registered closed-end funds with $307 billion in total net assets, and 13 variable annuity separate accounts registered as management investment companies on Form N–3 with $216 billion in total net assets. There also were 420 money market funds with $3,881 billion in total net assets.[253] Also, as of July 2020, there were 99 business development companies (''BDCs'') with $58 billion in total net assets.[254]

C. Potential Costs and Benefits

1. Overall Potential Costs and Benefits

We anticipate the final amendments will benefit audit firms, audit clients, and investors in several ways. First, by revising our rules to emphasize those relationships and services that are more likely to threaten auditor objectivity and impartiality, the final amendments will reduce compliance costs for audit firms and their clients. Under the amended rules, auditors and their clients will be able to focus their resources and attention on monitoring those relationships and services that pose the greatest risk to auditor independence. This will reduce overall compliance burdens without significantly diminishing investor protections.

The final amendments also may enhance the audit process by expanding the pool of eligible auditors. The potential larger pool of eligible auditors may allow audit clients to better align audit expertise with the needs of the audit engagement, which may lead to an improvement in audit quality and financial statement quality.[255] For example, audit clients in certain industries might have more complicated or very specialized businesses that would benefit from auditors with certain expertise or experience. If the pool of potential independent auditors is restricted due to provisions under current Rule 2–01 that are the subject of the final amendments, an audit client might have to choose a non-preferred audit firm, which may not provide the desired scope or quality of audit services. Because audit quality is correlated with financial reporting quality,[256] any improved financial reporting quality resulting from the final amendments will provide additional benefits by potentially reducing information asymmetry between issuers and their investors, improving firms' liquidity, and decreasing cost of capital.[257] Investors similarly will benefit from any resulting improvement in financial reporting quality.

With a larger pool of eligible auditors, audit clients could potentially avoid costs associated with searching for a new independent auditor and related costs resulting from switching from one audit firm to another, for example, when a new sister entity gives rise to an independence-impairing relationship for the entity under audit. A larger pool of potentially qualified independent auditors may promote competition among audit firms, which may lower audit fees for comparable audit quality. Reduction in audit fees would lead to cash savings for audit clients, who could further invest those savings or return those savings to investors, all of which may accrue to the benefit of investors. However, this competitive effect may be limited because the audit

Commission during calendar year 2019. The number of foreign private issuers is estimated as the number of unique issuers, identified by CIK, that filed either Form 20–F, 40–F, or an amendment thereto, with the Commission during calendar year 2019. Of FPIs with a self-reported status, approximately 37% are large accelerated filers, 21% are accelerated filers, and 42% are non-accelerated filers. Additionally, 26% are emerging growth companies.

[249] The estimates for the percentages of smaller reporting companies, accelerated filers, large accelerated filers, and non-accelerated filers are based on data obtained by Commission staff using a computer program that analyzes SEC filings, with supplemental data from Ives Group Audit Analytics.

[250] An ''emerging growth company'' is defined as an issuer that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year. *See* 17 CFR 230.405 and 17 CFR 240.12b–2. *See* Rule 405; Rule 12b–2; 15 U.S.C. 77b(a)(19); 15 U.S.C. 78c(a)(80); and Inflation Adjustments and Other Technical Amendments under Titles I and II of the JOBS Act, Release No. 33- 10332 (Mar. 31, 2017) [82 FR 17545 (Apr. 12, 2017)]. We based the estimate of the percentage of emerging growth companies on whether a registrant claimed emerging growth company status, as derived from Ives Group Audit Analytics data as of December 2019.

[251] ''Smaller reporting company'' is defined in 17 CFR 229.10(f) as an issuer that is not an investment company, an asset-backed issuer (as defined in 17 CFR 229.1101), or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (i) Had a public float of less than $250 million; or (ii) had annual revenues of less than $100 million and either: (A) No public float; or (B) a public float of less than $700 million.

[252] Based on the current reporting requirements for unregistered funds, we do not have data readily available regarding unregistered funds that would allow us to quantify the number of unregistered funds that would be affected by the final amendments. We did not receive data regarding unregistered funds from commenters.

[253] Estimates of the number of registered investment companies and their total net assets are based on a staff analysis of Form N–CEN filings as of July 8, 2020. For open-end funds that have mutual fund and ETF share classes, which only one fund sponsor currently operates, we count each type of share class as a separate fund and use data from Morningstar to determine the amount of total net assets reported on Form N–CEN attributable to the ETF share class. As money market funds generally are excluded we report their number and net assets separately from those of other mutual funds.

[254] Estimates of the number of BDCs and their net assets are based on a staff analysis of Form 10–K and Form 10–Q filings as of July 30, 2020. Our estimate includes BDCs that may be delinquent or have filed extensions for their filings, and it excludes six wholly-owned subsidiaries of other BDCs.

[255] *See* Mark DeFond and Jieying Zhang, A Review of Archival Auditing Research, 58 J. Acct. Econ. 275 (2014).

[256] *See id.*

[257] *See* Siew H. Teoh and T. J. Wong, Perceived Auditor Quality and the Earnings Response Coefficient, 68 Acct. Rev. (1993) 346–366. *See also* Jeffery A. Pittman and Steve Fortin, Auditor Choice and the Cost of Debt Capital for Newly Public Firms, 37. J. Acct. Econ. (2004). 113–136; Jere R. Francis and Bin Ke, Disclosure of Fees Paid to Auditors and the Market Valuation of Earnings Surprises, 11 Rev. Acct. Stud. (2006) 495–523; Chan Li, Yuan Xie, and Jian Zhou, National Level, City Level Auditor Industry Specialization and Cost of Debt, 24 Acct. Horizon (2010) 395–417; and Jagan Krishnan, Chan Li, and Qian Wang, Auditor Industry Expertise and Cost of Equity, 27 Acct. Horizon (2013) 667–691.

profession is highly concentrated [258] with the four largest audit firms auditing about 49.2% of all registrants.[259] More specifically, as noted above, the four largest audit firms audit about 73% of accelerated and large accelerated filers.[260]

Auditors also could benefit from potentially having a broader spectrum of audit clients and clients for non-audit services as a result of the final amendments. If the amendments reduce certain burdensome constraints on auditors in complying with the independence requirements, auditors likely will incur fewer compliance costs. For example, audit firms will not need to discontinue their non-audit services or switch their audit services as a result of certain client affiliations that are no longer deemed independence-impairing under the dual materiality thresholds. In addition, the final amendments potentially could reduce auditor turnover due to changes in audit clients' organizational structure arising from certain merger and acquisition activities. The final amendments also may benefit auditors that provide non-audit services, as those audit firms, under the final amendments, will be permitted to provide such services to a sister entity, so long as either the entity under audit or the sister entity is not material to the controlling entity. Similarly, under the final amendments, audit firms that currently provide non-audit services will be able to provide auditing services to sister entities under common control as long as the dual materiality thresholds are not triggered.

There also could be certain costs associated with the final amendments. For example, if the amendments increase the risk of auditors' objectivity and impartiality being threatened by relationships and services that are no longer deemed independence-impairing, audit quality could be negatively affected and investors could have less confidence in the quality of financial reporting, which could lead to less efficient investment allocations and increased cost of capital. One commenter asserted that the final amendments would undermine the credibility of auditors, with harmful effects on investor protection and capital formation.[261] We note, however, that relationships and services impacted by the final amendments remain subject to the general independence standard in Rule 2–01(b). Additionally, auditors will incur ongoing costs associated with the monitoring of potential affiliate status if they elect to rely on the final amendments to realize the associated benefits (*e.g.,* the ability to retain or acquire new engagements that were previously deemed independence-impairing). Overall, however, we do not anticipate significant costs to investors or other market participants associated with the final amendments because the amendments address those relationships and services that are less likely to threaten auditors' objectivity and impartiality.

2. Costs and Benefits of Specific Amendments

We expect the final amendments will result in benefits and costs to auditors, audit clients, and investors, and we discuss those benefits and costs qualitatively, item by item, in this section.

a. Amendments to the Definition of an Affiliate of the Audit Client and Investment Company Complex

i. Affiliate of the Audit Client

The inclusion of all sister entities regardless of materiality in the definition of affiliate of the audit client in current Rule 2–01(f)(4) creates practical challenges and imposes compliance costs on both auditors and audit clients, especially those with complex organizational structures. As it relates to the common control provision, the proposed amendment included as affiliates of the audit client sister entities that are material to the controlling entity. As discussed in Section II.A.1.a, commenters recommended further aligning the common control provision with analogous provisions of the AICPA and IESBA ethics and independence requirements, and the final amendments now include a dual materiality threshold such that a sister entity would be deemed an affiliate of the audit client only when both the entity under audit and the sister entity are material to the controlling entity. Conditioning affiliate status on the entity under audit being material to the controlling entity, and excluding sister entities that are not material to the controlling entity, likely will reduce overall compliance burdens and challenges associated with having to resolve independence violations arising from services or relationships with sister entities. Two commenters argued that relying on materiality may increase the risk of auditors performing audits when they are not objective and impartial, citing evidence that auditors' materiality judgments vary widely.[262] While we acknowledge that the use of materiality introduces judgment compared to a bright-line test, we note that the evidence presented by these commenters, on which their conclusion is based, is not directly related to materiality assessments in the context of sister entities.

As discussed in Section II.A.1.a.iii, monitoring-related compliance burdens may not be reduced. Under the current rules, an auditor needs to examine an audit client's organizational structure and identify all sister entities that will be considered affiliates on the basis of a bright-line standard. Under the final amendments, auditors, with the assistance of their audit clients, still need to understand an audit client's organizational structure to identify any affiliates of the audit client as well as monitor for changes in the structure and materiality status of those affiliates on an on-going basis.[263] Thus, auditors may incur some incremental cost related to monitoring potential affiliate status and assessing materiality. Auditors, however, would weigh whether the associated benefits (*e.g.,* the possibilities of offering new services or entering into new relationships) are worth the incremental materiality assessment and monitoring efforts. We expect an auditor would rely on the final amendments only if the benefits of using the amendments outweigh the costs involved. If an auditor decides it does not want to incur any increased monitoring-related compliance burdens, it could treat all sister entities as affiliates and avoid the effort to assess materiality.

The final amendments related to the dual materiality threshold should reduce the overall compliance related challenges associated with the existing rule. Under existing Rule 2–01(f)(4), all sister entities are deemed affiliates. Existing Rule 2–01(f)(4) creates compliance challenges that require the auditor's and the audit client's attention to resolve or that can restrict the choices of the auditor and the audit client, even when the violations or potential violations are with sister entities that are less likely to affect an auditor's objectivity and impartiality. For example, the dual materiality threshold will help avoid the costs that audit

[258] *See* United States Government Accountability Office. Audits of Public Companies—Continued Concentration in Audit Market for Large Public Companies Does Not Call for Immediate Action, *available at www.gao.gov/new.items/d08163.pdf* (2008).

[259] *See supra* note 246.

[260] *Id.*

[261] *See* letter from CFA.

[262] *See supra* note 29.

[263] As discussed in Section II.A.1.a.iii, identifying sister entities and monitoring for potential affiliate status will be important to timely address when a sister entity may become an affiliate and is important for an audit firm to appropriately consider and apply Rule 2–01(b).

clients could incur to switch auditors where an auditor provides services to or has an existing relationship with a newly acquired sister entity and either the entity under audit or sister entity is not material to the controlling entity. These cost savings could be especially pronounced for entities with complex organizational structures that have an expansive and constantly changing list of affiliates because the final amendments may significantly reduce the number of sister entities that are deemed affiliates of the audit client.

Under the current definition of affiliate of the audit client, an auditor with desired expertise may be excluded from a firm's audit engagement consideration because, for example, the auditor currently provides non-audit services to the firm's sister entity, even though neither that entity nor the firm under audit is material to the controlling entity. The exclusion of certain auditors from an audit engagement due to their relationships with or services provided to a sister entity, in this example, might lead to the audit engagement not being matched with the most qualified auditors. Such an outcome could compromise audit quality and decrease financial reporting quality, thereby imposing compliance costs on audit clients and reducing the quality of financial information investors receive. In addition, the lack of matching between auditor expertise and necessary audit procedures and considerations for a particular audit client might result in inefficiencies in the auditing processes, which likely increases the costs of audit services (*e.g.,* audit fees).

The amended definition of affiliate of the audit client may result in an expansion of the pool of qualified auditors. With an expanded pool of eligible auditors, competition among auditors might increase, thereby reducing audit fees for audit clients.[264] However, because the market for auditing services is highly concentrated, such cost savings are likely to be limited. The expanded pool of qualified auditors also might improve matching between auditor expertise and necessary audit procedures and considerations for a particular audit client, thereby improving audit efficiency and reducing audit costs.[265] Furthermore, any improvement in matching would positively influence audit quality and financial reporting quality.[266]

The final amendments are likely to benefit investors indirectly. First, investors will benefit from any improvements in financial reporting quality that may be derived from improvements in audit quality, as discussed above.[267] Better financial reporting quality helps investors make more efficient investment decisions, thereby improving market efficiency. Second, the potential reduction in audit fees from possible increased competition among auditors and improved audit efficiency might generate cash savings to audit clients, which may be deployed in a manner that benefits investors. We acknowledge, however, that potentially this competitive effect will be limited given the concentrated nature of the audit profession, as explained above.

The final amendments also include a modification to use the term ''entity under audit'' in place of the term ''audit client'' within Rules 2–01(f)(4)(i) and (ii). As discussed in Section II.A.1.a.iii, these modifications are intended to address potential confusion that may result from an application that would negate the amendments to the common control provision. This clarification could assist audit firms and audit clients in their compliance with the independence requirements.

The dual materiality threshold in the amended definition of an affiliate of the audit client might require more efforts from audit firms and audit clients to familiarize themselves with and to apply the threshold. However, given that the materiality concept is already part of the Commission's auditor independence rules,[268] and that the analogous provisions of the AICPA and IESBA for sister entities also include a dual materiality threshold, we do not expect a significant learning curve in applying the threshold or significant incremental compliance costs for auditors.

ii. Investment Company Complex

As discussed in Section II.A.1.c above, the final amendments: (1) Direct an auditor of an investment company or an investment adviser or sponsor to Rule 2–01(f)(14) (*i.e.,* the ICC definition) to identify affiliates of the audit client and focus the ICC definition on the perspective of the entity under audit; (2) include within the meaning of the term investment company, for the purposes of the ICC definition, unregistered funds; (3) amend the common control portion of the ICC definition to incorporate the dual materiality threshold included in the amended affiliate of the audit client definition; (4) add a dual materiality threshold in the control prong of the ICC definition, for portfolio companies of sister funds controlled by an investment adviser or sponsor of an investment company under audit; and (5) include within the ICC definition entities where significant influence exists between those entities and the entity under audit.

The amendments related to the ICC definition will affect the analysis used to identify entities that are considered affiliates of registered investment companies, unregistered funds, and investment advisers or sponsors that are under audit. The final rule should lead to improved clarity in the application of the ICC definition and, for the purpose of auditor independence analysis, could facilitate compliance by audit firms and the entities they audit within an ICC with the auditor independence requirements. The improved clarity under the amended definition may result in compliance cost savings that benefit audit firms and audit clients.

The economic implications of the amended common control provision within the ICC definition are largely similar to those of the analogous provision for operating companies. For example, under the current ICC definition, an investment company under audit may have a rather restricted set of independence compliant auditors due to the current common control provisions. The amended ICC definition excludes from the affiliate analysis sister entities when both the sister entities and the entity under audit are not material to the controlling entity, which potentially reduces compliance costs for an investment company under audit.

[264] *See* Paul K. Chaney, Debra C. Jeter, and Pamela E. Shaw, Client-Auditor Realignment and Restrictions on Auditor Solicitation, 72 Acct. Rev. (1997) 433. *See also* Emilie R. Feldman, A Basic Quantification of the Competitive Implications of the Demise of Arthur Andersen, 29 R. Ind. Org. (2006) 193; Michael Ettredge, Chan Li, and Susan Scholz, Audit Fees and Auditor Dismissals in the SOX Era, 21 Acct Horizon (2011) 371; Wieteke Numan and Marleen Willekens, An Empirical Test of Spatial Competition in the Audit Market, 20 J. Acct Econ. 450 (2012); and Joseph Gerakos and Chad Syverson, Competition in the Audit Market: Policy Implications, 53 J. Acct Res. 725 (2015).

[265] This could result in some crowding-out effect, as the four largest audit firms may be deemed to be independent from more clients under the final amendments, thereby crowding out smaller audit firms. However, we believe that better matching between auditor specialization and their clients and the reduction in unnecessary auditor turnovers could potentially prevent any decline in audit quality and in the long run may improve audit quality.

[266] *See* Chen-Lung Chin, and Hsin-Yi Chin, Reducing Restatements with Increased Industry Expertise, 26 Cont. Acct. Res., (2009) 729; Michael Ettredge, James Heintz, Chan Li, and Susan Scholz, Auditor Realignments Accompanying Implementation of SOX 404 ICFR Reporting Requirements, 25 Acct Horizon (2011) 17; and Jacob Z. Haislip, Gary F. Peters, and Vernon J. Richardson, The Effect of Auditor IT Expertise on Internal Controls, 20 Int. J. Acct. Inf. Sys. 1 (2016).

[267] *See supra* note 255.

[268] *See e.g.,* Rule 2–01(f)(4)(ii) and (iii).

Auditors currently engaging in relationships with or providing services to entities within an ICC that are independence-impairing under Rule 2–01(c) may become eligible to serve as an auditor to a different entity within the same ICC under the amended definition, including the amended common control provision. The potential expanded pool of eligible auditors could help registered investment companies and unregistered funds hire (and retain) auditors who have more relevant industry expertise, which could lead to better financial reporting for investment companies. Better financial reporting quality, in turn, would benefit investors in registered investment companies and unregistered funds by allowing them to make more informed investment decisions. With an expanded pool of eligible auditors, competition among auditors might increase, thereby reducing audit fees for audit clients for comparable audit quality, though potentially this competitive effect will be limited given the market concentration discussed above.

With respect to the amendments that include unregistered funds within the meaning of the term investment company for purposes of the ICC definition,[269] we believe the amendments provide a useful update to the ICC definition that was initially adopted in 2000. Specifically, we believe the final amendments provide clarity for unregistered funds, their investment advisers or sponsors, and their auditors. In addition, defining an investment company to include unregistered funds will promote consistency in the application of Rule 2–01 to registered investment companies and unregistered funds so that these two types of audit clients, which share some similar characteristics, will not be subject to disparate application of the independence rules.

We do not anticipate significant incremental costs associated with the final amendments to the ICC definition for registered investment companies, unregistered funds, investment advisers or sponsors, or their auditors as well as investment company investors. The amendments may require additional efforts from audit firms and the entities they audit within an ICC to become familiar with the application of the amended ICC definition. This may potentially lead to an initial increase in compliance costs. However, the amendments would improve the clarity of the ICC definition and therefore likely would decrease overall compliance costs after affected parties adjust to the amended definition.

The materiality test that we are adopting is already part of the Commission's auditor independence rules [270] and also is aligned with the final common control prong of the affiliate of the audit client definition. Consistent with our discussion in the preceding section, we do not expect a significant learning curve in applying the dual materiality threshold or significant incremental compliance costs for auditors or their audit clients.

As with auditors of operating companies, auditors of investment companies or investment advisers or sponsors will be required to consider significant influence when identifying affiliates of the audit client. We do not expect any significant economic effects associated with adding the ''significant influence'' provision [271] to the amended ICC definition. As discussed in Section II.A.1.c.iii above, audit clients and auditors should already be familiar with this concept as a result of the application of existing Rule 2–01(f)(4)(ii) and (iii).

b. Amendment to the Definition of Audit and Professional Engagement Period

Currently, the term ''audit and professional engagement period'' is defined differently for domestic first-time filers and FPI first-time filers.[272] A domestic IPO registration statement must include either two or three years of audited financial statements, and auditors of domestic first-time filers need to comply with Rule 2–01 for all audited financial statement periods included in the registration statement.[273] This may result in certain inefficiencies in the IPO process for domestic filers, such as the need to delay the offering or switch to a different auditor to comply with independence requirements. In comparison, for FPIs, the corresponding ''audit and professional engagement period'' includes only the fiscal year immediately preceding the initial filing of the registration statement or report. As a consequence, the current definition of the ''audit and professional engagement period'' creates disparate application of the independence requirements between domestic issuers and FPIs. To address this disparate treatment, we are amending the definition such that the one-year look-back provision applies to all first-time filers, domestic and foreign.

The final amendment to the definition of ''audit and professional engagement period'' will require domestic first-time filers to assess auditor independence over a shortened look-back period (*i.e.,* a single immediate preceding year). As a result, this amendment could help domestic firms avoid the compliance costs associated with switching auditors or delaying the filing of an initial registration statement when there is an independence-impairing relationship or service in earlier years. In this way, shortening the look-back period may promote efficiency and facilitate capital formation.

This amendment might also expand the pool of eligible auditors for domestic first-time filers. The potential increase in the number of eligible auditors for these filers could foster competition among eligible auditors and thus reduce the cost of audit services.[274] Specifically, where an audit client is looking to change auditors in connection with an IPO, an audit client would be able to select from a broader group of auditors to perform audit services, even if there were independence-impairing services or relationships in the second or third year prior to the filing of the initial registration statement. However, the audit profession is already highly concentrated, especially with respect to IPOs.[275] Consequently, any such benefit may not be significant. The expanded pool of qualified auditors also could allow the first-time domestic filers to better match auditor expertise to audit engagements. We anticipate that the improved alignment between auditor expertise and audit engagement likely will positively influence audit and financial reporting quality, thereby benefiting investors and improving market efficiency.[276]

The change in the look-back period for domestic first-time filers might lead to some financial statements in early years being audited by auditors that do not meet the Commission's current independence requirements, thus potentially compromising the integrity

[269] *See* amended Rule 2–01(f)(14)(ii).

[270] *See e.g.,* Rules 2–01(f)(4)(ii) and (iii).

[271] *See* amended Rule 2–01(f)(14)(i)(E).

[272] *See* Rule 2–01(f)(5)(iii).

[273] *See* Rule 2–01(f)(5).

[274] *See supra* note 264.

[275] *See* United State Government Accountability Office, Audits of Public Companies—Continued Concentration in Audit Market for Large Public Companies Does Not Call for Immediate Action (2008) *available at www.gao.gov/new.items/d08163.pdf. See also* Patrick Velte and Markus Stiglbauer, Audit Market Concentration and Its Influence on Audit Quality, 5 Intl. Bus. Res. (2012) 146; and Xiaotao Liu and Biyu Wu, Do IPO Firms Misclassify Expenses? Working paper, (2019) (showing that 84.2% of IPO firms of their sample use Big 4 auditors before going public).

[276] *See supra* note 255 and accompanying text.

and reliability of financial reporting information related to the earlier second and third years, if included in the first filing. However, this potential adverse effect would be mitigated by the requirement for these auditors to meet applicable independence requirements—such as AICPA independence requirements—for the audits of these periods and by the application of the general independence standard in Rule 2–01(b) to the relationships and services in those earlier years. In addition, there are often, if not always, internal and external governance mechanisms (*e.g.,* audit committees and underwriters) in place at first-time filers, and auditors are subject to heightened litigation risk around IPOs.[277]

c. Amendments to Loans or Debtor-Creditor Relationships

Currently, Rule 2–01 prohibits certain loans/debtor-creditor relationships and other financial interests with a few exceptions.[278] As discussed in Sections II.B.1 and 3, the final amendments will address two types of loans that are less likely to threaten an auditor's objectivity and impartiality by making the following changes: (1) Include, as part of the exceptions, student loans for a covered person and his/her immediate family members as long as the loan was obtained while the covered person was not a covered person; and (2) amend the Credit Card Rule to refer instead to ''consumer loans'' in order to except personal consumption loans such as retail installment loans, cell phone installment plans, and home improvement loans that are not secured by a mortgage on a primary residence.

The amendments to except certain student and consumer loans that are less likely to pose threats to auditors' objectivity or impartiality may alleviate some compliance burdens. For instance, audit firms will be able to reduce the level of monitoring for such student and consumer loans as part of their compliance program. The amendments would permit certain covered persons (including audit partners and staff) to be considered independent even when covered persons or their immediate family members have student loans or consumer loans with an audit client. The potential expansion of qualified audit partners and staff may allow audit firms to more readily identify audit partners and staff for a given audit engagement and improve matching between partner and staff experience with audit engagements. The improved alignment between partner and staff experience and audit engagements can increase audit efficiency and reduce audit costs. Such efficiency gains may transfer to audit clients in the form of reduced audit fees and audit delays.

Moreover, the better alignment between partner and staff experience and audit engagement may increase audit quality.[279] Since audit quality improvement increases financial reporting quality, this benefit likely will accrue to the overall investment community.[280] Finally, the final amendments may make it easier for covered persons and their immediate family members to obtain necessary consumer loans without having to determine if such loans are with audit clients of the accounting firm.

d. Amendments to the Business Relationships Rule

As discussed in Section II.C, the Business Relationships Rule currently refers to ''substantial stockholders'' to identify a type of ''person associated with the audit client in a decision-making capacity.'' [281] Under the current rule, a business relationship between a substantial stockholder of the audit client, among others, and the auditor or covered person would be considered independence-impairing. The final amendment will change the term ''substantial stockholders'' to ''beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence over the entity under audit'' to align this rule with changes recently made to the Loan Provision.[282] In a modification from the proposal, the final rule now codifies the guidance provided in the Proposing Release, which clarified that ''significant influence over the audit client'' is meant to focus on the entity under audit. Also, the final amendment clarifies that with respect to other persons in a decision-making capacity, such as officers and directors, the focus is similarly meant to be on the entity under audit. This amendment should improve compliance with the auditor independence rules by improving the clarity and reducing the complexity of application of the Business Relationships Rule.

There may be some additional compliance costs to auditors and audit clients associated with having to comply with a standard that now requires identifying beneficial owners of equity securities that have ''significant influence'' over the audit client, as opposed to identifying ''substantial stockholders.'' However, any such additional cost should be limited given that the concept of ''significant influence'' has been part of the Commission's auditor independence rules since 2000 as part of the definition of affiliate of the audit client.[283] We therefore do not expect a significant learning curve in applying the test for auditors and registrants.

e. Amendments for Inadvertent Violations for Mergers and Acquisitions

As discussed in Section II.D, certain merger and acquisition transactions can give rise to inadvertent violations of auditor independence requirements. For example, an auditor may provide non-audit services to a target firm and audit services to an acquirer prior to the occurrence of an acquisition. As a result, the acquisition may result in an auditor independence violation that had not existed prior to the acquisition. In this scenario, the auditor's objectivity and impartiality likely is not impaired.[284]

There may be compliance costs associated with the application of the current rule in that registrants might have to: (i) Delay mergers and acquisitions in order to comply with Rule 2–01; (ii) forgo such transactions altogether; or (iii) switch auditors or stop the relationships or services mid-stream, potentially resulting in costly disruptions to the registrant.

As discussed in Section II.D.3, the final amendments to Rule 2–01(e) establish a transition framework for mergers and acquisitions to address these costs. Under the amendments, auditors and their audit clients will be able to transition out of independence-impairing relationships or services in an orderly manner, subject to certain conditions. As such, the amendments likely will reduce audit clients' compliance costs in merger and acquisition transactions by reducing the uncertainty associated with incidences of inadvertent violations of auditor independence due to these corporate events.

[277] *See* Ray Ball and Lakshmana Shivakumar, Earnings Quality at Initial Public Offerings, 45, J. Acct. Econ. (2008) 324–349. *See also* Ramgopal Venkataraman, Joseph P. Weber and Michael Willenborg, Litigation Risk, Audit Quality, and Audit Fees: Evidence from Initial Public Offerings, 83 Acct Rev. (2008) 1315–1345.

[278] *See* Rule 2–01(c)(1)(ii).

[279] *See e.g.,* G. Bradley Bennett & Richard C. Hatfield, The Effect of the Social Mismatch between Staff Auditors and Client Management on the Collection of Audit Evidence, 88 Acct. Rev. (2013) 31–50.

[280] *See supra* note 255 and accompanying text.

[281] *See* Rule 2–01(c)(3).

[282] *See* Section II.C.4.

[283] *See e.g.,* Rule 2–01(f)(4)(ii) and (iii).

[284] *See* Section II.D.

For example, the transition framework will allow auditors and audit clients, subject to certain conditions, up to six months after the transaction effective date to terminate the independence-impairing relationships or services. As a result, this framework will help audit clients, especially those entities with complex organizational structures and those actively pursuing merger and acquisition transactions, retain an auditor that is compliant with the auditor independence requirements when they undertake mergers and acquisitions without missing out on the ideal timing for such transactions. In addition, investors may indirectly benefit from the value created through timely mergers and acquisitions and costs saved from managing inadvertent independence violations.

There may be some learning curve for auditors and audit clients as they adapt to the transition framework. However, given that the framework follows the consideration of the audit firm's quality controls similar to existing Rule 2–01(d), we do not expect a significant learning curve in applying the framework for auditors and audit clients. The framework does not alter the independence requirements for entities involved in mergers and acquisitions *per se;* rather, the framework offers a more practical approach to, and timeline for, addressing inadvertent independence violations as a result of merger and acquisition transactions. Thus, we do not anticipate significant compliance costs associated with this amendment.

D. Effects on Efficiency, Competition, and Capital Formation

We believe that the final amendments likely will improve the practical application of Rule 2–01, enhance efficiency of rule implementation, reduce compliance burdens, and increase competition among auditors. They also may facilitate capital formation.

One commenter questioned our conclusion and argued that the final amendments would undermine the credibility of auditors and have harmful effects on capital formation.[285] We disagree with the commenter's assessment. The final amendments to Rule 2–01 aim to reduce or remove certain practical challenges associated with the auditor independence analysis by focusing the analysis on those relationships and services that are more likely to pose a threat to an auditor's objectivity and impartiality. The amendments are expected to expand the pool of auditors and covered persons eligible to undertake audit engagements. As a result, audit clients should have more options for audit services and audit costs may decrease for comparable audit quality. The potential expansion of eligible auditors may also lead to better alignment between the audit client's needs and the auditor's expertise. The improved alignment between auditor expertise and audit client needs should enable auditors to perform audit services more efficiently and effectively, thus potentially reducing audit fees and increasing audit quality over the long term.

Under the final amendments, certain relationships and services between an auditor and an audit client that are currently deemed independence-impairing but are unlikely to threaten auditor objectivity and impartiality will no longer be deemed independence-impairing (subject to the general independence standard in Rule 2–01(b)), thus allowing auditors and audit clients to focus on those relationships and services that are more likely to threaten the auditor's objectivity and impartiality. To the extent that the amendments may reduce the amount of audit client or audit committee attention spent on independence questions when objectivity and impartiality is not at issue, the quality of financial reporting is likely to improve, thus allowing audit committees to focus on their other responsibilities. Furthermore, we expect that improved identification of threats to auditor independence would increase investor confidence about the quality and accuracy of the information reported. Reduced uncertainty about the quality and accuracy of financial reporting should attract capital and thus reduce the cost of capital, facilitate capital formation, and improve overall market efficiency.[286]

Under the final amendments, we expect some accounting firms to become eligible to provide audit services to new audit clients that were previously deemed independence-impairing under existing Rule 2–01. If the larger accounting firms are currently engaged in non-audit relationships with and providing services to potential audit clients that preclude such accounting firms from serving as the auditor under existing Rule 2–01, then these firms are more likely to be positively affected by the final amendments. In particular, these accounting firms may be able to compete for or retain a larger pool of audit clients. At the same time, the larger accounting firms' potentially increased ability to compete for audit clients could potentially crowd out the audit business of smaller audit firms. However, we estimate that the four largest accounting firms already perform 49.2% of audits for all registrants (or about 73% of accelerated and large accelerated filers) and more than 80% in the registered investment company space.[287] As a result, we do not expect any potential change in the competitive dynamics among accounting firms to be significant.

E. Alternatives

We considered certain alternative approaches to the final amendments, which we summarize below.

As an alternative to the dual materiality threshold for the definition of affiliate of the audit client that we are adopting, we could have adopted the single materiality threshold that was proposed in the Proposing Release. Under such an alternative, a sister entity would be deemed an affiliate of the audit client unless the entity is not material to the controlling entity, and there would be no materiality qualifier with respect to the entity under audit. Such an alternative, however, would introduce costs for both auditors and audit clients' sister entities relative to the final amendments when the entity under audit is not material to the controlling entity. For example, an auditor would not be allowed to provide certain services to sister entities even though its services with those entities would generally not threaten the auditor's objectivity and impartiality. One commenter argued that such an alternative would increase the burden on private equity firms by requiring more time and resources to monitor the ''continuously evolving universe of entities that the private firm would need to address.'' [288]

An alternative approach to the amendments to the definition of ''audit and professional engagement period'' would be to increase the look-back period for FPI first-time filers to align with the current requirement for domestic first-time filers. While this

[285] *See* letter from CFA.

[286] *See supra* note 255. *See also* Nilabhra Bhattacharya, Frank Ecker, Per Olsson, and Katherine Schipper, Direct and Mediated Associations among Earnings Quality, Information Asymmetry and the Cost of Equity, 87, Acct Rev. (2012) 449–482; and Shuai Ma. Economic Links and the Spillover Effect of Earnings Quality on Market Risk. 92 Acct Rev. (2017). 213–245.

[287] *See supra* note 246. Also, as of December 2018, there were approximately 12,577 fund series, with total net assets of $23 trillion that are covered by Morningstar Direct with identified accounting firms. There were 23 accounting firms performing audits for these investment companies. The market for these audit services was highly concentrated, as 86% of the funds were audited by the four largest accounting firms.

[288] *See* letter from AIC.

alternative would help level the playing field for both domestic and FPI first-time filers, similar to the final amendment to shorten the look-back period for a first-time domestic filer, and reduce the likelihood of potential independence-impairing relationships and services, it would increase compliance burdens for FPI first-time issuers and thus may reduce the incentives for the FPI first-time filers to list in the United States, thereby impeding capital formation and limiting investment opportunities for U.S. investors. As discussed above, we believe services or relationships that ended prior to the start of the most recently completed fiscal year are less likely to threaten an auditor's objectivity and impartiality. We do not, therefore, believe that lengthening the look-back period for FPIs would enhance investor protection in a manner that would justify an associated increase in compliance costs and a potential negative impact on capital formation.

An alternative to the complete exclusion of student loans of the covered person would be a bright-line test in which, if the percentage of the aggregate amount of the student loans of a covered person and his or her immediate family members to the total wealth of the covered person's family is below a certain threshold, then all of the students loans would be excluded from the prohibition. This alternative has the advantage of taking into consideration the importance of the student loans to the covered person's financial interests. However, this alternative, because it is a bright-line test, may lead to over-identifying or under-identifying scenarios where the auditor's objectivity and impartiality are deemed impaired, especially in cases close to the selected percentage threshold. In addition, this alternative could present operational and privacy challenges in calculating and monitoring changes to a family's total wealth.

An alternative with respect to the exclusion for consumer loans would be to increase the outstanding balance limit, currently set at $10,000. For example, several commenters suggested inflationary adjustments to the outstanding balance limit to make it as high as $20,000 or $25,000.[289] Such an increase would make it easier for covered persons to meet the requirements of the rule, and thus benefit audit clients by making it easier for them to find an auditor. Such an alternative, however, also would allow a covered person to have a significant amount of outstanding consumer loan(s) with an audit client, increasing the risk to the auditor's objectivity and impartiality and potentially negatively affecting investor protection.

Finally, the transition framework for merger and acquisition transactions includes a provision that, subject to certain conditions, allows affected auditors and audit clients to address independence-impairing relationships or services promptly, but in no event more than six months, following the effective date of the transaction. An alternative approach would be to require the independence-impairing relationship or service to be addressed within six months following the merger or acquisition announcement. A benefit of this alternative approach would be the improved timeliness of auditor compliance following merger and acquisition transactions. Under this alternative, auditors and registrants would assess independence immediately following the announcement that a definite agreement has been reached. However, some mergers and acquisitions take a long time to be completed and a substantial portion of such transactions never reach completion. As a result, an alternative window of six months following announcement of the merger or acquisition may unnecessarily increase compliance burdens and associated costs (*e.g.,* switching costs) for both affected companies and their auditors when such transactions are delayed or never successfully completed. A commenter suggested another alternative with respect to merger and acquisition transactions: To require the relationship or service triggering the inadvertent violation to be terminated before the merger or acquisition is effective.[290] Requiring termination prior to the merger and acquisition transaction, however, would generate significant costs for the auditor and the audit client, including search costs for finding a new auditor and disruption to valuable relationships and services for the company.

V. Paperwork Reduction Act

The final amendments do not impose any new ''collections of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA''),[291] nor do they create any new filing, reporting, recordkeeping, or disclosure requirements. Accordingly, we are not submitting the final amendments to the Office of Management and Budget for review in accordance with the PRA.[292] In the Proposing Release, the Commission asked about the conclusion that the amendments would not impose any new collections of information. We did not receive any comments in response.

VI. Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA'')[293] requires the Commission, in promulgating rules under section 553 of the Administrative Procedure Act,[294] to consider the impact of those rules on small entities. We have prepared this Final Regulatory Flexibility Analysis (''FRFA'') in accordance with Section 604 of the RFA.[295] This FRFA relates to final amendments to Rule 2–01 of Regulation S–X. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release.

A. Need for, and Objectives of, the Final Amendments

As discussed above, the primary reason for, and objective of, the final amendments is to update certain provisions within the Commission's auditor independence requirements to more effectively focus the analysis under Rule 2–01 on those relationships or services that are more likely to pose threats to an auditor's objectivity and impartiality. Specifically, the final amendments:

- Amend the definitions of affiliate of the audit client and ICC to address certain affiliate relationships;
- Shorten the look-back period for domestic first-time filers in assessing compliance with the independence requirements;
- Add certain student loans and de minimis consumer loans to the categorical exclusions from independence-impairing lending relationships;
- Replace the reference to ''substantial stockholders'' in the Business Relationships Rule with the concept of beneficial owners with significant influence;
- Introduce a transition framework for merger and acquisition transactions to consider whether an auditor's independence is impaired; and
- Make certain other miscellaneous updates.

The reasons for, and objectives of, the final amendments are discussed in more detail in Sections I and II above.

[289] *See e.g.,* letters from BDO, EY, Horahan, CAQ, PwC, and RSM.

[290] *See* letter from NYSSCPA.

[291] 44 U.S.C. 3501 *et seq.*

[292] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[293] 5 U.S.C. 601 *et seq.*

[294] 5 U.S.C. 553.

[295] 5 U.S.C. 604.

B. Significant Issues Raised by Public Comment

In the Proposing Release, we requested comments on the IRFA. In particular, we requested comments on the number of small entities that would be subject to the proposed amendments to Rule 2–01 of Regulation S–X and the existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis. In addition, we requested comments regarding how to quantify the impact of the proposed amendments and alternatives that would accomplish our stated objectives while minimizing any significant adverse impact on small entities. We also requested that commenters describe the nature of any effects on small entities subject to the proposed amendments to Rule 2–01 of Regulation S–X and provide empirical data to support the nature and extent of such effects. Furthermore, we requested comment on the number of accounting firms with revenue under $20.5 million. We did not receive comments regarding the impact of the proposal on small entities.

C. Small Entities Subject to the Proposed Rules

The final amendments will affect small entities that file registration statements under the Securities Act, the Exchange Act, and the Investment Company Act and periodic reports, proxy and information statements, or other reports under the Exchange Act or the Investment Company Act, as well as smaller registered investment advisers and smaller accounting firms. The RFA defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [296] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Title 17 CFR 230.157 and 17 CFR 240.0–10(a) define an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that, as of December 31, 2019, there are approximately 1,056 issuers, other than registered investment companies, that may be small entities subject to the final amendments.[297] The final amendments will affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act. In addition, the final amendments will affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities Act and that has not been withdrawn.

An investment company is considered to be a ''small business'' for purposes of the RFA, if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less at the end of the most recent fiscal year.[298] We estimate that, as of June 2020, approximately 39 registered open-end mutual funds, 8 registered ETFs, 26 registered closed-end funds, and 12 BDCs are small entities.[299]

For purposes of the RFA, an investment adviser is a small entity if it:

(1) Has assets under management having a total value of less than $25 million;

(2) Did not have total assets of $5 million or more on the last day of the most recent fiscal year; and

(3) Does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[300] We estimate, as of June 30, 2020, that there are approximately 524 investment advisers that would be subject to the final amendments that may be considered small entities.[301]

For purposes of the RFA, a broker-dealer is considered to be a ''small business'' if its total capital (net worth plus subordinated liabilities) is less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and that is not affiliated with any person (other than a natural person) that is not a small business or small organization.[302] As of June 30, 2020, we estimate that there are approximately 852 small entity broker-dealers that will be subject to the final amendments.[303]

Our rules do not define ''small business'' or ''small organization'' for purposes of accounting firms. The Small Business Administration (SBA) defines ''small business,'' for purposes of accounting firms, as those with under $20.5 million in annual revenues.[304] We have limited data indicating revenues for accounting firms, and we cannot estimate the number of firms with less than $20.5 million in annual revenues. As noted in the preceding section, we also did not receive any data from commenters that would enable us to make such an estimate.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The final amendments will not impose any reporting, recordkeeping, or disclosure requirements. The final amendments will impose new compliance requirements with respect to Rule 2–01.

With respect to the final amendments related to student loans, consumer loans, and the definition of the audit and engagement period for first-time filers, we believe these amendments are less burdensome than the current requirements and will not increase costs for smaller entities, including smaller accounting firms. With respect to the final amendments to the definitions of affiliate of the audit client and ICC, these amendments will reduce the number of entities that are deemed affiliates of the audit client. As such, any additional compliance effort related to the revised definitions (such as the need to monitor the materiality of entities under common control) will be offset by the less burdensome nature of the amended definitions as compared to the current definitions.

With respect to the final amendment adding a merger and acquisition transition framework, small entities, including smaller accounting firms, will incur a new compliance burden only if an auditor and its client seek to avail themselves of the framework. As such, any additional compliance effort will be

[296] 5 U.S.C. 601(6).

[297] This estimate is based on staff analysis of issuers, excluding co-registrants, with EDGAR filings on Forms 10–K, 20–F and 40–F, or amendments thereto, filed during the calendar year of January 1, 2019, to December 31, 2019. The analysis is based on data from XBRL filings, Compustat, and Ives Group Audit Analytics.

[298] 17 CFR 270.0–10(a).

[299] This estimate is based on staff analysis of data obtained from Morningstar Direct as well as data reported to the Commission for the period ending June 30, 2020.

[300] 17 CFR 275.0–7.

[301] This estimate is based on SEC registered investment adviser responses to Item 12 of Form ADV.

[302] 17 CFR 240.0–10(c).

[303] This estimate is based on staff analysis of the most recent information available, as provided in Form X–17A–5 Financial and Operational Combined Uniform Single Reports filed pursuant to Section 17 of the Exchange Act and Rule 17a–5 thereunder.

[304] 13 CFR 121.201 and North American Industry Classification System (NAICS) code 541211. The SBA calculates ''annual receipts'' as all revenue. *See* 13 CFR 121.104.

offset in any circumstance where relationships and services prohibited under the current rule will be deemed not to impair independence under the final amendments. Overall, the adopted transition framework provides a more practical approach to, and timeline for, addressing inadvertent independence violations that arise solely due to merger or acquisition transactions and reduces some of the cost associated with such inadvertent violations.

Regarding the final amendment to the Business Relationships Rule to replace the reference to ''substantial stockholders'' with the concept of beneficial owners with significant influence, the concept of ''significant influence'' already exists in other parts of the auditor independence rules, including the recently amended Loan Provision.[305] As such, we believe that affected entities will likely be able to leverage existing practices, processes, or controls to comply with the final amendments compared to having separate compliance requirements by retaining the reference to the substantial stockholder.

Compliance with the final amendments will require the use of professional skills, including accounting and legal skills. The final amendments are discussed in detail in Section II above. We discuss the economic impact, including the estimated costs, of the final amendments in Section III (Economic Analysis) above.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs us to consider alternatives that would accomplish our stated objectives while minimizing any significant adverse impacts on small entities. Accordingly, we considered the following alternatives:

- Establishing different compliance or reporting requirements that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

In connection with the final amendments to Rule 2–01, we do not think it feasible or appropriate to establish different compliance or reporting requirements or timetables for small entities. The final amendments are designed to address compliance challenges for both large and small audit clients and audit firms, including smaller accounting firms. With respect to clarification, consolidation, or simplification of compliance and reporting requirements for small entities, the final amendments do not contain any new reporting requirements.

Some of the final amendments, such as establishing a dual materiality threshold for the common control provision in the affiliate of the audit client definition, amending the ICC definition, and incorporating the concept of ''significant influence'' into the Business Relationships Rule, will create new compliance requirements. However, the amendments to the affiliate of the audit client and the ICC definitions are less burdensome in nature when compared to the existing rules, and the amendment to the Business Relationships Rule will help with compliance by using a consistent concept that is defined and understood. These amendments are meant to better identify those relationships and services that are more likely to impair an auditor's objectivity and impartiality, thereby resulting in fewer instances where certain relationships and services would cause the auditor to violate our independence requirements, as compared to the existing rule. The flexibility that could result from the final amendments will be applicable to all affected entities, regardless of size.

With respect to using performance rather than design standards, we note that several of the final amendments are more akin to performance standards. Rather than prescribe the specific steps necessary to apply such standards, the final amendments recognize that ''materiality'' and ''significant influence'' can be implemented using reasonable judgment to achieve the intended result. Regarding the mergers and acquisitions transition framework, the final amendments do not prescribe specific procedures or processes and instead focus on requiring the performance that would lead to the identification of potential violations and how to address such violations. We believe that the use of these standards will accommodate entities of various sizes while potentially avoiding overly burdensome methods that may be ill-suited or unnecessary given the facts and circumstances.

The final amendments are intended to update the independence rules to reflect recent feedback received from the public and the Commission's experience administering those rules since their adoption nearly two decades ago and address certain compliance challenges for audit firms and their clients, including those that are small entities. Overall, the final amendments are expected to be less burdensome in nature than the existing rule. For this reason, exempting small entities from the final amendments would increase, rather than decrease, their regulatory burden relative to larger entities. The potential benefits to be derived from the final amendments discussed in the Economic Analysis apply to small entities as well as the larger entities. As such, exempting small entities from any of the final amendments would deprive them of the intended benefits and create the potential for confusion maintaining two sets of independence requirements.

VII. Codification Update

The ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 [306] (April 15, 1982) is updated by adding at the end of Section 602, under the Financial Reporting Release Number (FR–85) assigned to this final release, the text in Sections I and II of this release.

The Codification is a separate publication of the Commission. It will not be published in the Code of Federal Regulations.

VIII. Statutory Basis

The amendments described in this release are being adopted under the authority set forth in Schedule A and Sections 7, 8, 10, and 19 of the Securities Act, Sections 3, 10A, 12, 13, 14, 17, and 23 of the Exchange Act, Sections 8, 30, 31, and 38 of the Investment Company Act of 1940, Sections 203 and 211 of the Investment Advisers Act of 1940, and Section 3(a) of the Sarbanes Oxley Act of 2002.

List of Subjects in 17 CFR Part 210

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and recordkeeping requirements, Securities, Utilities.

In accordance with the foregoing, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

[305] *See* Loan Provision Adopting Release.

[306] 47 FR 21028 (May 17, 1982).

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j–1, 78l, 78m, 78n, 78o(d), 78q, 78u–5, 78w, 78ll, 78mm, 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012), unless otherwise noted.

■ 2. Amend § 210.2–01 by
■ a. Removing Preliminary Note to § 210.2–01;
■ b. Adding an introductory paragraph;
■ c. Revising paragraphs (c)(1)(ii)(A) introductory text;
■ d. Revising paragraphs (c)(1)(ii)(A)(*1*)(*iii*) and (*iv*);
■ e. Revising paragraph (c)(1)(ii)(A)(*1*)(*iv*);
■ f. Adding paragraph (c)(1)(ii)(A)(*1*)(*v*);
■ g. Revising paragraph (c)(1)(ii)(E);
■ h. Revising paragraph (c)(2)(iii)(B)(*2*)(*i*);
■ i. Revising paragraph (c)(2)(iii)(C)(*3*)(*i*);
■ j. Revising paragraph (c)(3);
■ k. Revising paragraph (c)(6)(i)(A)(*1*);
■ l. Revising paragraph (c)(6)(i)(B)(*1*);
■ m. Revising paragraph (e);
■ n. Revising paragraph (f)(4);
■ o. Revising paragraph (f)(5)(iii);
■ p. Revising paragraph (f)(6); and
■ q. Revising paragraph (f)(14).

The revisions and additions read as follows:

§ 210.2–01 Qualifications of accountants.

Section 210.2–01 is designed to ensure that auditors are qualified and independent of their audit clients both in fact and in appearance. Accordingly, the rule sets forth restrictions on financial, employment, and business relationships between an accountant and an audit client and restrictions on an accountant providing certain non-audit services to an audit client. Section 210.2–01(b) sets forth the general standard of auditor independence. Paragraphs (c)(1) through (c)(5) of this section reflect the application of the general standard to particular circumstances. The rule does not purport to, and the Commission could not, consider all circumstances that raise independence concerns, and these are subject to the general standard in § 210.2–01(b). In considering this standard, the Commission looks in the first instance to whether a relationship or the provision of a service: Creates a mutual or conflicting interest between the accountant and the audit client; places the accountant in the position of auditing his or her own work; results in the accountant acting as management or an employee of the audit client; or places the accountant in a position of being an advocate for the audit client. These factors are general guidance only, and their application may depend on particular facts and circumstances. For that reason, § 210.2–01(b) provides that, in determining whether an accountant is independent, the Commission will consider all relevant facts and circumstances. For the same reason, registrants and accountants are encouraged to consult with the Commission's Office of the Chief Accountant before entering into relationships, including relationships involving the provision of services that are not explicitly described in the rule.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(A) * * *

(*1*) Any loan (including any margin loan) to or from an audit client, an audit client's officers or directors that have the ability to affect decision-making at the entity under audit, or beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence over the entity under audit. The following loans obtained from a financial institution under its normal lending procedures, terms, and requirements are excepted from this paragraph (c)(1)(ii)(A)(*1*):

* * * * *

(*iii*) Loans fully collateralized by cash deposits at the same financial institution;

(*iv*) Mortgage loans collateralized by the borrower's primary residence provided the loans were not obtained while the covered person in the firm was a covered person; and

(*v*) Student loans provided the loans were not obtained while the covered person in the firm was a covered person.

* * * * *

(E) *Consumer loans.* Any aggregate outstanding consumer loan balance owed to a lender that is an audit client that is not reduced to $10,000 or less on a current basis taking into consideration the payment due date and any available grace period.

* * * * *

(2) * * *

(iii) * * *

(B) * * *

(*2*) * * *

(*i*) Persons, other than the lead partner and the Engagement Quality Reviewer, who provided 10 or fewer hours of audit, review, or attest services during the period covered by paragraph (c)(2)(iii)(B)(*1*) of this section;

* * * * *

(C) * * *

(*3*) * * *

(*i*) Persons, other than the lead partner and the Engagement Quality Reviewer, who provided 10 or fewer hours of audit, review, or attest services during the period covered by paragraph (c)(2)(iii)(C)(*2*) of this section;

* * * * *

(3) *Business relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers or directors that have the ability to affect decision-making at the entity under audit or beneficial owners (known through reasonable inquiry) of the audit client's equity securities where such beneficial owner has significant influence over the entity under audit. The relationships described in this paragraph (c)(3) do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

* * * * *

(6) * * *

(i) * * *

(A) * * *

(*1*) The services of a lead partner, as defined in paragraph (f)(7)(ii)(A) of this section, or Engagement Quality Reviewer, as defined in paragraph (f)(7)(ii)(B) of this section; for more than five consecutive years; or

* * * * *

(B) * * *

(*1*) Within the five consecutive year period following the performance of services for the maximum period permitted under paragraph (c)(6)(i)(A)(*1*) of this section, performs for that audit client the services of a lead partner, as defined in paragraph (f)(7)(ii)(A) of this section, or Engagement Quality Reviewer, as defined in paragraph (f)(7)(ii)(B) of this section, or a combination of those services; or

* * * * *

(e) *Transition provisions for mergers and acquisitions involving audit clients.*

An accounting firm's independence will not be impaired because an audit client engages in a merger or acquisition that gives rise to a relationship or service that is inconsistent with this rule, provided that:

(1) The accounting firm is in compliance with the applicable independence standards related to such services or relationships when the services or relationships originated and throughout the period in which the applicable independence standards apply;

(2) The accounting firm has or will address such services or relationships promptly under relevant circumstances as a result of the occurrence of the merger or acquisition;

(3) The accounting firm has in place a quality control system as described in paragraph (d)(3) of this section that has the following features:

(i) Procedures and controls that monitor the audit client's merger and acquisition activity to provide timely notice of a merger or acquisition; and

(ii) Procedures and controls that allow for prompt identification of such services or relationships after initial notification of a potential merger or acquisition that may trigger independence violations, but before the effective date of the transaction.

(f) * * *

(4) *Affiliate of the audit client* means:

(i) An entity that has control over the entity under audit, or over which the entity under audit has control, including the entity under audit's parents and subsidiaries;

(ii) An entity that is under common control with the entity under audit, including the entity under audit's parents and subsidiaries, when the entity and the entity under audit are each material to the controlling entity;

(iii) An entity over which the audit client has significant influence, unless the entity is not material to the audit client;

(iv) An entity that has significant influence over the audit client, unless the audit client is not material to the entity; or

(v) Each entity in the investment company complex as determined in paragraph (f)(14) of this section when the entity under audit is an investment company or investment adviser or sponsor, as those terms are defined in paragraphs (f)(14)(ii), (iii), and (iv) of this section.

(5) * * *

(iii) The ''audit and professional engagement period'' does not include periods ended prior to the first day of the last fiscal year before the issuer first filed, or was required to file, a registration statement or report with the Commission, provided there has been full compliance with applicable independence standards in all prior periods covered by any registration statement or report filed with the Commission.

(6) *Audit client* means the entity whose financial statements or other information is being audited, reviewed, or attested to and any affiliates of the audit client, other than, for purposes of paragraph (c)(1)(i) of this section, entities that are affiliates of the audit client only by virtue of paragraphs (f)(4)(iii), (f)(4)(iv), or (f)(14)(i)(E) of this section.

* * * * *

(14) *Investment company complex.* (i) ''Investment company complex'' includes:

(A) An entity under audit that is an:

(*1*) Investment company; or

(*2*) Investment adviser or sponsor;

(B) The investment adviser or sponsor of any investment company identified in paragraph (f)(14)(i)(A)(*1*) of this section;

(C) Any entity controlled by or controlling:

(1) An entity under audit identified by paragraph (f)(14)(i)(A) of this section, or

(2) An investment adviser or sponsor identified by paragraph (f)(14)(i)(B) of this section. When the entity is controlled by an investment adviser or sponsor identified by paragraph (f)(14)(i)(B), such entity is included within the investment company complex if:

(i) The entity and the entity under audit are each material to the investment adviser or sponsor identified by paragraph (f)(14)(i)(B) of this section; or

(ii) The entity is engaged in the business of providing administrative, custodial, underwriting, or transfer agent services to any entity identified by paragraphs (f)(14)(i)(A) or (B) of this section;

(D) Any entity under common control with an entity under audit identified by paragraph (f)(14)(i)(A) of this section, any investment adviser or sponsor identified by paragraph (f)(14)(i)(B) of this section, or any entity identified by paragraph (f)(14)(i)(C) of this section; if the entity:

(1) Is an investment company or an investment adviser or sponsor, when the entity and the entity under audit identified by paragraph (f)(14)(i)(A) of this section are each material to the controlling entity; or

(2) Is engaged in the business of providing administrative, custodian, underwriting, or transfer agent services to any entity identified by paragraphs (f)(14)(i)(A) and (f)(14)(i)(B) of this section;

(E) Any entity over which an entity under audit identified by paragraph (f)(14)(i)(A) of this section has significant influence, unless the entity is not material to the entity under audit identified by paragraph (f)(14)(i)(A) of this section, or any entity that has significant influence over an entity under audit identified by paragraph (f)(14)(i)(A) of this section, unless the entity under audit identified by paragraph (f)(14)(i)(A) of this section is not material to the entity that has significant influence over it; and

(F) Any investment company that has an investment adviser or sponsor included in this definition by paragraphs (f)(14)(i)(A) through (f)(14)(i)(D) of this section.

(ii) An investment company, for purposes of paragraph (f)(14) of this section, means any investment company or an entity that would be an investment company but for the exclusions provided by Section 3(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)).

(iii) An investment adviser, for purposes of this definition, does not include a subadviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser.

(iv) Sponsor, for purposes of this definition, is an entity that establishes a unit investment trust.

* * * * *

By the Commission.

Dated: October 16, 2020.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–23364 Filed 12–10–20; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 85 Friday,
No. 239 December 11, 2020

Part VII

Department of Transportation

Federal Railroad Administration

49 CFR Parts 218, 221, and 232
Miscellaneous Amendments to Brake System Safety Standards and Codification of Waivers; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 218, 221, and 232

[Docket No. FRA–2018–0093, Notice No. 2]

RIN 2130–AC67

Miscellaneous Amendments to Brake System Safety Standards and Codification of Waivers

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is revising its regulations governing brake inspections, tests, and equipment. The changes include the incorporation of relief from various provisions provided in long-standing waivers related to single car air brake tests, end-of-train devices, helper service, and brake maintenance. FRA is also extending the time that freight rail equipment can be ''off-air'' before requiring a new brake inspection. In addition, FRA is making various modifications to the existing brake-related regulations to improve clarity and remove outdated or unnecessary provisions. FRA expects the revisions will benefit railroads and the public by reducing unnecessary costs, creating consistency between U.S. and Canadian regulations, and incorporating the use of newer technologies demonstrated to maintain or increase safety. The rule will reduce the overall regulatory burden on railroads.

DATES: This final rule is effective December 11, 2020.

Justification for Immediate Effective Date. FRA finds that this rule relieves current regulatory restrictions, thus in accordance with 5 U.S.C. 553(d)(1), FRA has determined it is appropriate to make the rule effective upon publication.

Incorporation by Reference. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 11, 2020. The incorporation by reference of certain other publications listed in the rule was approved by the Director of the Federal Register as of December 15, 2008.

FOR FURTHER INFORMATION CONTACT: Steven Zuiderveen, Senior Safety Specialist, Motive & Power Equipment Division, Office of Technical Oversight, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: 202–493–6337); Jason Schlosberg, Senior Attorney, Office of the Chief Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: 202–493–6032).

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Executive Summary

A. Purpose of the Regulatory Action

In a letter dated July 12, 2018, which is included in the public docket to this rulemaking proceeding, the Association of American Railroads (AAR) submitted a petition for rulemaking (Petition) requesting FRA relax the requirement to conduct a Class I brake test prior to operation if a train is off-air for a period of more than four hours, by extending the off-air period to twenty-four hours. On January 15, 2020, FRA issued a Notice of Proposed Rulemaking (NPRM) responding to AAR's petition, proposing codification of existing waivers related to brake systems, and making technical amendments to reduce regulatory burdens while maintaining or improving safety. 85 FR 2494, Jan. 15, 2020. This rulemaking is a result of FRA's effort to streamline and update its regulations to reflect technological advances and lessons learned through feedback from all stakeholders. AAR submitted a separate rulemaking petition in March 2019 proposing amendments to part 232 related to the industry's development of a rail car electronic air brake slip (eABS) system. FRA will address the recommendations in that petition in a separate rulemaking proceeding in Docket No. FRA–2019–0072 (the ''eABS Rule'').

B. Summary of the Major Provisions of the Regulatory Action

In this final rule, FRA is incorporating into the regulations various long-standing waivers providing conditional exceptions to existing rules concerning air brake testing, end-of-train (EOT) devices, and helper service. FRA is also extending to 24 hours the time that freight rail equipment can be ''off-air'' before requiring a new brake inspection and is making various modifications to the existing brake-related regulations for clarity and is removing outdated or unnecessary provisions.

C. Costs and Benefits of the Regulatory Action

FRA analyzed the economic impacts of this final rule over a 10-year period, and estimated its costs, cost savings, and benefits. For the final rule, FRA estimates net cost savings of $503.0 million (using a 7% discount rate), and $594.6 million (using a 3% discount rate). The results of this analysis are displayed in the table below.

TABLE E–1—TOTAL COSTS AND COST SAVINGS OVER 10 YEARS

[2017 Dollars in millions]

Section	Present value 7%	Present value 3%	Annualized 7%	Annualized 3%
Costs: Training	(*)	(*)	(*)	(*)
Cost Savings:				
Helper Link	$3.9	$4.5	$0.6	$0.5
26–C Brake Valve	0.4	0.5	0.06	0.06
D–22 Brake Valve	1.0	1.1	0.1	0.1
24 Hours Off-air	325.6	386.2	46.4	45.3
90 CFM	1.8	2.1	0.3	0.2

TABLE E–1—TOTAL COSTS AND COST SAVINGS OVER 10 YEARS—Continued

[2017 Dollars in millions]

Section	Present value 7%	Present value 3%	Annualized 7%	Annualized 3%
Single Car Air Brake Test (SCT) 24 month	150.7	176.1	21.5	20.6
SCT 48 month	19.5	23.8	2.8	2.8
Waiver Cost Savings	0.1	0.1	0.01	0.01
Government Administrative Cost Savings	0.1	0.1	0.01	0.01
Total Cost Savings	503.0	594.6	71.6	69.7
Net Cost Savings	503.0	594.6	71.6	69.7

Note: Figures may not sum in this and subsequent tables due to rounding. Net Cost Savings = Cost Savings − Costs.
* De minimis.

This final rule generally increases flexibility for the regulated entities by codifying waivers. It does not impose any new substantive requirements. This final rule will not negatively impact safety in any aspect of railroad operations and FRA does not expect any increase in end-of-train device or brake failures as a result of this rule. As noted in the Regulatory Impact Analysis (RIA) accompanying this rule, safety may be improved due to railroad employees experiencing less risk of common injuries such as slips, trips, and falls by having to perform fewer physical inspections, which would produce positive safety benefits, though these have not been quantified.

II. Background

A. Existing Regulations

FRA regulations require the air brake systems of trains, and the air brakes of individual freight cars, to be inspected and tested in certain circumstances. The regulations provide for five primary types of brake system inspections: Class I (initial terminal inspection), Class IA (1,000-mile inspection), Class II (intermediate inspection), Class III (trainline continuity inspection), and the SCT.

A Class I air brake test, also referred to as an initial terminal inspection, is a comprehensive inspection of the brake equipment on each car in an assembled train that is required to be performed at the location where a train is originally assembled, when the consist is changed pursuant to 49 CFR 232.205(a)(2) (*e.g.,* other than by adding or removing a single car or solid block of cars, removing a defective car, or picking up multiple blocks of cars under the space or trackage constraints referenced by paragraph (b)(2)), and when a train is off-air for a defined number of hours. Class I brake tests help ensure that a train is in proper working condition and capable of traveling to its destination with minimal problems en route. A Class I brake test requires the performance of a leakage test and in-depth inspection of the brake equipment (on both sides of the freight car) to ensure that each car's brake system is properly secure, does not bind or foul, and responds by applying or releasing in accordance with a specified brake pipe pressure signal. Piston travel must also be inspected and adjusted to a specified length if found not to be within a certain range of movement.[1]

A Class IA brake test—required every 1,000 miles—includes all the same elements of a Class I test, but with less stringent piston travel requirements. The most restrictive car or block of cars in a train determines the location where Class IA tests must be performed. For example, if a train travels 500 miles from its point of origination to a location where it picks up a block of cars that has travelled 800 miles since its last Class I brake test, and the crew does not perform a Class I brake test when adding the cars, then the entire train must receive a Class IA brake test within 200 miles, even though that location is only 700 miles from the train's origination.

Class II brake tests are less detailed inspections used for cars that do not have a compliant Class I inspection record that are picked up by a train at locations other than the initial terminal of the train, and where a Class I test cannot be performed. A railroad may utilize a Class II brake test where it is physically impossible to perform safely all of the requirements of the Class I brake tests; for example, where there is insufficient room to walk along both sides of the train. The Class II brake test includes a test for excessive brake pipe leakage, charging the air brakes to within 15 pounds per square inch (psi) of working pressure, making a 20-psi reduction in the brake pipe to actuate the brake, restoring pressure to working psi, releasing all brakes, and restoring full brake pipe pressure to the rear of the train. While a railroad may perform a Class II brake test, the rule requires a Class I brake test to be performed at the next available location in the car's line of travel in order to continue operating past that point. Due to the inefficiencies of this procedure, railroads generally perform the Class I brake tests in most instances where a Class II would be permitted as an alternative.

A Class III brake test must be performed any time the brake pipe is opened on an operating train. The test includes charging the air brakes to working pressure (no less than 60 psi at rear of train), making a 20-psi reduction in the brake pipe to actuate the brake on the rear car of the train, releasing the brake, and ensuring that pressure at the rear of the train is restored.

In addition to the types of air brake tests noted above, the regulations require the brakes of individual cars to be maintained periodically and tested in certain circumstances. This test is known as an SCT and is used to validate individual air brake effectiveness. An SCT is required: At least every 8 years for new or rebuilt freight cars, at least every 5 years for all other freight cars, and any time a freight car is on a shop track or repair track, if the car has not had an SCT in the previous 12 months.

A more in-depth summary, history, and analysis of the regulations affecting Class I, Class IA, Class II, and Class III brake tests, SCTs, and the operation and testing of end-of-train devices, are provided in the FRA final rule ''Freight and other non-passenger trains and equipment; brake system safety standards; end-of-train devices,'' 66 FR 4104, Jan. 17, 2001; and two subsequent modifications to that final rule that FRA promulgated in response to petitions for reconsideration, 66 FR 39683, Aug. 1, 2001, and 67 FR 17555, Apr. 10, 2002.

[1] When a car's brakes are applied, a piston in the brake cylinder travels (*i.e.,* moves), causing the brake shoe to push against the wheel to create the braking action. Piston travel must be within specified limits to be capable of producing its designed retarding force in order for FRA to consider a car's brakes to be effective.

B. FRA Waiver Authority and Process

When the existing rules do not adequately address or apply to the use of new and novel transportation technologies, industry stakeholders have often sought waiver of those rules through FRA's authorized process under subpart C to 49 CFR part 211. 49 U.S.C. 20103 (''The Secretary [of Transportation] may waive compliance with any parts of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety.''); 49 CFR 1.89(a). Each properly filed petition for a permanent or temporary waiver of a safety rule, regulation, or standard is referred to the Safety Board for decision. 49 CFR 211.41(a). The FRA Railroad Safety Board's (Safety Board) decision is typically rendered after a notice is published in the **Federal Register** and an opportunity for public comment is provided. 49 CFR 211.41(b). If a waiver petition is granted, the Safety Board may impose conditions on the grant of relief to ensure the decision is in the public interest and consistent with railroad safety. 49 CFR 211.41(c).

Activity under a waiver of regulatory compliance may generate sufficient data and experience to support an expansion of its scope, applicability, and duration. For instance, in many cases FRA has expanded the scope of certain waivers or issued the same or similar waivers to additional applicants. FRA has also extended various waivers' expiration dates. A waiver's success and its continued expansion warrant consideration of regulatory codification. Codifying a waiver, and thereby making its exemptions and requirements universally applicable, allows the entire industry to benefit from the regulatory relief the waiver provides without incurring the costs associated with seeking a waiver.

C. Petition for Rulemaking and Review of Existing Waivers

In December 2017, AAR filed a petition for waiver, on behalf of its members, from FRA's regulation requiring a Class I brake test prior to operation if a train is off-air for a period of more than four hours, contending it is too restrictive. Docket No. FRA–2017–0130. The Safety Board denied the waiver petition, finding that there was a lack of supporting data submitted with the waiver request, and that with the appropriate data, the relief requested was more appropriately addressed through the rulemaking process. Subsequently, in a letter dated July 12, 2018—included in the public docket to this rulemaking proceeding—AAR submitted a petition for rulemaking (Petition) requesting that FRA relax the requirement to conduct a Class I brake test prior to operation if a train is off-air for a period of more than four hours, by extending the off-air period to twenty-four hours. On January 15, 2020, FRA issued an NPRM responding to AAR's petition, proposing codification of existing waivers related to brake systems, and making technical amendments to reduce regulatory burdens while maintaining or improving safety. This rulemaking is a result of FRA's effort to streamline and update its regulations to reflect technological advances and lessons learned through feedback from all stakeholders.

In this final rule, FRA is also codifying waivers of compliance from rules affecting motive power and equipment (MP&E), including the aforementioned brake inspection requirements. Specifically, FRA is implementing changes to the regulations affecting: The use of EOT devices and *Helper Link* devices or similar technologies; higher air-flow on distributed powered (DP) trains; and the performance of Class I air brake tests and SCTs. FRA is also making technical corrections to existing regulations.

The waiver subject matters considered for codification are explained further below. FRA attempted to capture and identify the dockets for all substantially similar waivers affected by this rulemaking.

There may be some substantially similar waivers not identified in the NPRM and this final rule, but still affected by this rulemaking. Each affected waiver, whether specifically referenced or not, remains in force for the time being unless it expires without extension or a direct beneficiary explicitly requests and receives termination of the waiver in accordance with part 211. FRA does not intend to terminate any waivers upon the effective date of a final rule, as it is possible that there are exceptions or conditions in some existing waivers that are not specifically codified in the final rule. Terminating waivers immediately upon the effective date of a final rule may unnecessarily complicate matters, especially considering many of the waivers will simply expire soon thereafter. If a regulated entity wishes to continue a waiver's provision not captured by this final rule beyond the expiration date of that waiver, that entity can petition the Safety Board for an extension of that provision.

D. Identified Waivers

Below is a list of waiver petition dockets, organized by subject matter, which FRA has identified as potentially being affected by this final rule. The public docket for each listed waiver may be accessed at *www.regulations.gov*.

Air Flow Method

- Extending air flow limits (49 CFR 232.205(c)(1)(ii))
  - BNSF Railway (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), and Union Pacific Railroad (UP) Docket No. FRA–2012–0091

End-of-Train (EOT) Device

- Power source (49 CFR 232.403(f)(2))
  - Wabtec Corporation (Wabtec), Docket No. FRA–2001–9270
  - Quantum Engineering, Inc (Quantum) (now known as Siemens Industry, Inc. (Siemens)), Docket No. FRA–2006–25794
- Calibration (49 CFR 232.409(d))
  - Wabtec, Docket No. FRA–2004–18895
  - Ritron, Inc. (Ritron), Docket No. FRA–2009–0015
  - DPS Electronics, Inc. (DPS), Docket No. FRA–2012–0096
  - Siemens, Docket No. FRA–2015–0044
- Helper service (49 CFR 232.219(c))
  - BNSF, Docket No. FRA–2006–26435
  - Montana Rail Link (MRL), Docket No. FRA–2014–0013
- Marker lamp height (49 CFR 221.13(d))
  - DPS, Docket No. FRA–2015–0023
  - Siemens, Docket No. FRA–2017–0093
- Utility employee duties (49 CFR 218.22(c)(5))
  - BNSF, Docket No. FRA–2001–10660
  - Canadian Pacific Railway (CP), Docket No. FRA–2004–17989

Single Car Test

- Update to AAR Standard S–486–18 (49 CFR 232.305(a))
  - AAR, Docket No. FRA–2018–0011
- Add AAR Standard S–4027–18 (49 CFR 232.305(a))
  - BNSF and Union Pacific Railroad (UP), Docket No. FRA–2013–0030

Automated Single Car Test

- Testing periodicity (49 CFR 232.305(b)(2))
  - BNSF and UP, Docket No. FRA–2013–0030

Brake Systems for Covered Non-Freight Operations

- Add AAR Standard S–4045–13 (49 CFR 232.717(b)(2), formerly appx B, I, § 232.17(b)(2))
  - AAR, Docket No. FRA–2013–0063

E. Incorporating by Reference New and Updated Standards Under 1 CFR 51.5

As required by 1 CFR 51.5, FRA has summarized the standards it is incorporating by reference in the section-by-section analysis to this preamble. The AAR standards summarized herein, and listed in the table directly below for convenience, are reasonably available to all interested parties for inspection. The standards can be obtained from the Association of American Railroads, 425 Third Street SW, Washington, DC 20024, telephone: (202) 639–2345, email: *publications@aar.com,* website: *https://aarpublications.com.*

AAR STANDARDS INCORPORATED BY REFERENCE IN 49 CFR PART 232

Identification No.	Title	Year or edition	Section affected in 49 CFR
S–469–01	Performance Specification for Freight Brakes	2006	§ 232.103(l).
S–486–18	Code of Air Brake System Tests for Freight Equipment	2018	§ 232.305(a).
S–4027–18	Automated Single-Car Test Equipment, Conventional Brake Equipment-Design and Performance Requirements.	2018	§ 232.305(a).
S–4045–13	Passenger Equipment Maintenance Requirements	2013	§ 232.717(e)(1).
S–4200	Electronically Controlled Pneumatic (ECP) Cable-Based Brake Systems—Performance Requirements.	2014	§ 232.603(f)(1).
S–4210	ECP Cable-Based Brake System Cable, Connectors, and Junction Boxes—Performance Specifications.	2014	§ 232.603(f)(1).
S–4230	Intratrain Communication (ITC) Specification for Cable-Based Freight Train Control System.	2014	§ 232.603(f)(1).
S–4250	Performance Requirements for ITC Controlled Cable-Based Distributed Power Systems	2014	§ 232.603(f)(1).
S–4260	ECP Brake and Wire Distributed Power Interoperability Test Procedures	2008	§ 232.603(f)(1).
N/A	2020 Field Manual of the AAR Interchange Rules	2020	§ 232.717(e)(1).

The rule text already incorporates by reference the latest versions of the following AAR standards, so no updates are currently necessary: S–4220, ECP Cable-Based Brake DC Power Supply—Performance Specification (2002); S–4240, ECP Brake Equipment—Approval Procedure (2007); and S–4270, ECP Brake System Configuration Management (2008).

F. Railroad Safety Advisory Committee (RSAC) Advice and Input

FRA received substantial advice and feedback from the RSAC on the contents of this rule prior to its initiation. FRA first established the RSAC in March 1996 under Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463) to provide a forum for stakeholder groups to provide advice and recommendations to the FRA on railroad safety matters. In April 1996, the RSAC formed the Tourist and Historic Railroads and Private Passenger Car Working Group (THRWG). Since that time, the THRWG had considered numerous issues affecting tourist and historic rail operations and in August 2013, the THRWG accepted Task No. 13–01 to consider the applicability of FRA's regulations to historical or antiquated equipment that is used only for excursion, educational, recreational, or private transportation purposes. The THRWG met in Washington, DC on April 9–10, 2014, and reviewed, among other things, the safety glazing standards (49 CFR part 223) regarding the treatment of certain equipment; regulatory treatment under the freight car safety standards (49 CFR part 215) of non-commercial freight cars over 50 years old; and the scope and application of appendix B of 49 CFR part 232 (freight power brake standards). The THRWG also identified other issues involving FRA's regulatory treatment of tourist, scenic, historic, excursion, educational or recreational rail operations or private passenger rail car operations and equipment in other chapters of title 49, which FRA anticipates will be addressed in subsequent rulemakings. On December 4, 2014, the full RSAC accepted the THRWG's report. *See* RSAC Meeting Minutes, p. 12, *https://rsac.fra.dot.gov/radcms.rsac/File/DownloadFile?id=44.* Subsequently, in a July 24, 2019, meeting the THRWG reviewed and concurred with the proposed appendix B updates, which FRA is adopting, with minor revision, as new subpart H in this final rule.

G. Comments Filed

In response to the NPRM, comments were filed by: AAR and the American Short Line and Regional Railroad Association (ASLRRA) (collectively, the ''Railroads''); the American Train Dispatchers Association, the Brotherhood of Locomotive Engineers and Trainmen (BLET), the Brotherhood of Railroad Signalmen, the Brotherhood Railway Carmen Division TCU/IAM, and the International Association of Sheet Metal, Air, Rail and Transportation Workers—Transportation Division (collectively, ''Labor''); the Transport Workers Union of America (TWU); Wabtec and New York Air Brake (collectively, the ''Suppliers''); the National Transportation Safety Board (NTSB); and various individuals.

Comments related to specific proposals in the NPRM are addressed in the section-by-section analysis below (*see* part III of this preamble). FRA addresses the more general comments received directly below.

An anonymous commenter generally contests the proposal, stating that safety regulation seems to be needed and that equipment should be placed out of service until brought up to ''these standards.'' TWU states the proposed changes would reduce the current safety standards for single car air brake tests, EOT devices, helper service, and brake maintenance and inspections. While there could be significant value in creating consistency between U.S. and Canadian regulations, and in incorporating newer safety technologies, TWU said the proposals downplay the cumulative magnitude of the changes and exclusively benefit the railroads' profit margins at the expense of safety. Labor alleged that FRA is ''cherry picking'' Canadian regulations to adopt. Labor further notes that, while FRA acknowledges its obligation to regulate ''in the public interest and consistent with railroad safety,'' the NPRM appears

(according to Labor) ''in the economic interests of the railroad and consistent with carrier convenience and higher profits.''

While there are many similarities between the Canadian and U.S. railroad regulations, and further harmonization could benefit seamless international operations, it is not necessarily optimal for the two sets of regulations to mirror each other precisely. Each country's regulators have ample opportunity to observe and study one another's experiences, and take regulatory action to implement lessons learned. This measured approach allows for greater harmonization when appropriate. While there is merit in TWU's general position that any changes should be considered in the context of related regulations, TWU did not identify any particular related regulation for consideration. Similarly, the anonymous commenter generally critiques the safety measures proposed in the NPRM, but does not identify any specific measures and does not explain how any of the proposals would result in less safe rail operations.

In response to the Labor concern that the proposed rule is in railroads' economic interest, FRA's first priority is safety. Further, this rule is based on safety data from U.S. and Canadian operations performed under regulations and longstanding FRA waivers. Labor has had multiple opportunities to provide input on these waivers and this rulemaking, has been an active participant on all test waivers, and has provided comments considered by FRA during those proceedings.

Labor also commented and requested clarification on the applicability of waivers after issuance of this final rule, questioning what relief the rule would provide if railroads are still governed by the existing waivers as indicated in the NPRM and discussed above. As noted above, the purpose of this rulemaking is to extend the relief provided by the identified waivers to the entire railroad industry. While each waiver applies only to the petitioning entity or entities in defined situations, and only for a limited duration of time, this rule applies universally and eliminates the inefficiencies and uncertainties that result from having to periodically review and renew individual existing waivers. This final rule does not supersede the associated and affected waivers. While the final rule may have provisions mirroring and redundant of certain waivers, the waivers are still active and applicable. Unless this final rule differs from a particular waiver, very little should change for each entity benefiting from that waiver. However, any relief or condition remaining in an existing waiver that has not been codified by this final rule remains in force. For instance, there may be certain local conditions or extra information in the waiver not captured by this rule. It is up to each railroad or other waiver holder to decide whether it still wants or requires a waiver (or a modification to a waiver) after the final rule becomes effective.

III. Section-by-Section Analysis

Unless otherwise noted, all section references below refer to sections in title 49 of the Code of Federal Regulations (CFR).

Amendments to 49 CFR Part 218

Section 218.22 *Utility Employee*

As stated in the 1993 final rule initially adopting § 218.22, ''Protection of Utility Employees,'' this section defines the circumstances under which a utility employee may be permitted to function as a member of a train or yard crew without the benefit of blue signal protection. 58 FR 43287, 43290, Aug. 16, 1993 (1993 final rule). FRA's blue signal regulations (found at 49 CFR part 218, subpart B) generally require that when ''workers'' are on, under, or between rolling equipment: (1) Blue signals be displayed in accordance with the requirements of part 218; and (2) the rolling equipment may not be coupled to, moved, or have equipment placed to obscure the blue signal protecting the protected track. 49 CFR 218.23. The regulations define a ''worker'' as ''any railroad employee assigned to inspect, test, repair, or service railroad rolling equipment, or their components, including brake systems,'' but specifically exclude members of train and yard crews, except when they are assigned to inspect, test, repair, or service ''railroad rolling equipment that is not part of the train or yard movement they have been called to operate.'' 49 CFR 218.5.

In the NPRM, FRA proposed two modifications to § 218.22 related to blue signal protection. First, FRA proposed to replace the incorrect reference to ''subpart D'' in paragraph (c) to reflect the correct reference to the blue signal regulations in subpart B. Second, to incorporate longstanding waivers, FRA proposed to amend the list of functions in paragraph (c)(5) that a utility employee properly attached to a train or yard crew could perform without establishing blue signal protection to include the changing of a battery on a rear-end marking or EOT device, provided the battery can be changed ''without the use of tools.'' In the NPRM, FRA also invited commenters to identify other tasks that may justify being added to the list of exceptions from the blue signal requirements in the paragraph and to address the utility and feasibility of establishing a performance-based requirement as an alternative to listing specific tasks excluded from the blue signal requirements.

FRA received no comments responding to its proposal to correct the erroneous reference to subpart D in paragraph (c). Accordingly, in this final rule, FRA is adopting this proposed amendment.

In response to FRA's request for comments on the proposed revised list of functions in paragraph (c)(5), TWU commented that ''utility employees'' are often ''different employees each day or each hour, creating confusion and raising safety concerns.'' TWU suggests that this final rule permit designation of only one utility employee ''per shift/per day'' provided they are working under the 3-point protection [2] of the train crew (currently § 218.22 permits up to three utility employees to be attached to one train or yard crew at any given time).

Labor generally asserts that exempting utility employees from blue-flag protection when replacing an EOT device's battery would create an unnecessary risk because ''[i]f the switch behind the train isn't locked and another crew is free to line the switch, they could inadvertently line a switch into the train being worked upon, exposing the utility employee to unnecessary risk.'' Labor did not, however, explain why the alleged risk associated with a utility employee replacing an EOT device's battery is any different from the risks associated with a utility employee performing any of the existing functions listed in paragraph (c)(5). In addition, Labor provided no comment on the feasibility of establishing a performance-based requirement.

The Railroads support FRA's proposal to codify the longstanding waivers permitting utility employees to replace batteries on EOT devices under § 218.22. Further, the Railroads suggest that FRA delete the ''prescriptive list'' of functions applicable to utility employees and revise the rule instead to state that a properly attached utility employee working as a train crew member can perform all functions that

[2] ''3-point protection'' is a railroad operating rule that provides protection for workers who are not required to use blue signal when fouling equipment. Exact language varies by railroad (some refer to the procedure as ''set and centered''); however, the most common steps are (1) placing the locomotive generator field switch in ''off'' position, (2) centering the reverser (*i.e.,* placing the forward/reverse control in neutral), and (3) fully applying locomotive and train brakes.

a train or yard crew member can perform. Referencing the preamble of the 1993 final rule, the Railroads assert that the list represents FRA's understanding at that time ''of all the functions train or yard crew members typically performed without blue signal protection.'' Railroads Comments at p. 2. The Railroads state that the ''use of a utility employee who is a member of a train crew is now ubiquitous across the entire industry'' and that after a utility employee properly attaches to a train or yard crew, he or she becomes a member of that train crew, functions in the same manner as a train crew member, and is a part of the constant communication that occurs between members of the train crew working as a team. The Railroads also assert that allowing a properly attached utility employee working as a train crew member to perform all functions that members of the train or yard crew can perform will ''likely improve safety by reducing unnecessary accident/incident injury exposure to railroad employees caused by the physical act of establishing blue signal protection for utility employee activities that are not on the list.''

FRA finds that the Railroads' comments may have merit and more substantial updates to § 218.22 may be justified because the section has not been updated since its initial implementation almost 30 years ago. Accordingly, FRA concludes that although a more substantial update to § 218.22 may be justified, to allow appropriate notice and comment on any such update, FRA will address both the Railroads' comments and TWU's comments on § 218.22 in a subsequent rulemaking.

FRA is, however, adopting the revision to paragraph (c)(5) as proposed in the NPRM by amending the list of functions provided in that paragraph that do not require blue signal protection to include battery change-out on rear-end marking devices or end-of-train devices without tools. As noted in the NPRM, this revision effectively incorporates two longstanding waivers granted by FRA over a decade ago and under which each Class I railroad has operated successfully, with no reports of related injuries or incidents. This successful record demonstrates that the relief provided by waiver and adopted in this final rule is safe.[3]

[3] *See* Docket No. FRA–2001–10660; Docket No. FRA–2004–17989.

Amendments to 49 CFR part 221

Section 221.13 Marking Device Display

Section 221.13 includes EOT marking device display requirements. Paragraph (d) requires each marking device's centroid to be located at a minimum of 48 inches above the top of the rail. In the NPRM, FRA proposed to revise this requirement to 40 inches above the top of the rail based on two longstanding waivers that allowed the marker height measurement to be reduced to 41 and 42 inches, respectively. *See* Docket No. FRA–2015–0023; Docket No. FRA–2017–0093.

Since FRA granted the waiver petitions, no accidents attributed to the lowered marker lamp height permitted have been reported through the FRA accident reporting system. As discussed in the NPRM, FRA proposed the change to allow the use of lighter weight and newer types of EOT devices that do not use heavy batteries. FRA expects the use of these devices, which can be mounted lower than the larger devices with heavy batteries, will improve safety by lowering the risk of injury to personnel handling the devices.[4] FRA proposed a minimum height of 40 inches above the top of the rail, so as not to interfere with the top of couplers (which are typically 38″ from the top of the rail) or other safety appliances, such as end sill handholds. FRA also proposed a minimum height of 40 inches above the top of the rail to ensure that the ergonomic advantages of the newer types of EOT devices are consistently realized (*i.e.,* to avoid employees installing or maintaining the devices having to reach high or stoop low to access the devices). In proposing this change, FRA noted that the parties to the waivers had provided data showing no discernable visibility difference up to one mile away.

TWU, Labor, and the Railroads filed comments. TWU states the change in permissible height is unnecessary and should be rejected because it is not based on any safety metric. Labor has ''no quarrel'' with any EOT weight or height, but questions the viewing distance metrics of 0.5–1.0 mile. Labor asserts that FRA should measure from at least 1.5 miles away, given the increased train lengths and the additional space need to come to a safe stop without incident. The Railroads propose allowing centroids to be as low as 36″ from the top of the rail to allow for design flexibility. According to the Railroads, the testing performed in support of the waivers at 36″ , with LED-equipped lamps, provides for adequate visibility from varying angles.

FRA notes that under its waiver, DPS performed visibility field testing of marker lights placed at heights of 48 inches and 36 inches up to 2 miles away on flat, tangent track. In addition, FRA used its own experience and testing over distances up to a mile away to test and review the visibility of marker lights. Based on this testing, the data developed through the waivers, and FRA's experience, the previous threshold height of 48 inches and the new threshold height of 40 inches each permit EOT device marker light visibility from over one mile away if there are no obstructing curves or hills. In other words, on flat, tangent track, EOT marker lights at 48 inches and 40 inches are visible from 1.5 miles away. The range of 0.5–1.0 miles was cited by FRA as, oftentimes, there can to be some vertical undulation in the track or curves that could reduce the visibility below 1.5 miles. Due to the variability of light visibility, and without any comments proposing a specific safety metric, FRA was unable to develop a more reliable methodology.

FRA notes that in its requests for waivers, the manufacturers requested that the marking device's centroid be permitted to measure 41.3″ to 44.3″ from the top of rail. FRA also notes that although data submitted in the course of the waiver proceedings generally supported a 36″ marker light height, only a 40″ height has actually been tested under the waivers. In addition, a minimum marker light height of 36″ would potentially expose the device to damage from a neighboring coupler and risks fouling other safety appliances, including end sill handholds compliant with § 231.1(i)(3)(ii). Also, the lower a marker's height, the more susceptible it is to mud spray from the track bed or to damage caused by low flying ballast rock, which may adversely affect the visibility of the marker light.

In addition to changes to permissible marker light height, FRA also sought comment on the effects of using LED bulbs and the utility and feasibility of establishing a performance-based standard in lieu of the specific height requirements of this section. While FRA received no comments on bulb types or

[4] *See* DPS, ''FRA Waiver Request—49 CFR 232.221.13(d)—Marking Device Display, p. 2, Docket No. FRA–2015–0023, dated Mar. 9, 2015 (posted Mar. 12, 2015) (''A 15 lb or less End of Train Device will enhance railroad safety for all North American Railways by reducing the risk of injuries.''); DPS, ''Incoming Waiver Extension-DPS—Marking Light Centroid 2020,'' p. 2, Docket No. FRA–2015–0023, dated April 14, 2020 (posted April 24, 2020) (''A smaller lighter End of Train Device will enhance railroad safety for all North American railroads by reducing the risk of injuries.'').

the effects of using LED bulbs, the Railroads expressed support for replacing the technical height requirement with a performance-based standard addressing minimum distance and visibility requirements, claiming markers may become obsolete as train separation technologies continue to advance. The Railroads, however, provided no meaningful suggestion for such a standard.

After considering all available waiver and testing data, and all comments received in response to the NPRM's proposal to revise paragraph (d) of § 221.13, FRA concluded that additional flexibility in marker height could be allowed without adversely affecting marker visibility. Accordingly, in this final rule, FRA is revising paragraph (d) to require the centroid of any marking device to be located above the coupler, where its visibility is not obscured and it does not interfere with an employee's access to, or use of, any other safety appliance on the car.

Appendix A to Part 221 Procedures for Approval of Rear End Marking Devices

As proposed in the NPRM, to correct typographical errors, FRA is modifying ''perscribed'' to ''prescribed'' in paragraph (a)(1)(2)(ii) and ''peformed'' to ''performed'' in paragraph (b)(3)(ii).

Amendments to 49 CFR Part 232

Section 232.1 Scope

Paragraph (b) of § 232.1 describes how the scope of Part 232 would change in phases after the January 2001 publication of the final rule that created Part 232. Paragraph (c) and the final phrase of paragraph (d) include similarly antiquated instructions. Because the dates in these paragraphs have passed and are no longer relevant, as proposed in the NPRM, FRA is removing paragraph (b)'s historical schedule, paragraph (c) in its entirety, and the final phrase in paragraph (d) providing for earlier optional compliance. FRA is also moving paragraph (d) to paragraph (c).

Section 232.5 Definitions

Section 232.5 defines certain terms as they are used in Part 232. The existing rule text refers to certain provisions of § 232.1 to account for varying effective dates and its inapplicability to appendix B. Since those dates have passed, and appendix B is being moved to Subpart H, these cross-references are no longer necessary and are therefore being deleted from the introductory paragraph of § 232.5.

In the NPRM, FRA proposed to update the definition of ''Air flow method indicator, AFM'' to clarify that the definition includes digital, as well as analog, AFM indicators, and to specify that a digital version must have markings of equivalent or finer resolution to that specified by FRA for an analog device.

FRA also proposed to add definitions for the terms ''Air repeater unit, ARU'' and ''APTA.'' FRA's proposed definition of ARU recognized that a specialized car, other rolling equipment, or containers in well cars could be used as an ARU by providing an additional brake pipe source responding to air control instructions from a controlling locomotive using a communication system such as a distributed power system. For an item to be considered an ARU under this definition, the communications must be akin to a distributed power system to ensure accurate and sufficient responses. The purpose and use of the technology, not its physical description, determines whether an item is an ARU. FRA purposefully recognizes this distinction to avoid limiting innovation and future options.

Commenters concurred with FRA's proposal to update the ''Air flow method indicator, AFM'' definition and add the new definitions for the terms ''Air repeater unit, ARU'' and ''APTA.'' Accordingly, FRA is adopting the revisions to this section as proposed.

In this final rule FRA is also adding a definition of the term ''brake pipe gradient.'' In the existing rules (*e.g.,* §§ 232.103(m) and 232.205(c)) and as discussed in the NPRM, FRA often describes the readily measured change in psi of air pressure between the front and rear of the train. This differential is often referred to as a ''brake pipe gradient'' or ''taper'' due to the shape of the graph line of the pressure as it reduces from source of air to rear of train. In certain circumstances, the brake pipe gradient also measures the pressure between additional air sources such as an ARU or distributed power unit (DPU). To ensure a common understanding of this term, FRA is defining ''Gradient, brake pipe'' in this final rule.

Section 232.11 Penalties

This section contains provisions regarding penalties. As noted in the NPRM, the section contains references to specific penalty amounts that change over time as a result of the statutory requirement to periodically update penalties for inflation. Accordingly, in the NPRM, FRA proposed to replace the references to specific penalty amounts with general references to the minimum civil monetary penalty, ordinary maximum civil monetary penalty, and aggravated maximum civil monetary penalty. FRA also proposed additional language referring readers to 49 CFR part 209, appendix A, where FRA specifies statutorily provided civil penalty amounts updated for inflation and to FRA's website (*www.fra.dot.gov)* which contains a schedule of civil penalty amounts used in connection with this part.

As the Railroads note in their comments, the *www.fra.dot.gov* website address now defaults to FRA's new website address at *www.railroads.dot.gov*. FRA has updated the regulatory text accordingly. Interested parties may check FRA's website for any future changes to its civil penalty schedules.

Section 232.17 Special Approval Procedure

In comments responding to proposed § 232.407, the Railroads asked for language permitting the use of new and innovative technologies that could enhance or replace EOT devices or their capabilities. While § 232.407 already provides for the use of an alternative technology to perform the same function, this concern is best addressed and clarified by including an opportunity for interested parties to seek and potentially receive special approval of such alternatives under § 232.17. Accordingly, FRA has included § 232.407 in the list of sections affected by § 232.17.

Section 232.103 General Requirements for All Train Brake Systems

This section sets forth general requirements for brake systems of trains and incorporates the 1999 version of AAR's ''Performance Specification for Freight Brakes'' (AAR Standard S–469–47) at § 232.103(l). In the NPRM, FRA provided a regulatory history of the applicable regulations, orders, and standards (*see* 85 FR 2494, 2499, Jan. 17, 2020) and proposed to update this reference to incorporate the presently-available version of this AAR standard. AAR Standard S–469–01 defines and prescribes requirements for power brakes and appliances for operating power brake systems. Accordingly, FRA is updating the citation to the presently available S–469, and to reflect AAR's correct address.

The Railroads submitted comments concurring with FRA's proposal to update the incorporation by reference, but encouraged amendments to the incorporation by reference regulations to provide for more timely codifications of updated industry standards. The incorporation by reference regulations,

found at 1 CFR part 51, are under the purview of the Director of the Federal Register. Because FRA has no authority to amend those regulations, we cannot address the Railroads' concerns.

Labor expressed concern under this section regarding high air flow rates and the reduction of 8 psi regarding pressure taper limits. FRA discusses those concerns below in the section-by-section discussion of § *232.205—Class I brake test-initial terminal inspection.*

Although not proposed in the NPRM, in reviewing comments to this section, FRA determined a need to revise § 232.103(m) to make clear that if a train experiences a brake pipe gradient greater than 15 psi, it must be stopped at the next available location and inspected for leaks. This is not a substantive revision, but merely conforms paragraph (m) of this section to paragraph (c) of § 232.205 to remove any confusion. As currently written, the ''15-psi gradient for trains en route'' provision in that paragraph could be read to apply only to trains tested with an AFM indicator. Such a reading, however, is incorrect and directly conflicts with § 232.205(c), which requires a train's gradient to be no more than 15 psi, regardless of whether brake pipe pressure is measured using the leakage test or with an AFM indicator. *See also* 66 FR 4104, 4169, Jan. 17, 2001 (''[T]he AFM should be permitted as an alternative on any train provided the 15-psi gradient is maintained on the train . . . The brake-pipe gradient of 15 psi has been retained for both the leakage and air flow method of train brake testing.''). Accordingly, FRA is revising § 232.103(m) to conform the ''15-psi gradient for trains en route'' provision to the corresponding provision in § 232.205(c).

Section 232.203 Training Requirements

Section 232.203 contains training requirements for operators, and for employees who perform brake system inspections, tests, or maintenance. Specifically, paragraph (c) requires railroads to adopt and comply with a training program specifically addressing the testing, operation, and maintenance of two-way EOT devices for employees who are responsible for testing, operation, and maintenance of the devices. In the NPRM, FRA expressed concern with the safety risks associated with the loss of communication events between the controlling locomotive and the EOT device. As discussed in the NPRM, radio communication between the controlling locomotive and the EOT device is critical to proper brake functioning. If communications are interrupted, an EOT device will not be able to initiate emergency braking when requested. Under existing § 232.407(g), communication between the EOT device and the controlling locomotive can be lost for up to 16 minutes and 30 seconds before the engineer is notified. If an engineer encounters a situation necessitating an emergency brake application during a loss of communication, the engineer may have to request an emergency brake application multiple times before the system responds.

Accordingly, in the NPRM, FRA sought comments on the frequency and duration of communication losses; what operational and technological solutions for communication loss the industry has considered and implemented; what should be done to ensure an emergency signal is sent and received by the system when needed even in the event of a temporary communications loss; and what has and should be done to alert the locomotive engineer that a loss of communication has occurred.

The Railroads' response listed factors that may affect the frequency and duration of communication losses and some ''comprehensive solutions'' they have implemented and will continue to implement—including repeaters; high-gain EOT antennas; event, fault, and data-logging technologies; and the design and installation of multicast repeating capabilities and more robust hardware—to help mitigate such losses. The Railroads are also looking at the next generation of EOT devices currently under development, which are expected to utilize advanced communications strategies and more robust hardware design. The Railroads, however, offered no truly comprehensive solutions to address the risk of extended losses of communications in the interim.

The NTSB filed public comments suggesting that FRA revise § 232.405 to require a shorter duration between failed communication checks before the engineer is notified. Until the EOT device receives a head-end confirmation of having received a message regarding a communication loss, NTSB recommends that FRA require each telemetry system (*i.e.,* the communication system between an EOT device and the controlling locomotive) to initiate continuously an emergency brake command transmission until a confirmation message or a decrease in brake pipe pressure message is received. Labor similarly recommended that FRA require telemetry systems to continuously initiate an emergency brake until the subject train comes to a complete stop. In addition, Labor recommended that telemetry systems enforce a complete safe stop upon loss of communications lasting longer than 4 minutes and 59 seconds.

FRA appreciates the Railroads' explanation of technologies and efforts it uses, or plans to use, to mitigate concerns relating to telemetry communications loss. While most of those identified have yet to materialize, FRA looks forward to considering them in the future.

FRA agrees in principle with the desire of NTSB and Labor to minimize the potential impact of communication losses. However, neither NTSB nor Labor provided any evaluation of the anticipated impacts of the recommended actions (that FRA require each telemetry system to initiate continuously an emergency brake command transmission until a confirmation message or a decrease in brake pipe pressure message is received, or that FRA require that telemetry systems enforce a complete safe stop upon loss of communications lasting longer than 4 minutes and 59 seconds), estimate of the resulting costs to the railroads and the public, or quantified the safety benefits of the recommended actions. Given that there are thousands of telemetry systems in use throughout the railroad industry today, FRA finds that the costs of requiring such a change would be significant and FRA does not currently have sufficient data to determine the likely resulting benefits. Accordingly, it is premature at this time to adopt either of the recommended solutions because the potential impacts of the recommended solutions are not yet understood.

Instead, to address the safety risks involved with potential losses of communication, FRA is revising the training requirements at § 232.203(c) to ensure that employees who operate EOT equipment are trained in the limitations and proper use of the equipment's emergency application signal and loss of communications indicator.

Section 232.205 Class I Brake Test-Initial Terminal Inspection

Section 232.205 contains the requirements for conducting Class I brake tests-initial terminal inspections. Pursuant to § 232.205, a Class I brake test must be performed when a train is initially assembled, the consist is changed in certain ways (by adding or removing cars), or a train is off-air for more than four hours. Section 232.205 provides two methods for conducting Class I brake tests on standard pressure-maintaining brake valves: (1) A leakage test; or (2) an air flow test method.

Based on data submitted by AAR in support of their Petition, including data garnered from Canadian rail operations, FRA (in the NPRM) proposed extending the duration of the off-air limitation.[5] FRA also proposed revisions to the brake pipe leakage requirements during certain Class I air brake tests, and requirements associated with the calibration of AFM indicators used to conduct Class I brake tests using the air flow test method.

In the NPRM, FRA also sought comments on its analysis leading to the proposal, including the accuracy and sufficiency of the data on which it based the NPRM. FRA requested comment on the reasons underlying Canada's lower rates of air-brake-related failures that would better inform FRA of the off-air requirement's impact. In addition, FRA requested comment on whether a time off-air tracking system is necessary or if there are other means for FRA to determine the amount of time equipment is left off a source of compressed air. FRA also requested comment on potential regulatory alternatives to a time off-air limit that would address the same safety risks and ensure that, despite equipment being off-air for any length of time, the equipment's air brakes are in proper working order.

Generally, the Railroads, Suppliers, and at least two individual commenters, submitted comments in support of the proposed revisions, while Labor and other commenters expressed concern about the proposed revisions. For the reasons explained below, in this final rule FRA is adopting revisions to this section as proposed and, in response to comments received, FRA is clarifying certain requirements related to the use of ARUs.

Off-Air Requirement

As noted above, and as discussed in more detail in the preamble to the NPRM (*see* 85 FR 2499), under the existing regulation, if a train or other equipment (*e.g.,* individual cars) is left unattached to any air source (*e.g.,* locomotive, yard air) for more than four hours, it must receive a Class I brake test prior to further operation of the train. 49 CFR 232.205(a)(3). Moreover, to ensure that an air brake system did not degrade, and to allow a railroad to delay a full-train Class I test in many circumstances, under the existing regulation equipment off-air for more than four hours may require a Class I or II test prior to being added to an en route train, and will require a Class III brake test prior to being operated in revenue service. 49 CFR 232.209(a)(1) and 232.211(a)(3)–(a)(5). This requirement also affects yard air applications. 49 CFR 232.217(c)(1). For a more detailed discussion of requirements related to Class I brake tests and a substantial history and analysis of the off-air requirement, *see* 66 FR 4103, 4122, Jan. 17, 2001.

In the NPRM, FRA proposed to extend the four-hour off-air requirement to 24 hours. The Railroads and Suppliers submitted comments supporting FRA's proposal to increase the off-air requirement from 4 to 24 hours. The Railroads assert that the data provided by AAR cited in the NPRM shows that ''time off-air is now not relevant to safe air brake functioning'' and that improvements in air brake components have ''greatly reduced'' brake pipe leakage. Citing Canada's experience, and supplying TTCI test data as further support, the Railroads state that there is no safety detriment to cars being off-air for 24 or 48 hours or more. Further, the Railroads assert that although FRA revised the air brake regulations in 2001, those revisions did not reflect the safety enhancements that had been gained since the 1950's and that further brake system improvements have been made since 2001 concerning brake pipe leakage-mitigation and moisture and contaminate removal. In response to FRA's request for comment on the data on which the NPRM was based, the Railroads expressed their confidence in the accuracy and sufficiency of the data.

The Railroads also contend that extending the amount of time that equipment may be left off-air without requiring another Class I brake inspection would result in positive financial, environmental, and operational benefits. A larger time window for equipment to remain off-air would reduce the amount of time locomotives would stand idling, which may disturb communities with noise, vibration, and emissions. In addition, the larger time window could result in trains clearing highway-rail grade crossings more expeditiously in certain circumstances by allowing trains to be cut at crossings while awaiting a crew change. According to the Railroads, permitting 24-hours off-air would reduce idling that results in an annual $2 million in fuel savings and a 3,600-ton reduction of carbon dioxide emissions.

A separate comment filed by an individual asserted that a primary benefit of the proposal would be to help decrease each railroad's fuel consumption and carbon footprints. This commenter notes that extending the time off-air limitation would allow railroads to shut down locomotives rather than leave them idling to keep air in cars' brake lines.[6]

In its comments, TWU contends AAR's supporting factors for this proposal—the ''alleged'' technological advancements and the interest in aligning U.S. and Canadian regulations—were the same used by AAR, and rejected by FRA, in the final rule published January 17, 2001. Quoting extensively from that rule, TWU posits that ''while some technology has progressed, none of [that final rule's] logic has been undermined.'' Specifically, TWU states that although air dryers or other moisture-mitigating systems may indicate progress, not all locomotives are equipped with these systems and these systems do not eliminate the freeze-up problems caused by moisture. Moreover, noting that AAR's tests with these technologies were performed on a consist of only 20 hopper and gondola cars, TWU asserts that the testing conditions fell ''well short'' of replicating actual conditions in the industry and do not consider trains consisting of 80 to 100 or more cars, each car's age and condition, extreme climates, or old and water-saturated yard air plants.

TWU also contends that aligning U.S. regulations with the off-air hours permitted by Canada ignores each country's differing safety structures and other factors. Labor also objects to FRA's attempt to harmonize with Canadian regulations, alleging that FRA is ''cherry picking'' Canadian standards without holistically considering Canada's much more stringent standards. Neither TWU or Labor provide any substantive information or comment on Canada's alleged differing safety structure or more stringent standards.

In addition, Labor commented that extensions to the off-air requirement should be handled collaboratively through the RSAC process. Labor asserts that in 2001, FRA supported a four-hour off-air requirement partially out of concern about the potential for vandalism to affect braking systems negatively. Labor contends there is no data suggesting anything has changed. Labor also asserts that, instead of extending the off-air requirement, and thus reducing the number of inspections performed, FRA should require better walking conditions at inspection locations to mitigate employee risk. Labor argues AAR's position describing

[5] *See also* amendments to §§ 232.209, 232.211 and 232.217 in this final rule.

[6] Environmental issues, like those referenced by the comments summarized in this paragraph, are considered in section IV.D, *infra,* and in this final rule's Regulatory Impact Analysis.

the four-hour off-air limit as ''too restrictive'' is merely subjective. According to Labor, the four-hour off-air rule should remain because four hours is necessary in cold weather conditions where freeze-ups can occur and vandalism continues to exist. Labor also contends that the time and costs associated with brake tests are less than any potential damages resulting from a defect. Like TWU, Labor believes that FRA should develop its own data, and not rely on AAR data, regarding the number of slips, trips, and falls.[7]

One individual commenter—an employee and mechanical officer of multiple freight and passenger railroads—expressed support for the proposal to extend the off-air limitation to 24 hours. This commenter asserted that reinspection of cars adds significant risk to employees, citing the requirements for employees to establish blue signal protection, setting necessary switches and derails, and walking the train two complete times to observe the set and release.

Another individual commenter, a freight conductor, suggests that FRA analyze the impact of the proposed extension of the off-air requirement on brake cylinder piston extension timing, rather than on the rate of line-of-road failures (expressed as emergency brake applications), for which a specific mechanical cause was not found. The commenter states that in his experience he has found that typically between 2%–5% of the car brakes will not initially apply during a test of a fully charged system.[8]

After consideration of all comments submitted to the docket and all available data, FRA concludes that extending the existing 4-hour off-air limitation to 24-hours is justified. The technological improvements to the air brake systems, introduced and proliferated both before and subsequent to FRA's 2001 rule, have been beneficial in improving the overall health of brake systems. Moreover, the supporting information comparing Canadian and U.S. operations provided in Appendix 7 to AAR's Petition clearly demonstrates the safety of extending the permitted off-air limit to 24 hours. In favor of the reliability of these data is the fact that they include same-railroad results (based on CN and CP data) showing fewer undesired and unintended emergency brake applications occurring in Canada than in the U.S. *See* AAR Petition for Rulemaking, July 12, 2018, Appendix 7, Slide 4. While the TTCI technology test data submitted by AAR are based on a sound premise, FRA did not rely on the TTCI technical test data alone to support this rule given the small sample size (*i.e.,* 20 cars tested over the course of 5 days) and the much more relevant safety information from the Canadian railroads' operational data that spanned a full year.

FRA expects that a reduced number of brake inspections based on a 24-hour off-air limit will lead to a reduced number of injuries that can occur during those inspections (*e.g.,* slips, trips, and falls), though FRA does not have sufficient data to determine quantifiable safety benefits. FRA finds Labor's argument that the data AAR submitted quantifying slips, trips, and falls incurred during brake tests to be misplaced because the data is based on data submitted by Labor's own constituents to their employing railroads. The railroads, in turn, compile and submit the data each month to FRA as required by FRA's accident/incident reporting regulations (49 CFR part 225). FRA then aggregates the submitted data and such aggregated data is then available on FRA's public database located at *https://safetydata.fra.dot.gov.* Thus, FRA considers these data to be of the type the agency routinely relies upon to inform its rulemakings, as is done here.

FRA does not share Labor's concerns about vandalism of air brakes. FRA's accident database contains no information indicating that vandalism of air brakes has had any significant relationship to air brake-caused accidents. Labor has not submitted any data to support its concerns and no other commenters provided any information on vandalism.

FRA further notes that Labor provided no data to support its belief that the costs of more frequent Class I brake tests, as presently performed, are significantly less than the costs resulting from accidents that could have been avoided by the performance of such tests. Regarding Labor's recommendation that FRA mandate ''better walking conditions,'' FRA notes this is outside of the scope of this rule. Finally, despite Labor's desire to involve the RSAC process, FRA does not anticipate that asking RSAC to address this matter would provide any additional meaningful insight into the technical validity of extending the off-air limitation period.

With regard to the individual commenter's concern that he has to apply brakes a second time for 2–5% of the freight cars he inspects, he does not correlate this experience with the length of time the affected cars have been off-air. FRA notes that regardless of whether equipment is off-air for four or 24 hours, 100% of the brakes must apply for a Class I brake test to be successful.

A multitude of variables affect brake system integrity (*e.g.,* environmental factors such as temperature and humidity, operational factors,[9] age, and overall condition of the equipment). The longer equipment remains off air, the greater opportunity these factors have to affect brake system integrity. Moreover, despite the many technical advancements in air brake technology, the structure of conventional air brake systems on rail equipment involves many car-to-car connections, which by nature cause the systems to experience gradual leaks once removed from an air source. For example, as noted in the NPRM, in its 2013 report on the Lac-Mégantic, Quebec accident, the Transportation Safety Board of Canada (TSB) cited two previous instances of air brake failures concerning rail equipment that, when left off-air, leaked and unintentionally released. Accordingly, absent universal installation, use, and regulatory oversight of acceptable brake health effectiveness and monitoring technologies (*e.g.,* wheel temperature detectors, electronic brake valves, eABS),[10] besides triggers such as mileage or reclassification, time off air remains the only metric for ensuring brake system integrity. While FRA intends to address some of these technologies in future proceedings, no commenter has identified an alternative to a time off-air limit that would address the same safety risks.

The Railroads commented that FRA's discussion of the TSB report ''does not promote public confidence in the agency's objective and fact-based approach to rulemaking.'' However, FRA believes that considering an objective, fact-based report, from Canada's equivalent of the NTSB, to be the exact type of action that would inspire public confidence in the

[7] Labor also objects to AAR's request (in its separate eABS rulemaking petition) to consider increasing the allowed mileage between brake inspections when railroads use an eABS system. Labor's comments are outside the scope of this rulemaking and FRA will address Labor's comments on this issue in the appropriate rulemaking proceeding (*i.e.,* the eABS rule).

[8] The commenter also questions why FRA restricts block swapping and seeks clarification on Class I test requirements for cars added to trains en route. Because those issues appear to be beyond the scope of this rulemaking, FRA declines to discuss them here. For an explanation of the block swapping limitations under § 232.205, please refer to the preamble of the 2001 final rule. *See, e.g.,* 66 FR 4104, 4119 and 4168, Jan. 17, 2001.

[9] Examples of operational factors may include the use of power braking, train length, time taken to inspect equipment, and quality of compressed air from locomotives or yard air plants.

[10] *See, e.g.,* Docket Nos. FRA–2005–21613, FRA–2016–0018, FRA–2018–0049, FRA–2019–0072.

transparency and thoroughness of the agency's rulemaking process.

Recognizing that Canada permits equipment to remain off-air without a brake inspection for up to 48 hours upon notification to Transport Canada (TC),[11] as noted in the NPRM, FRA requested comment on potentially extending the off-air limit to 48 hours in certain circumstances. FRA also sought comment on how often this provision is utilized in Canada and under what circumstances it is used. FRA received no comments or information in response to the extent of this provision's use in Canada. Citing the technological improvements in air brakes discussed above, the Railroads, however, suggest that FRA should universally extend the off-air limitation to 48 hours. The Railroads assert that equipment is ''routinely permitted to be off-air for 48 hours'' without approval from TC. Alternatively, if FRA chooses to adopt a universal 24-hour off-air rule, with a 48-hour limit only applicable in certain circumstances, the Railroads state they should be permitted to designate a list of ''extended off-air locations'' where equipment may remain off-air for up to 48 hours without requiring a new Class I air brake test.

The Suppliers fully support allowing a 48-hour off-air restriction, believing it is appropriate to align these regulations with the Canadian Rule that demonstrates the successful implementation of increased off-air time.

While the Railroads and Suppliers expressed support for allowing a 48-hour off-air restriction, FRA received no comments in response to requests for comment on the Canadian experience with such an allowance, nor any comments on the potential applicability of the notification procedures in §§ 232.207(c)(2) and 232.213(a)(1). FRA understands TC receives only a small number of 48-hour off-air notifications per year (no more than 12), primarily from two locations during three-day holiday weekends or special situations such as labor strikes. Such sparse use of Canada's 48-hour provision does not make it routine, as the Railroads suggest.

Because there is not sufficient data demonstrating the safety impact of extending the off-air limit beyond 24 hours, in this final rule, FRA is not extending the limit beyond 24 hours.

As noted in the NPRM, FRA remains concerned with its ability to provide oversight concerning cars left off-air for extended periods of time. While FRA has historically used train and car movement records, the presence of any ground air sources, and witness interviews to verify equipment's time off-air, those tools will likely prove insufficient over 24 hours. In the NPRM, FRA did not propose a specific solution to this concern, but sought comment on whether a requirement for tracking off-air time is necessary or whether there are other means by which FRA could determine the amount of time equipment is left off a source of compressed air. FRA asked for comment on what types of tracking systems are available and how tracking data should be maintained. FRA also sought comment on the potential burden or benefit of a tracking requirement.

In their comments, the Railroads do not support an off-air time tracking requirement, claiming that railroads already track off-air time and there is no one-size-fits all solution. The Railroads, however, do not explain or provide any information as to how industry currently tracks each equipment's time-off-air. The Railroads also do not provide any insight into how, if the off-air limit is extended to 24 hours, FRA could determine the amount of time specific equipment is left off-air. Instead, the Railroads point to FRA's rule allowing the use of ECP brakes (§ 232.607(b)(4)(i)). The ECP brake rule permits trains operating in ECP brake mode to remain off-air for 24 hours between Class I brake tests and also does not include any method for tracking equipment's time off-air.

ECP brakes are fundamentally different than traditional air brakes. ECP brake systems have self-diagnostic capabilities (*i.e.,* ECP brake systems self-report system health in real time to the operator). Therefore, § 232.607's allowance for freight trains operating in ECP brake mode to remain off-air for 24 hours is not an appropriate indicator of whether a time off-air tracking system is needed for traditional freight equipment.

Despite the above concerns, FRA is not establishing a time-tracking requirement in this final rule. Such a requirement is more appropriately considered in the eABS Rule. FRA notes, however, that railroads remain legally obligated to comply with the off-air requirement adopted in this final rule. As such, railroads will need to adopt and comply with a methodology to determine that the equipment in its trains comply with the new off-air rule. FRA will continue to monitor each railroad's implementation of the off-air requirement and appropriately utilize its available oversight and enforcement tools (including civil penalties) to enforce its compliance.

Brake Pipe Leakage Limit

As explained in the NPRM, § 232.205, as currently written, provides two methods for conducting Class I brake tests on pressure-maintaining brake valves such as the standard 26–L brake valve: (1) A leakage test; or (2) an air flow method test. *See* § 232.205(c)(1)(i), (ii). It is physically impossible to prevent all leakage from a train's brake pipe given the mechanical connections between cars' air hoses (*i.e.,* a certain amount of air will always leak through the mechanical connections) and each method of testing measures the pressure drop in a train's brake pipe in different ways. The leakage test measures the amount of compressed air that leaks from the brake pipe, while the air flow test method measures the amount of compressed air the pressure maintaining valve puts back into the brake pipe to maintain the line's pressure. Regardless of the test method employed, § 232.205 requires the pressure at the rear of the train to be within 15 psi of the pressure that the train will be operated at (known as the ''gradient'' or ''pressure taper'').

When conducting a Class I test using the air flow method, paragraph (c)(1)(ii)(B) prohibits brake pipe leakage from exceeding 60 cubic feet per minute (CFM). In the NPRM, FRA proposed increasing the limit to 90 CFM when a DPU or an ARU is utilized.

The traditional air flow test is measured from a single point of air flow, at the controlling locomotive of the train. In other words, the traditional air flow test measures the amount of air the controlling locomotive's brake system is putting back into the train's brake pipe. Because the air originates at a single source (the controlling locomotive) and travels sequentially through each car's air brake system, each connected via a mechanical air hose, gradually the pressure in the train's brake pipe tapers off. DP trains have locomotives located at two or more locations in the train, providing a more uniform distribution of power to reduce in-train forces and provide multiple supplies of air brake pressure and control. Similarly, air brake repeater boxcars or containers mounted in well cars, and other equipment serving the same purpose as these ARUs, have been used to provide multiple sources of air brake pressure and control. Because use of DP locomotives and ARUs provide multiple

[11] *See* Railway Freight and Passenger Train Brake Inspection and Safety Rule (''Canadian Rule''), section 11.2(b), Transport Canada, Oct. 27, 2014, available at *https://www.tc.gc.ca/eng/railsafety/rules-tco0184-139.htm#section11* (''A No.1 brake test is not required on: A block swap of cars that have been off-air for no more than 24 hours or 48 hours after notifying the department.''). A copy of this rule is included in Appendix 3 of AAR's Petition.

sources of air, the total leakage from the brake pipe can be greater than 60 CFM, as long as each individual source of air is controlling a portion of the brake pipe that leaks less than 60 CFM, causing the overall average brake pipe pressure to be better controlled than it would be with a single source of air.

As explained in more detail in the NPRM, since 2011, Canadian railroads have operated with the higher air flow limit of 90 CFM on DP trains. Under a waiver issued by FRA in Docket No. FRA–2012–0091 (test waiver), several Class 1 railroads in the U.S. have tested and operated with air flow limits of 90 CFM on DP trains. With the exception of one unintentional brake release that occurred during testing, all trains tested in the U.S. were operated safely and without incident. Of the one train that experienced an unintentional brake release, the test committee overseeing the operations concluded that the occurrence was an anomaly and not related to the test.

In the NPRM, FRA proposed to revise § 232.205(c)(ii)(B) to allow the use of a combined 90 CFM air flow limit on DP and ARU-equipped trains, provided railroads implement operating rules to ensure compliant operation of a train if air flow exceeds these parameters after the Class I brake test is completed. The combined air flow is derived by the sum of the air flow from all air sources in the train. Comments were filed by the Railroads, Labor, and an individual commenter.

The Railroads concur with FRA's proposal to permit the use of 90 CFM and a requirement to update each railroad's operating rules to address its use. An individual commenter expressed a high level of confidence in the safe use of 90 CFM during a leakage test with additional air sources. According to the commenter, adding air sources, especially during cold weather conditions, could mitigate risk and even allow the safe use of a 160 CFM limit.

Labor expressed concern regarding high air flow rates and the reduction of 8 psi regarding pressure taper limits.[12] Labor believes 90 CFM is too high a limit, because ''greater air compressor power should mean need less effort expended and less overall airflow due to having more compressors working to maintain pressure [sic].'' Labor seeks additional information on the unintentional release that occurred during the test waiver in the U.S. Labor also notes that the NPRM is silent regarding how an ARU, as defined, will be inspected, tested and maintained. According to Labor, an ARU is a locomotive appurtenance and its operation should comply with part 229, including the daily inspection requirements, because it functions as a part of the controls of a train's air brake system.

It appears that Labor misinterprets the effect of the 8-psi reduction in brake pipe pressure. FRA notes that a conventional end-of-train brake pipe supply is permitted a pressure taper of up to 15 psi. *See* § 232.103(m). In the test waiver issued by FRA in Docket No. FRA–2012–0091, the test committee found that the amount of leakage that would cause a 15-psi pressure taper on a conventional end-of-train air source (*i.e.,* where brake pipe gradient is measured from the rear of the train) only creates an 8-psi pressure ''sag'' between two DP locomotives.[13] This condition not only provides more available braking power than a compliant conventional train with a permitted 15-psi pressure taper, but provides a train that responds to brake control signals in approximately one-half the time, arguably resulting in a safer train.

Labor further states concerns that its crews are being required to operate trains with AFM indicator readings over ''100 psi.'' This is a misunderstanding of the AFM indicator. The AFM indicator tells the engineer the leakage of his brake pipe in CFM, not in psi. Nonetheless, if Labor is concerned that railroads are instructing employees to operate trains in non-compliance with these regulations, FRA encourages Labor to contact an appropriate representative of FRA's Office of Railroad Safety to investigate the specific matter.

In response to Labor's comment seeking information about the unintentional release during the test waiver, FRA notes that Labor was fully involved in the test waiver on which FRA based its proposal. *See* Docket No. FRA–2012–0091. Individual engineers completed test reports for each train operated and three BLET members were part of the test committee where they ultimately supported a 90 CFM limit. Each test report required the operating engineer to report information related to the train's operations (*e.g.,* equipment identification, route, temperature, air flow at origination and en-route, brake system performance and whether any unintentional release occurred). Ultimately, the entire test committee came to a consensus that the single unintentional brake release was an anomaly and insignificant to the test.[14]

With regard to Labor's assertion that use of 90 CFM is unsafe, FRA notes that Labor's comment does not consider the use of additional air sources such as a DP or ARU, which is the fundamental basis of FRA's proposal. As FRA explained above, the additional air sources provided by a DPU or ARU reduces the gradient within the brake pipe, maintains a higher overall pressure, and provides a quicker response to air brake reductions; resulting in faster brake applications. Each additional compressor from a DP locomotive or an ARU reduces the stress on any one compressor, likely making the system more safe. FRA does not agree with Labor's characterization of an ARU as an appurtenance automatically subject to the requirements of part 229. Under the Locomotive Inspection Act (the ''Act,'' 49 U.S.C. 20701), a locomotive and its ''appurtenances'' must be ''in proper condition and safe to operate'' before it can be placed in service. FRA's Locomotive Safety Standards (49 CFR part 229) implement the Act. Under the Act, if a locomotive or appurtenance of a locomotive does not meet the ''in proper condition and safe to operate'' standard, it may not be placed in service. *See* 49 CFR 229.7.

Because the use of an ARU is optional and not necessary for a locomotive to be ''in proper condition and safe to operate,'' an ARU is not an appurtenance to the locomotive under the Act. While Labor argues an ARU is an appurtenance, ''because it functions

[12] Labor noted its comments regarding the proposed allowance for higher air flow under *Section 232.103–General requirements for all train brake systems,* but FRA is discussing them in the context of § 232.205 as this is where FRA proposed to codify the requirements.

[13] On a DPU-equipped train, the gradient can be a ''sag,'' as the graph line of the pressure will assume a catenary curve between the air sources. The depth of the sag is not readily measured (without ECP or similar technology) and is not presently regulated. In this particular example, the 8-psi pressure was rounded up from 7.5 psi, representing the nadir midpoint of a 15-psi pressure taper.

[14] According to the test report, the relevant unintentional release resulted from a mechanical problem concerning the mid-train DPU's main reservoir compressor governor, which caused the main reservoir's air pressure to fluctuate outside its normal range. More specifically, the affected equipment included an 8,902 foot, 12,248-ton manifest train operated January 8, 2015. The DPU was in 2x1x0 configuration (mid-train unit), and the train was operating at temperatures between −2 °F and −8 °F. The engineer reported that ''DP main reservoir would drop when standing and lower brake pipe below equalizing reservoir pressure. [He] would have to take deeper sets greater than 15 psi to hold the train due to fluctuation in main reservoir pressure on the DP.'' The railroad commented that brake pipe flow on the lead locomotive remained in the low 20 CFMs, but acknowledged the engineer was having issues with the main reservoir pressure on the DPU. The railroad concluded that the main reservoir problems could have resulted in the reported unintentional release. The test committee concurred with the railroad's findings. The problem with the main reservoir of the DP unit was mechanical, and not related to the subject study of the test.

as a part of the controls of a train's air brake system,'' it is more akin to an EOT device in its relationship to a locomotive; it receives commands but is not a component of a locomotive. Moreover, an ARU differs from a locomotive in that it does not have motive traction power. Without a propelling motor or control stand, an ARU cannot be considered a locomotive per §§ 229.5 or 232.5. Accordingly, an ARU is not automatically subject to part 229.

With respect to Labor's concern about the inspection, safety, and maintenance of each ARU, FRA notes that ARUs are subject to the applicable requirements in parts 215 and 232. Indeed, an ARU shares many features and operations of a locomotive that is subject to part 229. For example, an ARU may contain a locomotive air brake system (automatic function, but not independent), a diesel generator, an air compressor, and a DP control unit. Most ARUs also likely include electrical wiring, internal walkways, rotating equipment, and main reservoir pressure air tanks, which could expose employees to the same hazards as a locomotive, if poorly maintained.

In the NPRM, FRA proposed a definition for, and considered the use of, ARUs. In response to Labor's comments on that proposed definition, FRA is clarifying how, under the existing regulations, each ARU must be properly maintained and functional for its safe operation. Because each ARU shares features with both locomotives and freight cars, each such element must comply with the appropriate regulatory requirement.

The components of an ARU that are the same as those for a freight car must continue to be inspected in compliance with parts 215 and 232 and the components that are similar to a locomotive must be inspected in accordance with part 229. Accordingly, in paragraph (c)(9), FRA is specifying that each ARU operating in accordance with part 232 must comply with parts 215 and 232, and, as appropriate, the relevant sections of part 229. While an ARU may share many features of a locomotive, it does not have a propelling motor, or a control stand for employees. *See* § 229.5 for the definition of ''locomotive.'' Thus, an ARU is not a locomotive. FRA recognizes, however, that certain elements of ARUs provide the same functionality as locomotives (*e.g.,* they compress air, modulate the brake pipe, or otherwise control the train's movement). Accordingly, to help ensure those features are functioning properly (as Labor notes in their comments), they must be inspected. New paragraph (c)(9) specifies that an ARU's locomotive-like features must receive a pre-trip inspection in accordance with § 229.21 each time the train receives a Class I air brake test at its initial terminal. For example, depending on the construction and functionality of specific ARUs, applicable part 229 rules may include those concerning periodic air brake maintenance (§§ 229.29–33), general requirements (§§ 229.41–45), brake systems (§§ 229.46, 229.49–53, 229.59), electrical systems (§§ 229.83–87, 229.91), internal combustion equipment (§§ 229.95–97, 229.101), and cabs, floors, and passageways (§ 229.119(c)).

Similar to how FRA treats passenger equipment (*see* § 238.309(f)), because an ARU is not a locomotive, FRA is not requiring the inspection to be documented on form FRA F 6180–49A. Instead, FRA is requiring the inspection to be recorded on a form with substantially the same information and that otherwise complies with § 229.21.

In light of the proven safety and efficacy of the test waiver, and after consideration of the comments filed in this rulemaking, FRA is adopting the proposed new § 232.205(c)(1)(ii)(B), which permits the use of a 90 CFM air flow limit on each train equipped with a DPU or ARU. To ensure the same level of safety intended by FRA during the waiver, but to allow for continued flexibility, FRA is requiring each railroad to implement operating rules intended to ensure compliant operation of a train if air flow exceeds the required parameters after the Class I brake test is completed. A railroad may consider using the test waiver's conditions as a template or starting point when drafting their operating rules on this subject. While FRA appreciates the Railroads' and the individual commenter's comments in support of a higher CFM limit and notes that additional research is being performed to look at longer trains and higher air flow, currently, FRA's experience and data only supports a 90 CFM limit with additional air sources.

AFM Indicator Calibration

Current § 232.205(c)(1)(iii) requires air flow indicator calibration at least every 92 days and prohibits the calibration of air flow test orifices at temperatures below 20 °F. As noted in the NPRM, to calibrate each device accurately, the entire AFM system—not just the test orifices—must be calibrated at not less than 20 °F. In the NPRM, FRA proposed clarifying within the regulation that the temperature of the AFM indicator and the test orifices must be considered during calibration to ensure accuracy.

The Railroads concur that AFM indicator temperature should be considered during calibration. In addition, the railroads state that the quarterly reports required under the waiver referenced in the NPRM are no longer necessary. Further, while the Railroads support codification of FRA guidance regarding the handling of an inoperative or out-of-calibration AFM indicator, they urge FRA to adopt the 184-day periodic maintenance schedule for certain systems.

In their comments, Labor did not contest the proposal, but raised related concerns. Labor states that, ''a traditional form of leakage test method should also be used in temperatures less than 20 °F. Moreover, if an AFM cannot be calibrated without taking temperature into account, temperature also should be taken into account to verify the instrument's readings.'' Labor also believes that AFM indicators are appurtenances that should be regulated under part 229, because once installed they are no longer optional.

The Railroads' comment regarding adopting the 184-day periodic maintenance schedule is outside the scope of this rulemaking. In addition, while quarterly reports are required as part of the ongoing test waiver's conditions, FRA did not propose to codify that requirement.[15] Moreover, that particular test waiver remains under consideration. Any conclusions based on its early findings would be premature. FRA's purpose of referring to this waiver in the NPRM was solely to identify the AFM indicator temperature issue in support of the proposed requirement that the AFM indicator temperature must also be considered.

If the AFM indicator is calibrated at a temperature above 20 °F, its use will still be acceptable at lower temperatures. Using ideal gas law calculations, the permitted variation of ±3 CFM can be expressed as a variation of approximately 100 °F. Therefore, if an AFM indicator is precisely calibrated at 70 °F, its calibration should be in tolerance from 20° to 120 °F. Theoretically (by calculation), at 20 °F, an AFM reading of 60 CFM would be an air flow of 57.2 CFM. Where V = volumetric flow in CFM, and T = temperature of air into the AFM (absolute units in °R), with $V_1 = 60$ CFM, $T_1 = 70$ °F, $T_2 = 20$ °F we calculate V_2 from equation

$$\frac{(V_2 - V_1)}{V_1} = \frac{1}{2} \cdot \frac{(T_2 - T_1)}{T_{1\,(\text{absolute})}}$$

[15] If a railroad believes certain waiver conditions, including quarterly reports, are no longer necessary, then the railroad is welcome to request revision or rescission of that waiver.

(Note $T_1 = 460 + 70 = 530$): $V_2 = 57.2$ CFM. Because this error is on the ''safe'' side of the air flow rule (*i.e.,* in colder temperatures the AFM indicator will display more air leakage than is actually occurring), FRA is confident in the safe use of an AFM indicator at lower temperatures.

In response to the Labor comment that an AFM indicator is an appurtenance to the locomotive, FRA disagrees because its use is optional under § 232.205(c) and unnecessary for a locomotive to be ''in proper condition and safe to operate.'' Accordingly, the daily inspection requirements of part 229 do not apply to an AFM indicator. However, as proposed in the NPRM, FRA is adopting new paragraph (c)(1)(iv) which requires the recording of the last date of calibration on Form FRA F6180–49A (locomotive ''blue card''). While that Form applies to locomotives, the field provided for AFM indicator calibration has been included as a matter of convenience for compliance with and enforcement of new § 232.205(c)(1)(iv) instead of requiring a second form for non-appurtenances.

To clarify the rules applicable to noncompliant or out-of-calibration AFM indicators, as proposed, FRA is adding a new paragraph (c)(1)(v). This new paragraph prohibits the use of an AFM indicator not in compliance with part 232 and requires tagging a noncompliant AFM indicator in accordance with § 232.15(b), with the tag to be placed in a conspicuous location of the controlling locomotive cab.

Section 232.207 Class IA Brake Tests—1,000-Mile Inspection

Although not proposed in the NPRM, due to an internal agency reorganization, FRA is removing references to the FRA Regional Administrator in § 232.207(c)(2).

Section 232.209 Class II Brake Tests—Intermediate Inspection

FRA is amending the off-air requirements of this section without change from the NPRM. Please refer to the off-air requirements analysis provided for § 232.205.

Section 232.211 Class III Brake Tests-Trainline Continuity Inspection

FRA is amending the off-air requirements of this section without change from the NPRM. Please refer to the off-air requirements analysis provided for § 232.205.

Section 232.213 Extended Haul Trains

Under existing § 232.213, a railroad may be permitted to move a train up to, but not exceeding, 1,500 miles between brake tests and inspections if the railroad designates a train as an extended haul train and the train meets certain requirements.[16] For a train to qualify as an extended haul train, paragraph (a)(1) requires the railroad to, in writing, designate the train as an extended haul train and provide certain information to FRA, including ''[t]he type or types of equipment the train will haul.'' *See* 49 CFR 232.213(a)(1)(iii). Railroads have complied with § 232.213(a)(1)(iii) by periodically supplying FRA with spreadsheets identifying their extended haul trains and providing the required information.

In the NPRM, FRA reminded railroads of the need to identify, with sufficient clarity, the type of equipment being hauled in extended haul trains. FRA also sought comments and information on how to achieve such clarity, what level of description FRA should expect, and how to otherwise differentiate extended haul trains for oversight purposes. Noting that § 232.213 no longer provides for an inbound inspection of all extended haul trains, and paragraphs (a)(5) and (a)(6) contain certain requirements related to that previous inbound inspection requirement, FRA proposed to modify those paragraphs to remove the outdated references to inbound inspections.

In response to FRA's request for comments on types of equipment, the Railroads expressed the view that the type of equipment used in an extended haul train has no bearing on the safe operation of that train or its brakes and that the requirement to report the information to FRA is outdated. Accordingly, the Railroads recommended that § 232.213(a)(1)(iii) be deleted.

While the information required under § 232.213(a)(1)(iii) is useful to FRA for focusing inspection resources, FRA agrees with the Railroads comments that it is not otherwise necessary. Accordingly, in this final rule, FRA is deleting paragraph (a)(1)(iii) and redesignating paragraph (a)(1)(iv) as paragraph (a)(1)(iii).[17]

In the NPRM, FRA proposed to add a new paragraph (8) to this section that would provide railroads the flexibility to designate different inspection and test locations for extended haul trains in certain circumstances. FRA mirrored proposed new paragraph (8) on the notification procedures of § 232.207(c)(2), which allow railroads to change the location of Class IA brake tests without prior notice to FRA in certain emergency situations. Codification of this practice would provide the railroads a flexible reporting procedure, and ultimately regulatory certainty, to address emergency circumstances involving extended haul operations. Due to an internal reorganization, FRA is also removing the reference to the Regional Administrator in paragraph (8).

While the Railroads concur with FRA's proposed new paragraph (8), TWU objects to the paragraph, asserting that § 232.213 should not be altered in any way. TWU states that sufficient flexibility already exists and that the proposal would allow railroads ''more latitude to close more yards and further reduce the number of Carmen available to perform'' Class I inspections.[18] TWU also notes that, if FRA did not codify the proposed flexibility, a railroad could still modify its designated inspection locations by submitting an updated extended haul train list complying with § 232.213(a).

However, requiring such a process could frustrate railroads' ability to respond to emergency situations and the process would provide no safety benefit. Accordingly, FRA is adopting new paragraph (a)(8) as proposed in the NPRM.

With respect to paragraphs (a)(5) and (6), the Railroads concurred with FRA's proposed removal of the outdated references to inbound inspections in those paragraphs and there were no other comments. FRA is, therefore, adopting the revisions to paragraphs (a)(5) and (a)(6) as proposed.

In the NPRM, FRA also requested comments on potential regulatory alternatives to the existing extended haul provisions of § 232.213, potential improvements that could be made to the section to clarify or expand the provision, or whether this provision

[16] On March 1, 2019, AAR submitted a petition for rulemaking that, if granted, would allow rail cars with a valid eABS record to travel up to 2,500 miles between brake tests and inspections. In this proceeding, FRA is addressing only foundational requirements, such as the 24-hour off-air proposal, that could support the full implementation of eABS. However, FRA expects to address this issue in the eABS Rule.

[17] FRA notes that paragraph (a)(1)(iv), which is being redesignated as paragraph (a)(1)(iii), requires each railroad to provide to FRA ''the locations where all train brake and mechanical inspections and tests will be performed'' for each designated extended haul train. *See* 49 CFR 232.213(a)(1)(iv). In other words, the submission must include the location of *every* expected brake and mechanical inspection, not only the Class I inspections performed by a qualified mechanical inspector, on the designated train.

[18] In its comments, TWU purports to offer alternative rule text, but merely restates the existing text of § 232.213(a)(6). Accordingly, FRA was unable to consider any particular revisions to the rule text that TWU may have contemplated.

could be eliminated by the adoption of certain alternative standards or requirements. For example, the section currently distinguishes between an inspection conducted by a qualified mechanical inspector (QMI) and a qualified person (QP) (both of which are defined in § 232.5). FRA requested comments and data on whether this distinction is still justified and necessary.

In response to this request for comment, the Railroads assert that the distinction between QMIs and QPs is no longer justified. According to the Railroads, ''there is no difference between the safety of trains that receive a QMI test as compared to those tested by a QP.'' However, the Railroads did not provide any data to support this assertion. Although the issue of distinguishing between QMI and QP inspections is relevant to any discussion of extending the mileage trains may travel between brake inspections, without sufficient data, FRA is unable to eliminate the distinction between QMIs and QPs at this time. However, FRA intends to consider this issue further in the eABS Rule. FRA encourages railroads to provide any data relevant to the safety distinctions and synergies between QMI and QP inspections in that rulemaking proceeding.

In its comments, the Railroads also recommended that FRA permit all trains receiving an initial terminal Class I brake test by a: (1) QP to operate up to 1,500 miles, and (2) by a QMI to operate up to 2,000 miles, without requiring an intermediate (*e.g.,* Class IA) brake test and with an unrestricted number of pick-ups and set-offs. To have the benefit of public comment on this recommendation, FRA expects to fully consider this recommendation in the eABS Rule.

Section 232.217 Train Brake Tests Conducted Using Yard Air

FRA is amending the off-air requirements of this section without change from the NPRM. Please refer to the off-air requirements analysis provided for § 232.205.

Section 232.219 Double-Heading and Helper Service

Section 232.219 provides regulations for the operation of double-headed and helper locomotives in a train including when *Helper Link* or a similar technology is used to control the emergency brake function on helper locomotive consists. As explained in the NPRM, the section, as written, is appropriate for a train with an EOT device; however, the section is incompatible with trains that are not equipped with traditional EOT devices, including ECP-brake operated trains and trains with DP units in lieu of an EOT device. To address this issue, in response to requests from two railroads, FRA issued waivers from this requirement for ECP brake-configured train consists and DP consists with one or more DP (non-helper) locomotives on the rear. *See* Docket Nos. FRA–2006–26435 and FRA–2014–0013. Since granting these waivers, there has been no known negative impact on safety involving these operations.

In the NPRM, FRA proposed to codify these waivers by adding a new paragraph (d) to § 232.219 to permit the use of a properly installed and tested EOT device on the helper locomotive that is cut-in to the train line air supply, provided railroads develop and implement associated operating rules consistent with parts 221 (concerning marker light display) and 232 (concerning EOT device installation and testing) and the conditions established in the waivers discussed above.

Both the Railroads and Labor support codifying these waivers, but Labor urges FRA not to eliminate paragraph (c)(3). In response to Labor's comment, FRA notes that it did not intend to eliminate paragraph (c)(3), which includes a maintenance requirement for *Helper Link* devices used on DP- or ECP-equipped trains. To enhance clarity in light of Labor's comment, FRA is adopting the substance of proposed paragraph (d) as new paragraph (c)(3) and existing paragraph (c)(3), which requires periodic testing and calibration of devices subject to § 232.219, is being redesignated as paragraph (c)(4).

A usage under new (c)(3) must still meet the requirements of (c)(1) and (c)(2). All usages must meet the requirements of the new (c)(4).

Section 232.305 Single Car Air Brake Tests

Section 232.305(a) requires each SCT to be performed in accordance with the Sections 3.0 (''Tests-Standard Freight Brake Equipment'') and 4.0 (''Special Tests'') of AAR Standard S–486–04 (2004) (''Code of Air Brake System Tests for Freight Equipment''), Section E of the AAR Manual of Standards and Recommended Practices (Jan. 1, 2004), or an alternative standard approved by FRA in accordance with § 232.307. Under the processes outlined in § 232.307, which allows the industry to request FRA approval of modifications to a currently acceptable SCT procedure, FRA approved the use of AAR Standard S–486–18 in May 2018. *See* Docket No. FRA–2018–0011. The purpose of S–486 is to provide a means of making a general check on the condition of the brake equipment on cars as called for in the Filed Manual of the AAR Interchange Rules. Only Sections 4 and 5 are codified, as these are the tests that ensure safe operation of individual freight car brakes to comply with the Safety Appliance Act. Other sections of the Standard contain supplemental information that are not codified to provide flexibility to be updated without meeting Federal requirements. These include troubleshooting guidance and information on the maintenance and construction of the physical testing devices. Accordingly, in the NPRM, FRA proposed to update AAR Standard S–486–04 to AAR Standard S–486–18.[19] FRA received no comments in response to its proposal to incorporate the updated AAR Standard S–486 and is incorporating the updated standard as proposed.

FRA also proposed to incorporate in paragraph (a), AAR Standard S–4027, which provides an automated process to perform a SCT with an automated single car test device (ASCTD). As explained in the NPRM, AAR Standard S–4027 provides for two types of automated single cars tests: (1) An automated test using an ASCTD connected to the end of a freight car; and (2) an automated test performed from the side of a car using the four-pressure manifold. FRA had conditionally approved a test waiver permitting BNSF and UP to perform SCTs with an ASCTD using AAR Standard S–4027 in lieu of AAR Standard S–486–4. *See* Docket No. FRA–2013–0030. In the NPRM, FRA detailed the test committee consensus process and its positive results and findings under that test waiver for 800,000 SCTs performed on freight cars over 4.5 years. No opposing comments were filed on the process, results, findings, or the standard itself and FRA is incorporating the standard as proposed.

Paragraph (b) identifies the events triggering a required single car air brake test. For instance, under paragraph (b)(2), ''a railroad shall perform a single car air brake test on a car when a car is on a shop or repair track . . . for any reason and has not received a single car air brake test within the previous 12-month period.'' Based on the results performed by the tests under Docket No. FRA–2013–0030, and the ability of the subject technology to provide a more comprehensive testing of the braking

[19] FRA notes that in the NPRM's preamble, FRA erroneously referred to Sections 4 and 5 of AAR Standard S–486, when the appropriate references were Sections 3 and 4. 85 FR at 2503.

system, FRA proposed requiring a SCT on each car on a shop or repair track for any reason that has not received a SCT with an end-of-car ASCTD within the previous 24-month period or with a four-pressure ASCTD within the previous 48-month period.

As FRA noted in the preamble to the NPRM, FRA based this proposal on the test waiver's findings that, after 4.5 years, cars tested with end-of-car ASCTDs experienced an 18% reduction in the rate of repeat brake failures, while a four-pressure test experienced a 58% reduction. ASCTDs generally identify more air brake system defects than other tests in the categories of air components, control valves and pipe brackets, valves and subsystems. Data from the test waiver has also shown that a car tested with an end-of-car ASCTD is 26% less likely to have an AAR-condemnable wheel impact load detector indication, and ASCTD tests with four-pressure showed a 70% reduction.

TWU opposes lengthening the minimum testing requirement from 12-months to 24–48 months, arguing that carriers ''could be missing deficiencies that will turn into a major incident or derailment.'' Noting FRA's assertion in the NPRM's preamble that, on a daily basis, thousands of individual freight cars are overdue for their SCT, TWU notes that there is an ''overabundance'' of furloughed mechanical employees. As such, TWU suggests that, ''[r]ather than lowering the standards,'' FRA should penalize railroads for ''intentionally undermining safety.'' Labor states that FRA should enforce the existing requirements on the thousands of overdue cars rather than ''move the goalposts.'' TWU and Labor also object to removing the ''repair yard provision'' for SCTs.

The Railroads support the ASCTD rules as proposed, but contest FRA's concern regarding the number cars overdue their SCTs.

In response to TWU and Labor's comments, FRA notes that it did not propose to change the rules as they concern application of a conventional SCT. To the contrary, FRA continues to require a SCT on each car appearing on a repair track at more than 12 months since its previous test using conventional testing equipment and would not remove the repair yard provision as it currently exists for any tests.

Instead, FRA's proposal would only extend the time allowed between each SCT conducted using an ASCTD under AAR Standard S–4027. Because AAR Standard S–4027 provides a highly repeatable test methodology with more accurate results, railroads can make more effective repairs, which may help reduce the backlog referenced in TWU's concerns.

In addition to the repair track provision of paragraph (b)(2), paragraphs (c) and (d) require a SCT on each car no less than 8 years after it was built or rebuilt, and no less than every 5 years thereafter. In the NPRM, FRA requested comments on the need to maintain these requirements.

In response, the Railroads urge FRA to delete any time-based test cycles and to instead adopt ''performance-based triggers (*e.g.,* identified via the study of data on actual line-of-road issues).''

While FRA understands the Railroads' request to replace the time-based test triggers required under paragraphs (b)(2), (c), and (d) with a performance standard relying on ''line-of-road'' capabilities, the request is unsupported by any specific performance standard, analysis, or data. Accordingly, FRA cannot implement the Railroad's request at this time.

For the reasons outlined above, in this final rule FRA is adopting the changes proposed to paragraph (b)(2), but not paragraphs (c) and (d).

Section 232.307 Modification of the Single Car Air Brake Test Procedures

Existing § 232.307 provides a procedure for industry to seek modification of the single car air brake test procedures in § 232.305(e). As discussed in the section-by section analysis for § 232.603 below, in response to FRA's NPRM proposal to modify § 232.603, the Railroads commented that proposed paragraph (g) of that section was confusing because it referred to the existing procedures in § 232.307, which in turn only referred to § 232.305(a). In this final rule, FRA is revising § 232.307, so that incorporated industry standards for air brake maintenance and testing may be updated utilizing the procedures of that section. When utilizing § 232.307, a petitioner will be required to specify the part, section, and paragraph for which modification is requested. Presently, §§ 232.305 and 232.603 refer to § 232.307. This final rule adds references to §§ 232.717 (addressing tourist, scenic, historic, and excursion operations braking systems) and 232.409 (addressing inspection and testing of EOT devices). Consistent with these revisions, FRA is also updating the title of § 232.307 to eliminate the specific reference to single car air brake test procedures and to refer more generally to ''brake test procedures.''

Section 232.403 Design Standards for One-Way End-of-Train Devices

Section 232.403 includes design standards for one-way EOT devices. In the NPRM, FRA proposed to modify paragraphs (d)(6) and (f)(4), which include shock requirements for rear and front units, referring to a 0.1 second window. In the NPRM, FRA indicated that the 0.1 second interval in paragraphs (d)(6) and (f)(4) is too large for maintaining a peak shock threshold and is likely a typographical or other error from a previous rulemaking. Accordingly, FRA proposed to make the shock requirements in these paragraphs the same as the 0.01 second peak shock threshold in AAR Standards S–9152 and S–9401. The only comment received supported correcting this typographical error, and therefore, FRA is adopting the proposed revisions to paragraphs (d)(6) and (f)(4).

Paragraph (g)(2) currently requires a minimum EOT device battery life of 36 hours at 0 °C. As noted in the NPRM, manufacturers have developed EOT devices that rely less on batteries and more on an internal, air-powered generator, which converts mechanical energy—created by the brake pipe air pressure—into electricity used to power the EOT device.

In the NPRM, FRA proposed codifying two long-standing waivers providing relief from this requirement for EOT devices using an air-powered generator as a power source. *See* Docket Nos. FRA–2006–25794 and FRA–2001–9270. In these waivers, FRA required each subject EOT device to include a back-up battery with a minimum operating life of 12 hours at 0 °C and the railroads to submit reports on the devices' usage and performance.

As noted in the NPRM, to date, FRA has not received any reports of accidents due to EOT device operations under these waivers. Accordingly, FRA proposed a new paragraph (g)(3) to provide for use of an air-powered generator as a primary power source as long as it operates with a backup battery with a minimum of 12 hours of continuous power at 0 °C. This change will improve efficiency and is consistent with railroad safety.

The Railroads agree with FRA's proposal to require that each back-up battery to an EOT device's air-powered generator be capable of providing 12 hours of continuous power at 0 °C. The Railroads also suggest FRA adopt a flexible, performance-based provision addressing EOTs generally and provide alternative language to accommodate future developments, such as the use of

other power sources or EOT devices becoming obsolete.

Labor supports requiring a back-up battery to each EOT device's air-powered generator, but believes it should include more than 12 hours of energy and provide subsequent crews with power-level notifications.

Various manufacturers and railroads have already, under the waivers, built and installed 12-hour back-up batteries. Labor has not provided any data, examples, or other information showing why 12 hours would be insufficient. To require a number higher than 12 hours would create a potentially unnecessary yet substantial burden on manufacturers and railroads to remove existing batteries and purchase and install new batteries. While a longer back-up battery life may provide a convenience to users, it would result in no new safety benefits. Moreover, current manufactured units may not be able to accept batteries with different specifications. Similarly, to require power notifications such as a percentage or other spectrum of available power would require modification of all affected EOT systems and batteries. With approximately 27,000 EOT devices registered in Umler, Labor has provided no data on the impact on the railroads and the public of such a requirement.

Although FRA is open to a performance-based approach to powering EOT devices, no performance standard was proposed or otherwise offered in this proceeding. FRA notes the Railroads' prediction that EOT devices may be rendered obsolete, but the Railroads provided no evidence, alternatives, or timelines showing such a possibility. While a suitable performance standard is not currently feasible, FRA is modifying the language of §§ 232.17(a) and (b), and 232.407(c) to provide special approval procedure consideration for the introduction of new and novel alternative technologies that serve the same or similar purposes as EOT devices in the interest of maintaining regulatory flexibility for future innovation.

For the reasons discussed above, in this final rule FRA is modifying paragraph (g)(2) and adding new paragraph (g)(3) as proposed.

Section 232.407 Operations Requiring Use of Two-Way End-of-Train Devices; Prohibition on Purchase of Nonconforming Devices

Section 232.407 addresses operations requiring the use of two-way EOT devices.

Although not specifically proposed in the NPRM, FRA is modifying paragraph (e)(1) to clarify that because an ARU (as defined in this final rule) is equipped with telemetry as defined for EOT devices in existing subpart E, an ARU may be used under the (e)(1) exception for the requirement for the use of a two-way EOT device. At least one Class I railroad operating in Canada uses an ARU in this manner and as long as an ARU performs the same function as an EOT device or DPU, and is operated and regulated in the same manner, such an allowance is warranted. As discussed in more detail in the analysis of the new definition of ''ARU'' in § 232.5 above, similar to the use of a DP locomotive currently contemplated under (e)(1), an ARU may communicate with, and receive wireless commands from a controlling locomotive to help regulate the brake system's air supply and pressure.

In the NPRM, FRA proposed to modify paragraph (f)(2), which addresses battery charging requirements for two-way EOT devices. Specifically, FRA proposed adding language to the end of the paragraph to require the testing of air-powered, generator-equipped devices to determine the ''residual charge'' of the back-up battery before initiating operation. As FRA explained in the NPRM, this requirement is ''meant to ensure that the generator back-up battery has a minimal residual charge, which will ensure that it is working properly and is capable of temporarily powering the EOT device should the air-powered generator fail.'' 85 FR 2505.

In their comments, Labor supports mandatory testing of each EOT device's back-up batteries, but asserts that FRA should use the term ''sufficient charge.''

The Railroads concur with FRA's proposed language in paragraph (f)(2) requiring the testing of air-powered-generator-equipped devices to determine the charge of the back-up battery before initiating operation. However, the Railroads urge FRA to adopt language to accommodate power sources other than batteries.

While FRA requires a primary battery to be sufficiently charged under paragraph (f)(2), under the waiver allowing the use of an air-powered generator, FRA prohibited the use of a dead battery. To comply with that condition, the suppliers manufactured EOT devices with a ''minimum charge'' indication showing that the battery has enough residual charge to accept charging from the air-powered generator. Labor has not provided any data or information showing why either a ''residual charge'' or ''minimum charge'' indication is insufficient and FRA is reluctant to require manufacturers to incur costs to change the indication without a sufficient safety justification.

Thus, in this final rule, FRA is using the term ''minimum charge.'' FRA understands a minimal charge of a back-up power source to mean it has a sufficient residual charge to accept charging from the air-powered generator. Passing the initiation test is evidence that the back-up power source has the required minimum charge.

While FRA agrees that other power sources may be considered, existing paragraphs (b) and (c) already provide for ''alternative technology to perform the same function.'' In response to the Railroads' comment, FRA is clarifying these paragraphs and providing for the consideration of such alternative technologies under the special approval procedure defined under § 232.17. *See also* the discussion of §§ 232.17 above.

Paragraph (f)(2) also requires that each EOT device's battery be sufficiently charged at its initial terminal or other installation point and throughout the train's trip to ensure that it will remain operative until the train reaches its destination. Although this is not a new requirement, the Railroads also request that FRA clarify the meaning of the phrase ''until the train reaches its destination.''

FRA addressed this issue in the preamble of the 1997 final rule. *See* 62 FR 278, 289, 294–95, Jan. 2, 1997. FRA recognizes that the amount of a battery's charge differs based on several variables, including the trip length. The railroad has the initial responsibility for determining how to comply with this performance standard, which can be based on manufacturer recommendations, scientific or mathematical studies, or experience. If an EOT device's battery dies before destination, that is evidence that the railroad did not comply with this requirement. This requirement, however, would not necessarily apply to air-power generators or back-up power sources. Air-powered generators are not expected to hold a full trip's worth of energy at the initial terminal of a train, because they are designed to charge continually during the train's operation. FRA has set a different charge standard for back-up power sources.

Section 232.409 Inspection and Testing of End-of-Train Devices

Section 232.409 includes requirements for EOT device inspection and testing. More specifically, existing paragraph (d) requires each EOT device's telemetry equipment be tested at least every 368 days for accuracy and calibrated, if necessary, in accordance with the manufacturer's specifications

and procedures. In the NPRM, FRA proposed instead to require telemetry equipment be tested and calibrated in accordance with its manufacturer's specifications and procedures, without requiring a maximum time interval between tests. FRA also proposed to add a new paragraph (e) to address comparison testing requirements for EOT device air pressure sensors.

FRA based its proposed revision to paragraph (d) on the reduced need for periodic telemetric equipment calibration due to technological advances that include continuous feedback such as phase-lock loop (PLL). A PLL feedback system consists generally of a reference oscillator in addition to radio telemetry components. The reference oscillator sets the communications frequency for the radio telemetry components. If the radio telemetry components are not able to achieve the communications frequency set by the reference oscillator, then the radio will go into a fail-safe mode and will not operate.

As explained in the NPRM, for EOT devices using PLL or a similar feedback loop technology, FRA granted multiple waivers from the 368-day calibration requirement for the radio portion only under the conditions that vendors apply a weather-resistant label on each applicable EOT device and manufacturers file annual reports on the rate of inoperable devices. *See, e.g.,* Docket Nos. FRA–2015–0044; FRA–2012–0096; FRA–2009–0015; and FRA–2004–18895. FRA required manufacturers to file annual reports on the rate of inoperable devices to ensure the devices continued to operate safely over time without a calibration requirement. Based on the relatively long-term experience under the above-noted waivers, and the data supplied in the annual reports, the continuous self-check circuitry of PLL technology ensures better overall safety given the potential for human error during periodic calibration. FRA's proposed revision to paragraph (d) was based on data garnered from the required annual reporting on these waivers, summarized in the renewal applications contained in the applicable waiver dockets. However, this does not include the pressure sensor components of EOT devices.

The Railroads agree with the proposed revision to paragraph (d). However, TWU believes FRA should continue to require calibration every 368 days for all non-PLL units. According to TWU, not providing for FRA verification of EOT device calibration would incentivize carriers to underreport communication losses. Labor concurs that PLL technology reduces the need for telemetry calibration and supports continued application of the maximum calibration period under § 232.409 to EOT devices not yet PLL-equipped.

FRA understands TWU's concern. However, FRA expects that manufacturers will continue to set appropriate calibration intervals for non-PLL radios. Given the level of safety attained with calibrations performed at least every 368-days and that any change could create operational or legal exposure on a technology the industry no longer produces, FRA does not expect manufacturers to change such intervals significantly. In addition, as proposed in the NPRM and adopted in this final rule, if a manufacturer does not set a periodic calibration interval for any unit (including legacy non-PLL units), the manufacturer will be required to report under paragraph (f)(2).

While TWU states that incorporating this allowance into regulations may incentivize underreporting of communications losses, it provides no analysis or data to support that prediction. Nevertheless, as further discussed below, under new paragraph (f) a manufacturer must describe in its annual report to FRA each time it repairs or reconditions a radio for an EOT device if it does not establish a calibration period for the device. Any underreporting would be a violation of this requirement. Accordingly, in this final rule, FRA is adopting its proposed revision to paragraph (d).

Despite the waivers, and their codification in paragraph (d), each EOT device and its operation still must comply with the applicable requirements of part 229. Specifically, paragraphs (a) and (b) of § 229.27 require comparison testing at least every 368 days with a test gauge, or self-test designed for this purpose, for each device that: (1) Engineers use to aid in the control or braking of a train or locomotive; and (2) provides an indication of air pressure electronically. Because the air pressure sensor in the EOT device is used by the locomotive engineer to control the train, it is similar to the gauges in the cab and must comply with parts 229 and 232. Although § 229.27 applies to the air pressure sensor in an EOT device, because the air pressure reading at the EOT device is used to control the train, FRA proposed a cross-reference to § 229.27 in proposed new paragraph (e) of § 232.409 for clarification purposes.

Under existing § 229.27, an annual test must be performed on each device used by the engineer to aid in the control or braking of the train or locomotive that provides an indication of air pressure electronically (pressure sensors). For instance, each EOT-device-equipped train relies on the pressure sensor to ensure compliant train handling, and in accordance with the pressure gradient requirements of §§ 232.103(m) and 232.205(c) and the Class III brake test performance requirements of § 232.211(c). Unlike the PLL radio portion of each EOT device, a pressure sensor does not self-test and react to pressure calibration drift.

Labor submitted comments agreeing that all EOT devices must comply with § 229.27. On the other hand, the Railroads commented that proposed paragraph (e) is not necessary. Instead, the Railroads recommended that FRA adopt alternative language requiring comparison testing in accordance with manufacturer's specifications similar to that proposed in § 232.403.

Although commenters provided no data, technology, or other specific risk-mitigating alternative that would justify modifying the generally-applicable requirements related to comparison testing of EOT device pressure sensors, FRA finds that device manufacturers should have the required expertise to evaluate their own devices and determine if such devices could be successfully comparison tested on an alternative schedule or by an alternative process. Accordingly, to allow manufacturers the flexibility to develop alternative comparison testing standards for EOT device pressure sensors, FRA is revising proposed paragraph (e) to specify that the air pressure sensor contained in the EOT device must be tested by the processes and frequency identified in § 229.27 or by manufacturer specifications approved under § 232.307. If approved under § 232.307, railroads using the applicable EOT device may apply the testing standard accordingly.

Despite the positive experience under the waivers and FRA's confidence in PLL technology, the frequency of the reference oscillator in an EOT device may, over time, ''drift'' outside of its accepted frequency range, which may affect a device remaining in communication with the front- or head-of-train device. In electrical engineering, and particularly in telecommunications, ''frequency drift'' is the unintended and generally arbitrary offset of an oscillator from its nominal frequency. Frequency drift that is not recognized during device initiation or otherwise by the EOT device's self-check circuitry, may prevent the device from failing in a safe manner, and can only be corrected during calibration. Until recently, FRA had not received any reports of PLL-

equipped radios experiencing frequency drift. However, since publication of the NPRM, FRA has been made aware of potential frequency drift in a very small percentage (less than 0.1%) of PLL transceivers covered under waiver FRA–2009–0015. Given this new information, FRA seeks to ensure this problem does not become more widespread, and is therefore codifying the waiver's annual reporting requirement for devices without calibration intervals specified by the manufacturer. This additional requirement will enable FRA and radio manufacturers to track any potential increase in frequency drift occurrences and ensure proper calibration intervals. These reports could also provide information that is useful to formulate a future performance standard. Paragraph (f) requires manufacturers to submit annual reports regarding certain transceivers to provide a means for FRA to monitor transceiver performance periodically, if they choose not to set a calibration period. If a manufacturer of telemetry transceiver equipment has multiple transceiver model types without recommended finite calibration periods, then the information required must be provided by model type in their reporting. This will not be a new burden to the manufacturers as they have already been providing this information to FRA pursuant to the waivers.

As noted in the NPRM, and in the discussion of § 232.203 above, FRA remains concerned with the safety risks associated with the reported and unreported loss of communications events between the controlling locomotive and the EOT device. As noted above, FRA understands that railroads are working to develop and implement solutions, but it does not appear that a feasible technological solution is yet available. Accordingly, as noted above, to address the safety risks involved with potential losses of communication, FRA is revising the training requirements at § 232.203(c) to ensure that employees that operate EOT equipment are trained in the limitations and proper use of the emergency application signal and the loss of communications indicator of the equipment to enable them to take effective action in the event of a communications loss.[20]

Section 232.603 Design, Interoperability, and Configuration Management Requirements

Section 232.603 contains the design, interoperability, and configuration management requirements for ECP brakes. In the NPRM, FRA proposed to revise paragraphs (a) and (d), move paragraph (f) to (g), and add a new paragraph (f) to meet the formatting and structure requirements for incorporation by reference under 1 CFR part 51. FRA also proposed to update the standards incorporated by reference in in paragraphs (a)(1), (a)(2), (a)(4), (a)(6), and (a)(7). For a discussion of the purposes of these standards, please see the NPRM.

FRA did not receive comments on the revisions and updates to paragraphs (a), (d), and (f). The purposes of the standards are as follows: S–4200 ensures uniform and consistent functionality and performance of ECP freight brake systems from different manufacturers; S–4210 provides the qualification test procedure to verify that the designed components have high reliability, will withstand harsh environmental conditions, and have a minimum 8-year operating life; S–4230 facilitates freight car and locomotive interoperability without limiting the proprietary design approaches used by individual suppliers and defines the requirements for an intratrain communications (ITC) system for freight equipment in revenue interchange service; S–4250 ensures uniform, consistent, and interoperable functionality and performance between devices developed by different manufacturers, by defining the high-level performance requirements to operate multiple locomotives via an ITC network; and S–4260 identifies the test procedure that individual suppliers would complete to establish the interoperability baseline among ECP/WDP (wire distributed power) systems that comply with the AAR S–4200 series of standards. Accordingly, FRA adopts those changes as proposed.

The Railroads commented that proposed paragraph (g) is confusing, because it refers to existing procedures to update an incorporated by reference standard in § 232.307, which in turn references § 232.305(a). In this final rule, FRA is clarifying § 232.307, so that incorporated industry standards for air brake maintenance may be updated in a consistent and efficient manner. When utilizing § 232.307, a petitioner will be required to specify the part, section, and paragraph for which modification is requested. Presently, §§ 232.305, 232.603, and 232.717 refer to § 232.307.

Subpart H Tourist, Scenic, Historic, and Excursion Operations Braking Systems

Appendix B was created to preserve part 232 as it existed prior to the 2001 final rule, and was intended to apply to tourist, scenic, historic, and excursion operations.[21] As proposed in the NPRM, this final rule is moving appendix B, with some revisions, to a new subpart H (§§ 232.700–232.719). FRA is only discussing those provisions of new subpart H that received public comments or have changed from the NPRM. The remaining provisions are being finalized as proposed, and not discussed here again.

In § 232.717 of the NPRM, FRA proposed to reference Rule 4 of the ''2020 Field Manual of the AAR Interchange Rules'' (''AAR Field Manual''). However, FRA has since realized that AAR Standard S–4045–13, which was referenced in proposed paragraph 232.717(b)(2), makes clear that the use of Rule 3 of the AAR Field Manual is also required for the maintenance of freight valves used on passenger equipment. Thus, to pinpoint the applicable rules more accurately for the convenience of the reader, all references to the AAR Field Manual in § 232.717 will include both Rules 3 and 4, which are concerned with the testing of railroad air brakes and with the maintenance of air brake valves and parts, respectively.[22]

In the NPRM, FRA indicated it was adding a paragraph (b)(2) to § 232.717. However, FRA notes that § 232.17 in appendix B, which became § 232.717 in proposed subpart H, already included a paragraph (b)(2). Accordingly, FRA notes that it is not ''adding'' a paragraph (b)(2), but rather just revising the paragraph as it existed previously in appendix B.

Labor commented about the proposed ''significant relaxation'' of current maintenance practices and operating requirements in 232.717(b), including the ''cleaned, repaired, lubricated, and tested'' periodic inspection requirements for 26–C and D–22 brake valves. According to Labor, while a relaxed periodicity of these practices may be appropriate to apply to the state-of-the-art locomotives used in pilot programs by the Class I railroads, extending the same relief to the ''motive power fleet that is the oldest in the

[20] *See* section-by-section analysis of § 232.203 above.

[21] On May 31, 2001, FRA issued an update to part 232. Some of the prior rule text was preserved in section I of appendix B to part 232, which remained applicable to tourist, scenic, historic, or excursion railroads on the general system of transportation, who have not been required to operate under present parts 232 or 238. *See* §§ 232.1(d) and 232.3(c)(5); 66 FR 4104, 4145–46, 4214, Jan. 17, 2001.

[22] FRA notes that this final rule incorporates by reference the January 1, 2020, version of AAR Rules 3 and 4. Prior to publication of this final rule, however, AAR issued updated versions of each of these Rules and FRA anticipates incorporating the updated AAR rules in a future rulemaking proceeding.

nation'' is not justified.[23] TWU's comments were similar to Labor's.

As proposed, paragraph (b)(2) changed brake inspection requirements from referencing AAR Standard S–045 to referencing AAR Standard S–4045–13, which establishes, for passenger equipment cars operating in the U.S. and Canada, standard maintenance practices and operating requirements, including the periodic inspection requirements for air brake cleaning, repairing, lubricating, and testing (known in the industry as ''clean, oil, test, and stencil'' or ''COT&S''). AAR Standard S–4045–13, would extend the timeline related to periodic brake valve inspections, and is based upon the safety experience of the waiver at Docket No. FRA–2013–0063 [24] and experience with the extended period for inspections at 49 CFR 238.309(d)(2) and (3) for conventional passenger equipment. As a result, railroads using 26–C type valves would now be required to test those valves every 48 months (instead of 36 months). Similarly, railroads using D–22 type valves would now be required to test those valves every 36 months (instead of 24 months).

Labor appears to incorrectly believe the relief provided in the waiver was the same as that provided under Docket No. FRA–2005–21613, which extended the service life of locomotive electronic brake valves (EBVs). This is the only recent docket that meets the description of Labor's concern. FRA notes that Amtrak has operated 26–C passenger car control valves for 48 months between inspections under the PB–94–3 waiver since July 1995 (codified at § 238.309 in May 1999), while railroads not subject to part 238 have operated under the subsequent waivers since April 2012. Passenger railroads have operated D–22 passenger car control valves for 1,104 days between inspections under § 238.309(d)(3) since 1999. In all cases, these waivers extended the periodic inspection interval for only 12 months and were based on over fifty years of operating experience,[25] plus confirming testing performed as part of the waiver investigations. The railroads have not reported any safety problems while under those waivers. By contrast, the locomotive EBV waiver that extended periodic inspection intervals for up to 5 years involves novel designs, requiring continuous product upgrades during the course of the waiver, and required a test committee to witness inspection and tear-down of several brake unit types on a biannual basis. Passenger car control valves with a long and successful service history do not require the same scrutiny and oversight.

The safety case provided, and the lack of negative safety data arising from the aforementioned control valve waivers, justifies the 12-month extension for each periodic inspection of a 26–C or D–22 valve provided by updated AAR Standard S–4045–13. Such an extension also aligns the inspection periods for 26–C and D–22 control valves on all railroads, thus reducing confusion. Accordingly, this final rule updates paragraph (b)(2) to reference AAR Standard S–4045–13.

Currently, appendix B does not require tourist, scenic, historic, and excursion railroads to develop a plan for servicing obsolete brake equipment. Accordingly, in the NPRM, FRA proposed § 232.717(c) within the new subpart H to allow tourist, scenic, historic, and excursion railroads to develop a compliant plan for servicing obsolete brake equipment. Under paragraph (c), these railroads—when utilizing equipment not covered by an applicable, available, and incorporated AAR standard—would have to maintain the equipment in a safe and suitable condition for service according to a railroad's written maintenance plan. A compliant maintenance plan, including its COT&S component and a periodic attention schedule, must be based upon a standard appropriate to the equipment. For example, a compliant plan might utilize a recognized industry standard or a former AAR interchange standard, to the extent it is modified to account for the unique operating conditions of the particular tourist railroad operation. The railroad must make its written maintenance plan available to FRA upon request.

While FRA expects some individual railroads may develop their own written maintenance plans, FRA understands that an industry organization (HeritageRail Alliance) may develop a consensus standard for the periodic maintenance of this brake equipment. FRA did not propose a formal approval process for each tourist, scenic, historic, and excursion railroad plan, as this would not be feasible from a regulatory standpoint, for both the railroads and FRA, and such a requirement would not enhance safety under subpart H. However, when evaluating maintenance plans during the course of regular inspections, FRA will consider the appropriate AAR-published valve standard in the last version (*e.g.,* 1992 for the ''AB'' control valve) of the AAR Code of Rules or the AAR Field Manual before a valve type was made obsolete, the usage of the equipment, and the railroad's voluntarily scheduled SCTs.[26]

Labor and TWU object to proposed paragraph (c), claiming it releases FRA from its regulatory responsibilities and allows affected railroads to self-regulate with their own inspection plans. According to Labor, paragraph (c) attempts to fix a problem that does not exist and would place a burden on those railroads with few resources.

In discussions between FRA and various tourist and historic railway industry associations, the railroads governed under former appendix B, now subpart H, have requested regulatory guidance on the applicability of those rules on discontinued brake valves. Moreover, under Section 415 of the Rail Safety Improvement Act of 2008, Congress directed FRA to study air brake maintenance regulatory compliance on diesel locomotives for tourist and historic railroads. The NPRM proposed changes consistent with Congress' direction and the railroads' requests to provide regulatory certainty and to reduce their compliance burdens. For instance, under the previous language of § 232.17 of appendix B, affected railroads were left without compliance guidance or regulatory protection each time AAR removed a brake type (*e.g.,* the ''AB'' brake) from the AAR Field Manual. FRA recognizes these ''obsolete'' brake valves may continue to be operated on older equipment while remaining compliant with § 232.103(l) (formerly § 232.3 of appendix B), and finds that each railroad is in a better position to determine how to maintain its (generally non-interchanged) equipment for its own operating environment. The

[23] Labor appears to believe incorrectly that the D–22 and 26–C brake valves are locomotive brake valves. As explained further below, there is a 25-year waiver history of extending these passenger car valves by 12 months.

[24] The waiver issued in Docket No. FRA–2013–0063 allowed railroads to utilize AAR Standard S–4045–13 in lieu of the obsolete AAR S–045. That waiver was the third waiver FRA issued related to inspection and testing frequency of passenger air brake control valves. *See also* Docket Nos. PB 94–3 (July 26, 1995) and FRA–2011–0070. The 1995 waiver was replaced by § 238.309, established by the final rule published at 64 FR 25660, May 12, 1999. The 2011 and 2013 waivers extended the flexibility afforded by § 238.309 to certain passenger equipment cars.

[25] The D–22 valve has been in use since the mid-1930s and the 26–C valve has been in use since the early 1950s.

[26] FRA notes that many of the former AAR Standards are presently available within *Annex A—Equipment-Dependent Instructions* of APTA Standard PR–M–S–005–98, Rev.4—*Code of Tests for Passenger Car Equipment Using Single Car Testing,* which is incorporated by reference in part 238. *See* Docket No. FRA–2018–0097. A copy of *Annex A* is also available in the docket of this rulemaking for review.

purpose of the new § 232.717(c) is to provide those railroads with a regulatory path going forward. Given the increasing quantity of obsolete equipment, and that the current rules in subparts A–G of part 232 reflect more modern technologies, these railroads require some level of flexibility to address their own equipment and operations. Without this change, railroads will be left to determine, at their own discretion, what rules apply to brake valves once they are no longer addressed in the applicable industry standard.

The new § 232.717(c) provides flexibility, while ensuring that railroads subject to § 232.717 remain under FRA oversight. Given these railroads' low accident or incident rate,[27] their limited (seasonal) operations, and FRA's experienced inspectors familiar with local conditions performing oversight, FRA is confident that paragraph (c) will provide regulatory clarity and improve safety.

FRA sought comments on how to manage future changes to industry standards while ensuring future compliance with 1 CFR part 51 (incorporation by reference). FRA did not receive comments on how to better manage this process. However, the Railroads encourage amendments to **Federal Register** incorporation by reference regulations to generally allow for more timely regulatory updates to standards incorporated by reference. FRA notes that the Railroads' comments regarding the incorporation by reference of standards under 1 CFR 51 is an issue under the authority of the Office of the Federal Register, not FRA.

IV. Regulatory Impact and Notices

A. E.O. 12866 and 13771, Congressional Review Act, and DOT Regulatory Policies and Procedures

This final rule is a significant regulatory action within the meaning of Executive Order 12866 (E.O. 12866) and DOT's Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a 'major rule', as defined by 5 U.S.C. 804(2). In addition, this rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings of this rule can be found in the rule's Regulatory Impact Analysis, which FRA has prepared and placed in the docket (docket number FRA–2018–0093). The analysis details estimated costs and cost savings that those regulated by the rule are likely to see over a 10-year period.

In this final rule, FRA is codifying several motive power and equipment waivers providing conditional exceptions to existing rules concerning air brake testing (including Class I air brake tests and SCTs), EOT devices, brake valves, and helper service. In particular, FRA is extending the time freight rail equipment can be off-air before requiring a new brake inspection. Furthermore, FRA is making technical corrections to existing brake-related regulations.

FRA estimated the impacts of this final rule. The results of this analysis are presented in the table below.

TOTAL COSTS AND COST SAVINGS OVER 10 YEARS

[2017 Dollars in millions]

Section	Present value 7%	Present value 3%	Annualized 7%	Annualized 3%
Costs: Training	(*)	(*)	(*)	(*)
Cost Savings:				
Helper Link	$3.9	$4.5	$0.6	$0.5
26–C Brake Valve	0.4	0.5	0.06	0.06
D–22 Brake Valve	1.0	1.1	0.1	0.1
24 Hours Off-air	325.6	386.2	46.4	45.3
90 CFM	1.8	2.1	0.3	0.2
SCT 24 month	150.7	176.1	21.5	20.6
SCT 48 month	19.5	23.8	2.8	2.8
Waiver Cost Savings	0.1	0.1	0.01	0.01
Government Administrative Cost Savings	0.1	0.1	0.01	0.01
Total Cost Savings	503.0	594.6	71.6	69.7
Net Cost Savings	503.0	594.6	71.6	69.7

Net Cost Savings = Cost Savings − Costs.
* De minimis.

Over a 10-year period of analysis, the present value of net cost savings are $503.0 million (using a 7% discount rate), and $594.6 million (using a 3% discount rate). The annualized cost savings are $71.6 million (using a 7% discount rate) and $69.7 million (using a 3% discount rate).

By way of explaining the above table, in response to comments from the NTSB and labor organizations, FRA is adding a requirement for railroads to train employees on loss of communication and limitations of the emergency brake signal. This provision is a new requirement and will add slightly to the training employees receive already on using EOT devices. FRA estimates the cost at $1,566 primarily for the railroads using two-way end-of-train devices to update their existing training plans.

Turning to cost savings, among the EOT device waivers incorporated into the final rule, the waiver allowing a train equipped with *Helper Link* (or similar technology) to use an alternative air brake test procedure will benefit railroads using this system. The *Helper Link* technology reduces employees' time in uncoupling the helper locomotive from the train so that it may be turned around to help other trains ascend steep grades. FRA bases its estimate of cost savings on this reduced labor time. For the 26–C and D–22 type brake valves, FRA is extending the time before these types of valves need to be inspected and cleaned, resulting in fewer tests and labor savings. FRA is also extending, from 4 hours to 24 hours, the time before a Class I brake

[27] Since 2010, tourist, historic, and excursion railroads have had no brake-caused train fatalities and 21 motive power and equipment-related accidents.

test must be conducted on rail equipment that is not connected to a source of compressed air prior to being operated in a train again. FRA estimates railroads will accrue savings from performing fewer brake tests, less locomotive idling time to keep rail cars on compressed air (including reduced fuel consumption), and less use of yard air sources. This provision will result in annualized cost savings of $46 million (using a 7% discount rate), the largest category of cost savings. Furthermore, in an EPA comment to the NPRM, it was noted that reduced locomotive idling time will also reduce emissions and pollutants therein. FRA has estimated these potential benefits will total approximately $14.2 million (annualized using a 7% discount rate), and $16.8 million (annualized using a 3% discount rate). However, due to uncertainty regarding these benefits, FRA has not accounted for them in the primary analysis.

Similar to the flexibility provided by other waivers, permitting an increase in brake pipe leakage to 90 CFM under certain conditions will allow railroads to conduct air brake tests without having to wait for additional crews (to test in higher daytime temperatures), or run shorter trains. The efficiencies gained through codifying the 90 CFM waiver are monetized in the table above. FRA found the maintenance requirements for air repeater units are already standard industry practice. In addition, for situations where a railroad can substitute an air repeater unit for a DP locomotive or EOT device, the railroad will save the opportunity cost of that equipment by employing it elsewhere. Finally, FRA expects large cost savings by increasing the time between single car air brake tests from 12 to 24 months for automated tests, and to 48 months for automated tests using a four-pressure receiver. FRA estimates the longer interval between tests for rail cars using automated tests (about 1.1 million freight cars out of 1.6 million freight cars in service) will result in the monetized time savings shown in the table.

Separately, FRA expects the regulated community to submit fewer waiver requests, and requests for waiver extensions, to FRA for the regulatory parts subject to this final rule. FRA generally approves waivers for five years and may extend them upon request. Given the final rule codifies these waivers, railroads and suppliers will save the cost of applying and re-applying for these waivers. These collective savings are represented in the Waiver Cost Savings category in the table, with a comparable savings in terms of government time to review these waivers and renewals.

FRA estimates this final rule will only impose minimal costs on the industry. This final rule generally increases flexibility for the regulated entities by codifying waivers and in certain circumstances, providing additional flexibility in meeting some regulatory requirements. The rule does not impose any new substantive requirements. Railroads and suppliers may choose voluntarily to take advantage of the flexibilities under this final rule. However, under proposed § 232.409(e), FRA is providing EOT device manufacturers additional flexibility in conducting the required testing by reiterating the existing requirement that EOT device air pressure sensors need to be tested annually, or in accordance with alternative test procedures developed by the EOT device manufacturer and approved by FRA. FRA is not accounting for these costs in the overall analysis for this rulemaking, but acknowledges railroads may incur a burden to calibrate the air pressure sensor on the EOT device, as they do under the existing regulation. The burdens are further described in the regulatory evaluation accompanying this final rule.

As is discussed in the preamble above, FRA does not believe that these provisions will have a negative impact on the safety of railroad operations. In fact, codifying several of the waivers may result in positive safety benefits for railroad employees. In general, the EOT device waivers, appendix B updates, 24-hour off-air, and automated single car tests will all reduce the frequency of air brake tests and inspections. Fewer brake tests and inspections will reduce the time employees are walking on potentially uneven ground such as track ballast (typically crushed stone), and reduce their chances of slipping, tripping, or falling. Also, railroad employees may reduce their chances of injury because they would spend less time moving in and around rail cars while connecting and disconnecting equipment for the brake test and checking equipment such as the brake pipe. For air brake tests conducted in yards, less frequent brake tests would likely result in employees reducing their exposure to adjacent train traffic. FRA has not quantified these safety benefits because it does not have injury data specifically from conducting brake tests, but has described the parameters that may reasonably reduce the risk of injury.

B. Regulatory Flexibility Act and E.O. 13272

The Regulatory Flexibility Act of 1980 ((RFA) 5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. Regulations issued by the U.S. Small Business Administration (SBA) generally require agencies to prepare an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities when issuing a proposed rule. (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.'' [28] To help the public comment on the potential small business impacts of the rulemaking, FRA prepared an IRFA to accompany the NPRM.

In this final rule, FRA is codifying various long-standing waivers that provide conditional exceptions to the existing rules concerning air brake testing and inspection, end-of-train (EOT) devices, brake valves, and helper service (*i.e., Helper Link* devices or similar technologies). In addition, FRA is extending the length of time freight rail equipment can be disconnected from a source of compressed air, or ''off-air,'' before needing a new brake inspection to be placed back in operation. FRA is also using this opportunity to clarify certain provisions of the brake regulations and to remove outdated or unnecessary provisions. FRA estimates this final rule provides the opportunity for small entities to use their employees and railroad equipment more efficiently, resulting in cost savings.

FRA did not receive any comments directly related to the IRFA. In consideration of comments received to the rulemaking, FRA made changes to the final rule that will affect small entities, but not to a significant degree. FRA is requiring manufacturers of telemetry equipment installed in the EOT device to continue to file an annual report to FRA if they do not specify a calibration period for their devices. This provision will enable FRA to monitor instances of frequency drift in a small percentage of this equipment. This report is a continuation of a report filed as a condition of a previous waiver. FRA

[28] *See* U.S. Small Business Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* p. 25, August 2017, available at *https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/.*

is also adding a requirement for employee training to reduce possible accidents from communication loss from the front of the train to the rear of the train, applicable to railroads that use two-way EOT devices.

Description of Small Entities Impacted by the Final Rule

In consultation with the SBA, FRA has published a final statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891, May 9, 2003 (codified at Appendix C to 49 CFR part 209). FRA is using this definition for the final rule. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, rail equipment supplier, or other respondent is a small entity.

This final rule will be applicable to all railroads, although not all changes will be relevant to all railroads. Based on the railroads required to report accident/incidents to FRA under 49 CFR part 225, out of 751 railroads (excluding passenger service railroads that are subject to their own brake standards), FRA estimates there are approximately 735 Class III railroads; with 692 of them operating on the general system. These are of varying size, with some a part of larger holding companies. Therefore, this rule will impact a substantial number of small railroads.

FRA is aware of four firms manufacturing EOT devices for sale in the United States, and a firm that supplies the radio used for telemetry in EOT devices. Of the EOT device manufacturers, only DPS Electronics, Inc. is a small entity with about $5 million to $10 million in annual revenues and about 15 employees. The other firms, Siemens Industry Inc., Wabtec Railway Electronics, and Progressive Rail are larger companies with access to their larger parent companies' resources. Ritron, Inc. manufacturers the radio used in many firms' EOT devices and is a small entity with about $16 million in annual revenue and 90 employees.[29] Therefore, this rule will impact a substantial percentage of suppliers (40 percent).

Economic Impacts on Small Entities

FRA has determined that the impact on small entities will not be significant. In particular, the extension of time that freight rail equipment can be off-air before requiring a new brake test and inspection will result in significant cost savings from conducting fewer tests. FRA expects another important benefit will be better crew management. On a small railroad, employees often ''wear several hats,'' that is, perform several types of jobs, ranging from office work to train operations. Under the final rule, these railroads will be able to make available for other railroad jobs the time an employee would have spent conducting a brake test. The provision will likely increase the efficiency of labor resources, to some degree. Small railroads that do not operate newer types of equipment, such as EOT devices with air powered generators, can continue to perform tests in substantially the same manner as before this final rule.

In a change from the NPRM, Ritron may choose to continue to file an annual report to FRA if it does not specify a calibration period. If Ritron chooses the report option, FRA estimates this report will take 12 hours to do and cost about $800 per year, or $854 when annualized using a 7 percent discount rate.[30] FRA estimates this cost, or reduction in cost savings, as a percent of Ritron's annual revenues (about $16 million) to be minimal at 0.006 percent.[31] The safety reason for these reports is to enable FRA to ascertain the performance of the PLL radios (*i.e.,* transceivers) over time.

FRA estimates the new training requirement will affect about 10 percent of Class III railroads that operate trains with the two-way EOT devices subject to this requirement, or 69 small railroads. Analogous to estimating these costs in the primary RIA analysis for all railroads, the cost for Class III railroads is estimated as primarily the cost for railroads to modify their training plans. Specifically, FRA estimates 15 minutes to revise training plans (done at the same time when training plans are reviewed generally). Railroads already train their train crews how to initiate an emergency brake application in a locomotive, so the marginal time to add this requirement will be minimal. FRA estimates this total cost is $1,242, or only $18 per railroad.[32] FRA determines this cost is not significant. Furthermore, this cost is only accounted for in the first year of the rule. (ASLRRA reports the average freight revenue per Class III railroad is $4.8 million per year.[33])

In addition, suppliers that make railroad EOT devices will be positively affected. In the past, they have applied to FRA for waivers for technological improvements to their devices, and their waivers are incorporated in this final rule, saving the cost to file a waiver renewal.

Certification

Consistent with the findings of FRA's IRFA, and the lack of any comments received on it, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this final rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements and the estimated time to fulfill each requirement are as follows:

[29] These suppliers would also be considered small entities under SBA size standards based on NAICS codes. FRA determined that these firms can be categorized under NAICS code 336999 All other transportation equipment manufacturing, with a corresponding size standard of 1,000 employees. *See* 13 CFR 121.201.

[30] Cost = 1 manufacturer * 12 hours * $66.51 per hour = $798. Wage rate sourced from the Bureau of Labor Statistics pay for Electrical and Electronics Engineers at *https://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronics-engineers.htm* as accessed April 28, 2020. The base wage was adjusted for 2017 dollars using the BLS Inflation Calculator, and burdened for benefits (30% of compensation per BLS Guidance). See primary analysis in the RIA for detailed explanation.

[31] Calculation: About $1,000 in annualized report cost/$16,000,000 annual revenues = 0.0000625 ≈ 0.006%

[32] Cost = Cost to revise training = 69 Class III railroads * (15 minutes/60 minutes) * $72.01 per hour (STB Professional and Administrative rate) = $1,242.22. Cost per affected railroad = $1,242/69 railroads = $18.00 per railroad.

[33] ASLRRA, *Short Line and Regional Railroad Facts and Figures,* p. 10 (2014 pamphlet) [hereinafter *Facts and Figures*].

[34] Totals may not add due to rounding.

[35] The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75 percent overhead charges.

CFR section	Respondent universe	Total annual responses	Average time per responses	Total annual burden hours [34]	Total cost equivalent [35]
229.27—Annual tests	30,000 locomotives	30,000 records of tests	30 seconds	250 hours	$18,000
232.3—Applicability—Export, industrial, & other cars not owned by railroads-identification.	708 railroads	8 cards	10 minutes	1 hour	72
232.7—Waivers	708 railroads	2 petitions	160 hours	320 hours	23,040
232.15—Movement of Defective Equipment -Tags/Records.	1,620,000 cars	128,400 tags/records	3 minutes	5,350 hours	385,200
—Written Notification	1,620,000 cars	25,000 notices	3 minutes	1,250 hours	90,000
232.17—Special Approval Procedure—Petitions for special approval of safety-critical revision.	708 railroads	1 petition	100 hours	100 hours	7,200
—Petitions for special approval of pre-revenue service acceptance plan.	708 railroads	1 petition	100 hours	100 hours	7,200
—(d) Service of petitions	708 railroads	1 petition	20 hours	20 hours	1,440
—(d)(2)(ii) Statement of interest	Public/railroads	4 statements	15 minutes	1 hour	72
—(f) Comment	Public/railroads	6 comments	4 hours	24 hours	1,728
232.103(f)(2)—Gen'l requirements—all train brake systems—stickers.	1,200,000 cars	70,000 stickers/stencils/badge plates.	10 minutes	11,667 hours	840,024
(n)(7)—RR Plan identifying specific locations or circumstances where equipment may be left unattended.	708 railroads	1 revised plan	10 hours	10 hours	720
—Notification to FRA when RR develops and has plan in place or modifies existing plan.	708 railroads	1 notice	30 minutes	1 hour	72
—Inspection of Equipment by Qualified Employee after Responder Visit.	708 railroads	12 inspections/records	4 hours	48 hours	3,456
232.107—Air source requirements and cold weather operations—Monitoring Plan (Subsequent Years).	10 new railroads	1 plan	40 hours	40 hours	2,880
—Amendments/Revisions to Plan	50 railroads/plans	10 revisions	20 hours	200 hours	14,400
—Recordkeeping	50 railroads/plans	1,150 records	10 minutes	192 hours	13,824
232.109—Dynamic brake requirements—status/record.	708 railroads	1,656,000 records	4 minutes	110,400 hours	7,948,800
—Inoperative dynamic brakes: Repair record	30,000 locomotives	6,358 records	4 minutes	424 hours	30,528
—Tag bearing words ''inoperative dynamic brakes''.	30,000 locomotives	6,358 tags	30 seconds	53 hours	3,816
—Deactivated dynamic brakes (Sub. Yrs.)	8,000 locomotives	10 markings	5 minutes	1 hour	72
—Operating rules (Subsequent Years)	5 new	5 rules	4 hours	20 hours	1,440
—Amendments/Revisions	708 railroads	15 revisions	1 hour	15 hours	1,080
—Requests to increase 5 mph overspeed restriction.	708 railroads	5 requests	30 min. + 20 hours	103 hours	7,416
—Knowledge criteria—locomotive engineers—Subsequent Years.	5 new	5 amendments	16 hours	80 hours	5,760
232.111—Train information handling	5 new	5 procedures	40 hours	200 hours	14,400
Sub. Yrs.—Amendments/Revisions	100 railroads	100 revisions	20 hours	2,000 hours	144,000
—Report requirements to train crew	708 railroads	2,112,000 reports	5 minutes	176,000 hours	12,672,000
232.203—Training requirements—Tr. Prog.—Sub Yr..	15 railroads	5 programs	100 hours	500 hours	36,000
—Amendments to written program	708 railroads	236 revisions	8 hours	1,888 hours	135,936
—Training records	708 railroads	24,781 records	8 minutes	3,304 hours	237,888
—Training notifications	708 railroads	24,781 notices	1 minute	413 hours	29,736
—Efficiency test plans	708 railroads	708 copies	1 minute	12 hours	864
232.205—Initial terminal inspection: Class I brake tests and notifications/records (Revised requirement).	708 railroads	383,840 notices/records.	45 seconds	4,798 hours	345,456
(c)(1)(ii)(B)—RR Development/implementation of operating rules to ensure compliant operation of train if air flow exceeds stipulated section parameters after Class I brake test is completed (New Requirement).	708 railroads	10 revised operating rules.	8 hours	80 hours	5,760
232.207—Class 1A brake tests—Designation Lists Where Performed.	708 railroads	1 list	1 hour	1 hour	72
Subsequent Years: Notice of Change	708 railroads	250 notices	10 minutes	42 hours	3,024
232.209—Class II brake tests-intermediate ''Roll-by inspection—Results to train driver.	708 railroads	159,740 comments	3 seconds	133 hours	9,576
232.213—Written Designation to FRA of Extended haul trains.	83,000 long	250 letters	15 minutes	63 hours	4,536
—Notification to FRA Associate Administrator for Safety of a change in the location where an extended haul brake test is performed (New Requirement).	7 railroads	250 notices	10 minutes	42 hours	3,024
232.219—Double heading and helper service: Testing/calibration/records of Helper Link devices used by locomotives (formerly under 232.219(c)(3)).	2 railroads	100 records	5 minutes	8 hours	576
232.303—General requirements—single car test: Tagging of Moved Equipment.	1,600,000 frgt.	5,600 tags	5 minutes	467 hours	33,624
—Last repair track brake test/single car test—Stenciled on Side of Equipment.	1,600,000 frgt.	240,000 markings	2 minutes	8,000 hours	576,000
232.307—Modification of single car air brake test procedures: Requests (includes 232.409(e)).	railroads/AAR	1 request + 3 copies	20 hours + 5 minutes	20 hours	1,440
—Affirmation Statement on Mod. Req. To Employee Representatives.	railroads/AAR	1 statement + 4 copies	30 minutes + 5 minutes.	1 hour	72

CFR section	Respondent universe	Total annual responses	Average time per responses	Total annual burden hours [34]	Total cost equivalent [35]
232.309—Repair track brake test equipment and devices used to perform single car air brake tests—Periodic calibration of devices.	640 shops	5,000 records of calibrations.	2 minutes	167 hours	12,024
232.403—Unique Code	245 railroads	12 requests	5 minutes	1 hour	72
232.409—Inspection/Tests/Records EOTs	245 railroads	447,500 recording of tests.	30 seconds	3,729 hours	268,488
—(d)–(e) Telemetry equipment—Testing/Calibration/Rcds/—Documentations of testing (paragraph (d) is a revised requirement; paragraph (e) clarifies the use of § 229.27).	245 railroads	17,000 records	2 minutes	567 hours	40,824
—(f)(2) Annual report to FRA on radios found with frequency drift (New requirement).	1 manufacturer	1 report	12 hours	12 hours	864
232.503—Process to introduce new brake technology.	708 railroads	1 letter	1 hour	1 hour	72
—Special approval	708 railroads	1 request	3 hours	3 hours	216
232.505—Pre-revenue service acceptance test plan—Submission of maintenance procedure.	708 railroads	1 procedure	160 hours	160 hours	11,520
—Amendments to maintenance procedure	708 railroads	1 revision	40 hours	40 hours	2,880
—Design description	708 railroads	1 petition	67 hours	67 hours	4,824
—Report to FRA Assoc. Admin. for Safety	708 railroads	1 report	13 hours	13 hours	936
—Brake system technology testing	708 railroads	1 description	40 hours	40 hours	2,880
232.717(c)—Freight and passenger train car brakes—Written maintenance plan (formerly under appendix B, recodified subpart H).	40 railroads	40 written plans	6 hours	240 hours	17,280
Total	708 railroads	5,345,581 responses	N/A	333,682 hours	24,025,104

All estimates include the time for reviewing instructions, searching existing data sources, gathering or maintaining the needed data, and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202–493–0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells via email at *Hodan.Wells@dot.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. The current OMB control number for 49 CFR 229 is 2130–0008.

D. Environmental Impact

FRA has evaluated this final rule consistent with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Council of Environmental Quality's NEPA implementing regulations at 40 CFR parts 1500–1508, and FRA's NEPA implementing regulations at 23 CFR part 771 and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS. *See* 40 CFR 1508.4. Specifically, FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.''

The purpose of this rulemaking is to revise FRA's regulations governing brake inspections, tests, and equipment to reduce unnecessary costs and incentivize innovation, while improving or maintaining rail safety. This rule does not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. Instead, the final rule is likely to result in safety benefits. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review. *See* 23 CFR 771.116(b). FRA calculated quantifiable reductions in air emissions related to reduced idling in the cost-benefit analysis for this rulemaking. However, these reductions are likely to result in environmental benefits and do not necessitate further environmental documentation. FRA has concluded that no such unusual circumstances exist with respect to this final regulation and it meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties. *See* 16 U.S.C. 470. FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f). *See* Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (91 FR 27534 May 10, 2012) require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898

and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

E. Federalism Implications

E.O. 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under E.O. 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule in accordance with the principles and criteria contained in E.O. 13132. This final rule generally codifies existing waivers or makes technical amendments to existing FRA regulations. FRA has determined that this final rule has no federalism implications, other than the possible preemption of state laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of E.O. 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

F. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This final rule would not result in such an expenditure, and thus preparation of such a statement is not required.

G. Energy Impact

E.O. 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355, May 22, 2001. FRA evaluated this final rule in accordance with E.O. 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of the E.O.

E.O. 13783, ''Promoting Energy Independence and Economic Growth,'' requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. *See* 82 FR 16093, March 31, 2017. FRA determined this final rule would not burden the development or use of domestically produced energy resources.

List of Subjects

49 CFR Part 218

Occupational safety and health, Penalties, Railroad employees, Railroad safety, and Reporting and recordkeeping requirements.

49 CFR Part 221

Railroad safety.

49 CFR Part 232

Incorporation by reference, Power brakes, Railroad safety, Securement, Two-way end-of-train devices.

V. The Rule

For the reasons discussed in the preamble, FRA amends parts 218, 221, and 232 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 218—RAILROAD OPERATING PRACTICES

■ 1. The authority citation for part 218 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20131, 20138, 20144, 20168, 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. Amend § 218.22 by revising paragraphs (c) introductory text and (c)(5) to read as follows:

§ 218.22 Utility employee.

* * * * *

(c) A utility employee may be assigned to and serve as a member of a train or yard crew without the protection otherwise required by subpart B of part 218 of this chapter only under the following conditions:

* * * * *

(5) The utility employee is performing one or more of the following functions: Set or release handbrakes; couple or uncouple air hoses and other electrical or mechanical connections; prepare rail cars for coupling; set wheel blocks or wheel chains; conduct air brake test to include cutting air brake components in or out and position retaining valves; inspect, test, install, remove or replace a rear end marking device or end of train device; or change batteries on the rear end marking device or the end of train device if the change may be accomplished without the use of tools. Under all other circumstances, a utility employee working on, under, or between railroad rolling equipment must be provided with blue signal protection in accordance with §§ 218.23 through 218.30 of this part.

* * * * *

PART 221—REAR END MARKING DEVICE—PASSENGER, COMMUTER AND FREIGHT TRAINS

■ 3. The authority citation for part 221 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 4. Amend § 221.13 by revising paragraph (d) to read as follows:

§ 221.13 Marking device display.

* * * * *

(d) The centroid of the marking device must be located above the coupler, where its visibility is not obscured and it does not interfere with an employee's access to, or use of, any other safety appliance on the car.

■ 5. Amend appendix A to part 221 by revising paragraphs (a)(2)(ii) and (b)(3)(ii) to read as follows:

Appendix A to Part 221—Procedures for Approval of Rear End Marking Devices

* * * * *

(a) * * *

(2) * * *

(ii) The results of the tests performed under paragraph (i) of this subsection demonstrate marking device performance in compliance with the standard prescribed in 49 CFR 221.15;

* * * * *

(b) * * *

(3) * * *

(ii) The results of the tests performed under paragraph (i) of this subsection demonstrate marking device performance in compliance with the standard prescribed in 49 CFR 221.15;

* * * * *

PART 232—BRAKE SYSTEM SAFETY STANDARDS FOR FREIGHT AND OTHER NON–PASSENGER TRAINS AND EQUIPMENT; END–OF–TRAIN DEVICES

■ 6. The authority citation for part 232 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–20302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 7. Amend § 232.1 by revising paragraphs (b) and (c) and removing paragraph (d) to read as follows:

§ 232.1 Scope.

* * * * *

(b) Except as otherwise specifically provided in this paragraph or in this part, railroads to which this part applies must comply with all the requirements contained in this part.

(c) Except for operations identified in § 232.3(c)(1), (4), and (6) through (8), all railroads part of the general railroad system of transportation must operate pursuant to the requirements in subpart H of this part (which contains the requirements in this part 232 as they existed on May 31, 2001), until they are either required to operate pursuant to the requirements contained in subparts A through G of this part or the requirements contained in part 238 of this chapter.

■ 8. Amend § 232.3 by revising paragraph (c) introductory text to read as follows:

§ 232.3 Applicability.

* * * * *

(c) Except as provided in § 232.1(c) and paragraph (b) of this section, this part does *not* apply to:

* * * * *

■ 9. Amend § 232.5 by revising the introductory text and removing the definition of ''Air Flow Indicator, AFM'' and adding definitions for ''Air flow method indicator, AFM,'' ''Air repeater unit, ARU,'' ''APTA,'' and ''Gradient, brake pipe'' in alphabetical order to read as follows:

§ 232.5 Definitions.

The definitions in this section are intended to clarify the meaning of terms used in this part.

* * * * *

Air flow method indicator, AFM means a calibrated air flow measuring device used as required by the air flow method (AFM) of qualifying train air brakes and with information clearly and legibly displayed in analog or digital format and visible in daylight and darkness from the engineer's normal operating position. Each AFM indicator includes:

(1) Markings from 10 to 80 cubic feet per minute (CFM), in increments of 10 CFM or less; and

(2) Numerals indicating 20, 40, 60, and 80 CFM for continuous monitoring of air flow.

Air repeater unit, ARU means a car, container, or similar device that provides an additional brake pipe air source by responding to air control instructions from a controlling locomotive using a communication system such as a distributed power system.

APTA means the American Public Transportation Association.

* * * * *

Gradient, brake pipe means the difference in brake pipe pressure, usually measured in pounds per square inch (psi), between each air supply source (*e.g.,* locomotive, distributed power unit, or ARU) or between an air supply source and the rear car of the train when the brake system is fully charged under existing leakage and temperature conditions.

* * * * *

■ 10. Amend § 232.11 by revising paragraph (a) to read as follows:

§ 232.11 Penalties.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to individuals, or has caused death or injury, a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed. See 49 CFR part 209, appendix A. Each day a violation continues shall constitute a separate offense. FRA's website at *https://railroads.dot.gov/* contains a schedule of civil penalty amounts used in connection with this part.

* * * * *

■ 11. Amend § 232.17 by revising paragraph (a), and revising and republishing paragraph (b) to read as follows:

§ 232.17 Special approval procedure.

(a) *General.* The following procedures govern consideration and action upon requests for special approval of a plan under § 232.15(g); an alternative standard under § 232.305 or § 232.603; an alternative technology under § 232.407(b) or (c); or a single car test procedure under § 232.611; and pre-revenue service acceptance testing plans under subpart F of this part.

(b) *Petitions for special approval of an alternative standard or test procedure.* Each petition for special approval of a plan under § 232.15(g); an alternative standard under § 232.305 or § 232.603; an alternative technology under § 232.407(b) or (c); or a single car test procedure under § 232.611 shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition;

(2) The plan, alternative standard, alternative technology, or test procedure proposed, in detail, to be submitted for or to meet the particular requirement of this part;

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the plan, alternative standard, alternative technology, or test procedure, will be consistent with the guidance under § 232.15(f), if applicable, and will provide at least an equivalent level of safety or otherwise meet the requirements contained in this part; and

(4) A statement affirming that the railroad has served a copy of the petition on designated representatives of its employees, together with a list of the

names and addresses of the persons served.

* * * * *

■ 12. Amend § 232.103 by revising paragraphs (l) and (m) to read as follows:

§ 232.103 General requirements for all train brake systems.

* * * * *

(l) Except as otherwise provided in this part, all equipment used in freight or other non-passenger trains must, at a minimum, meet the Association of American Railroads (AAR) Standard S–469, ''Freight Brakes- Performance Specification,'' Revised 2006 (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment), also referred to as AAR Standard S–469–01. The Director of the **Federal Register** approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from the Association of American Railroads, 425 Third Street SW, Washington, DC 20024, telephone: (202) 639–2345, email: *publications@aar.com,* website: *https://aarpublications.com*. You may inspect a copy of the document at the Federal Railroad Administration, Docket Clerk, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: (855) 368–4200) or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html*.

(m) An en route train shall be stopped at the next available location, inspected for leaks in the brake system, and provided with corrective action, if the train experiences:

(1) A brake pipe gradient of greater than 15 psi; or

(2) A brake pipe air flow of greater than that permitted by this part, when the air flow has been qualified by the Air Flow Method as provided for in subpart C of this part and the indication does not return to within the limits in a reasonable time.

* * * * *

■ 13. Amend § 232.203 by revising paragraph (c) to read as follows:

§ 232.203 Training requirements.

* * * * *

(c) A railroad that operates trains required to be equipped with a two-way end-of-train telemetry device pursuant to subpart E of this part, and each contractor that maintains such devices, shall adopt and comply with a training program that specifically addresses:

(1) The testing, operation, and maintenance of two-way end-of-train devices for employees who are responsible for the testing, operation, and maintenance of the devices; and

(2) For operating employees the limitations and proper use of the emergency application signal and the loss of communication indication between front-of-train and rear-of-train devices.

* * * * *

■ 14. Amend § 232.205 by revising paragraph (a)(3), revising and republishing paragraphs (b) and (c)(1), adding paragraph (c)(9), and revising paragraph (e) to read as follows:

§ 232.205 Class I brake test-initial terminal inspection.

(a) * * *

(3) A location where the train is off-air for a period of more than 24 hours.

(b) Except as provided in § 232.209, each car and each solid block of cars added to a train shall receive a Class I brake test as described in paragraph (c) of this section at the location where it is added to a train unless:

(1) The solid block of cars is comprised of cars from a single previous train, the cars of which have previously received a Class I brake test and have remained continuously and consecutively coupled together with the train line remaining connected, other than for removing defective equipment, since being removed from its previous train and have not been off-air for more than 24 hours; or

(2) The solid block of cars is comprised of cars from a single previous train, the cars of which were required to be separated into multiple solid blocks of cars due to space or trackage constraints at a particular location when removed from the previous train, provided the cars have previously received a Class I brake test, have not been off-air more than 24 hours, and the cars in each of the multiple blocks of cars have remained continuously and consecutively coupled together with the train line remaining connected, except for the removal of defective equipment. Furthermore, these multiple solid blocks of cars shall be added to a train in the same relative order (no reclassification) as when removed from the previous train, except for the removal of defective equipment.

(c) A Class I brake test of a train shall consist of the following tasks and requirements:

(1) Brake pipe leakage shall not exceed 5 psi per minute or air flow shall not exceed 60 cubic feet per minute (CFM).

(i) *Leakage Test.* The brake pipe leakage test shall be conducted as follows:

(A) Charge the air brake system to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, as indicated by an accurate gauge or end-of-train device at the rear end of train;

(B) Upon receiving the signal to apply brakes for test, make a 20-psi brake pipe service reduction;

(C) If the locomotive used to perform the leakage test is equipped with a means for maintaining brake pipe pressure at a constant level during a 20-psi brake pipe service reduction, this feature shall be cut out during the leakage test; and

(D) With the brake valve lapped and the pressure maintaining feature cut out (if so equipped) and after waiting 45–60 seconds, note the brake pipe leakage as indicated by the brake-pipe gauge in the locomotive, which shall not exceed 5 psi per minute.

(ii) *Air Flow Method Test.* When a locomotive is equipped with a 26–L brake valve or equivalent pressure maintaining locomotive brake valve, a railroad may use the Air Flow Method Test as an alternate to the brake pipe leakage test. The Air Flow Method (AFM) Test shall be performed as follows:

(A) Charge the air brake system to the pressure at which the train will be operated, and the pressure at the rear of the train shall be within 15 psi of the pressure at which the train will be operated, but not less than 75 psi, as indicated by an accurate gauge or end-of-train device at the rear end of train; and

(B) Use a calibrated AFM indicator to measure air flow. A train equipped with at least one distributed power unit or an air repeater unit providing a source of brake pipe control air from two or more locations must not exceed a combined flow of 90 cubic feet per minute (CFM). Otherwise, the air flow must not exceed 60 CFM. Railroads must develop and implement operating rules to ensure compliant operation of a train if air flow exceeds these parameters after the Class I brake test is completed.

(iii) The AFM indicator must be calibrated for accuracy at periodic intervals not to exceed 92 days. The AFM indicator and all test orifices must be calibrated at temperatures of not less than 20 °F. AFM indicators must be accurate to within ±3 standard cubic feet per minute (CFM) at 60 CFM air flow.

(iv) For each AFM indicator, its last date of calibration must be recorded and certified on Form F6180–49A.

(v) An AFM indicator not incompliance with this part must:

(A) Not be used, including in the performance of a leakage test or to aid in the control or braking of the train;

(B) Be tagged in accordance with § 232.15(b) and include text that it is ''inoperative'' or ''overdue''; and

(C) Be placed with its tag in a conspicuous location of the controlling locomotive cab.

* * * * *

(9) Although an air repeater unit is not a locomotive or appurtenance under part 229, an air repeater unit operated in accordance with this part must:

(i) Receive an inspection in accordance with § 229.21 where and when an inspection is required in accordance with § 232.205(a)(1); and

(ii) Otherwise comply with part 229 as applicable to those parts that provide compressed air, modulate the brake pipe, and otherwise control the movement of the train. All remaining parts are subject to the inspection requirements of parts 215 and 232.

* * * * *

(e) A railroad must notify the locomotive engineer that the Class I brake test was satisfactorily performed, whether the equipment to be hauled in his train has been off-air for a period of more than 24 hours, and provide the information required in this paragraph to the locomotive engineer or place the information in the cab of the controlling locomotive following the test. The information required by this paragraph may be provided to the locomotive engineer by any means determined appropriate by the railroad; however, a written or electronic record of the information must be retained in the cab of the controlling locomotive until the train reaches its destination. The written or electronic record must contain the date, time, number of freight cars inspected, and identify the qualified person(s) performing the test and the location where the Class I brake test was performed.

* * * * *

■ 15. Amend § 232.207 by revising paragraph (c)(2) to read as follows:

§ 232.207 Class IA brake tests—1,000-mile inspection.

* * * * *

(c) * * *

(2) In the event of an emergency that alters normal train operations, such as a derailment or other unusual circumstance that adversely affects the safe operation of the train, the railroad is not required to provide prior written notification of a change in the location where a Class IA brake test is performed to a location not on the railroad's list of designated locations for performing Class IA brake tests, provided that the railroad notifies FRA's Associate Administrator for Safety within 24 hours after the designation has been changed and the reason for that change.

■ 16. Amend § 232.209 by revising and republishing paragraph (a) to read as follows:

§ 232.209 Class II brake tests—intermediate inspection.

(a) At a location other than the initial terminal of a train, a Class II brake test must be performed by a qualified person, as defined in § 232.5, on the following equipment when added to a train:

(1) Each car or solid block of cars, as defined in § 232.5, that has not previously received a Class I brake test or that has been off-air for more than 24 hours;

(2) Each solid block of cars, as defined in § 232.5, that is comprised of cars from more than one previous train; and

(3) Except as provided in paragraph (a)(4) of this section, each solid block of cars that is comprised of cars from only one previous train, the cars of which have not remained continuously and consecutively coupled together with the train line remaining connected since being removed from the previous train. A solid block of cars is considered to have remained continuously and consecutively coupled together with the train line remaining connected since being removed from the previous train if it has been changed only by removing defective equipment.

(4) Each solid block of cars that is comprised of cars from a single previous train, the cars of which were required to be separated into multiple solid blocks of cars due to space or trackage constraints at a particular location when removed from the previous train, if they are not added in the same relative order as when removed from the previous train or if the cars in each of the multiple blocks of cars have not remained continuously and consecutively coupled together with the train line remaining connected, except for the removal of defective equipment.

* * * * *

■ 17. Amend § 232.211 by revising paragraphs (a)(3) through (5) to read as follows:

§ 232.211 Class III brake tests-trainline continuity inspection.

(a) * * *

(3) At a point, other than the initial terminal for the train, where a car or a solid block of cars that is comprised of cars from only one previous train the cars of which:

(i) Have remained continuously and consecutively coupled together with the trainline remaining connected, other than for removing defective equipment, since being removed from its previous train that has previously received a Class I brake test; and

(ii) That has not been off-air for more than 24 hours is added to a train;

(4) At a point, other than the initial terminal for the train, where a solid block of cars that is comprised of cars from a single previous train is added to a train, provided:

(i) The solid block of cars was required to be separated into multiple solid blocks of cars due to space or trackage constraints at a particular location when removed from the previous train;

(ii) The cars have previously received a Class I brake test;

(iii) Have not been off-air more than 24 hours; and

(iv) The cars in each of the multiple blocks of cars have remained continuously and consecutively coupled together with the train line remaining connected, except for the removal of defective equipment. Furthermore, these multiple solid blocks of cars must be added to the train in the same relative order (no reclassification) as when removed from the previous train, except for the removal of defective equipment; or

(5) At a point, other than the initial terminal for the train, where a car or a solid block of cars that has received a Class I or Class II brake test at that location, prior to being added to the train, and that has not been off-air for more than 24 hours, is added to a train.

* * * * *

■ 18. Amend § 232.213 by:

■ a. Removing paragraph (a)(1)(iii);

■ b. Redesignating paragraph (a)(1)(iv) as (a)(1)(iii);

■ c. Revising paragraph (a)(5);

■ d. Revising and republishing paragraph (a)(6); and

■ e. Adding paragraph (a)(8).

The revisions and addition read as follows:

§ 232.213 Extended haul trains.

(a) * * *

(5) The train must have no more than one pick-up and one set-out en route, except for the set-out of defective equipment pursuant to the requirements of this chapter. Cars added to the train en route must be inspected pursuant to

the requirements contained in paragraphs (a)(2) through (5) of this section at the location where they are added to the train.

(6) In order for an extended haul train to proceed beyond 1,500 miles, the following requirements shall be met:

(i) If the train will move 1,000 miles or less from that location before receiving a Class IA brake test or reaching destination, a Class I brake test must be conducted pursuant to § 232.205 to ensure 100 percent effective and operative brakes.

(ii) If the train will move greater than 1,000 miles from that location without another brake inspection, the train must be identified as an extended haul train for that movement and must meet all the requirements contained in paragraphs (a)(1) through (5) of this section. Such trains must receive a Class I brake test pursuant to § 232.205 by a qualified mechanical inspector to ensure 100 percent effective and operative brakes, a freight car inspection pursuant to part 215 of this chapter by an inspector designated under § 215.11 of this chapter, and all cars containing non-complying conditions under part 215 of this chapter must either be repaired or removed from the train.

* * * * *

(8) In the event of an emergency that alters normal train operations, such as a derailment or other unusual circumstance that adversely affects the safe operation of the train, the railroad is not required to provide prior written notification of a change in the location where an extended haul brake test is performed to a location not on the railroad's list of designated locations for performing extended haul brake tests, provided that the railroad notifies FRA's Associate Administrator for Safety within 24 hours after the designation has been changed and the reason for that change.

* * * * *

■ 19. Amend § 232.217 by revising paragraph (c)(1) to read as follows:

§ 232.217 Train brake tests conducted using yard air.

* * * * *

(c) * * *

(1) If the cars are off-air for more than 24 hours, the cars must be retested in accordance with § 232.205(c) through (f).

* * * * *

■ 20. Amend § 232.219 by revising the section heading and revising and republishing paragraph (c) to read as follows:

§ 232.219 Double-heading and helper service.

* * * * *

(c) If a helper locomotive utilizes a Helper Link device or a similar technology, the locomotive and device shall be equipped, designed, and maintained as follows:

(1) The locomotive engineer shall be notified by a distinctive alarm of any loss of communication between the device and the two-way end-of-train device of more than 25 seconds;

(2) A method to reset the device shall be provided in the cab of the helper locomotive that can be operated from the engineer's usual position during operation of the locomotive. Alternatively, the helper locomotive or the device shall be equipped with a means to automatically reset the device, provided that the automatic reset occurs within the period time permitted for manual reset of the device; and

(3) When helping trains equipped with distributed power or ECP brakes on the rear of the train, and utilizing a *Helper Link* device or a similar technology, a properly installed and tested end-of-train device may be utilized on the helper locomotive. Railroads must adopt and comply with an operating rule consistent with this chapter to ensure the safe use of this alternative procedure.

(4) The device shall be tested for accuracy and calibrated if necessary according to the manufacturer's specifications and procedures every 365 days. This shall include testing radio frequencies and modulation of the device. A legible record of the date and location of the last test or calibration shall be maintained with the device.

■ 21. Amend § 232.305 by revising paragraphs (a) and (b)(2) and adding paragraph (f) to read as follows:

§ 232.305 Single car air brake tests.

(a) Single car air brake tests must be performed by a qualified person in accordance with either Section 3.0, ''Tests-Standard Freight Brake Equipment,'' and Section 4.0, ''Special Tests,'' AAR Standard S–486–18; Section 3.0, ''Single-Car Test Requirements,'' Section 4.0, ''Special Tests,'' and Section 13.0 ''4-Pressure Single-Car Test Requirements,'' AAR Standard S–4027–18; an alternative procedure approved by FRA pursuant to § 232.17; or a modified procedure approved in accordance with the provisions contained in § 232.307.

(b) * * *

(2) A car is on a shop or repair track, as defined in § 232.303(a), for any reason and has not received either:

(i) A manual single car air brake test (AAR Standard S–486) within the previous 12-month period;

(ii) An automated single car air brake test (AAR Standard S–4027 §§ 3.0 and 4.0) within the previous 24-month period;

(iii) Or a 4-pressure single car air brake test (AAR Standard S–4027 § 13.0) within the previous 48-month period;

* * * * *

(f) The Director of the Federal Register approves the incorporation by reference of the standards required in this section into this section in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may inspect a copy of the material at the Federal Railroad Administration, Docket Clerk, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: 855–368–4200). You may also inspect the material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.* You may obtain the material from the following source(s):

(1) Association of American Railroads (AAR), 425 Third Street SW, Washington, DC 20024, telephone: (202) 639–2345, email: *publications@aar.com,* website: *https://aarpublications.com.*

(i) AAR Standard S–486, ''Code of Air Brake System Tests for Freight Equipment—Single Car Test,'' Revised 2018 (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment), also referred to as AAR Standard S–486–18.

(ii) AAR Standard S–4027, ''Automated Single-Car Test Equipment, Conventional Brake Equipment—Design and Performance Requirements,'' Revised 2018 (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment), also referred to as AAR Standard S–4027–18.

(2) [Reserved]

■ 22. Amend § 232.307 by revising the section heading and revising and republishing paragraph (a) to read as follows:

§ 232.307 Modification of brake test procedures.

(a) *Request.* The AAR or other authorized representative of the railroad industry may seek modification of brake test procedures prescribed in this chapter. The request for modification shall be submitted to the Associate Administrator for Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 and shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the modification;

(2) The section and paragraph at issue, and the modification, in detail, to be substituted for a particular procedure prescribed in this chapter;

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the modification will provide at least an equivalent level of safety; and

(4) A statement affirming that the railroad industry has served a copy of the request on the designated representatives of the employees responsible for the equipment's operation, inspection, testing, and maintenance under this part, together with a list of the names and addresses of the persons served.

* * * * *

■ 23. Amend § 232.403 by revising paragraph (d)(6) and revising and republishing paragraphs (f)(4) and (g) to read as follows:

§ 232.403 Design standards for one-way end-of-train devices.

* * * * *

(d) * * *

(6) During a shock of 10 g. peak for 0.01 seconds in any axis.

* * * * *

(f) * * *

(4) The front unit shall be designed to meet the requirements of paragraphs (d)(2), (3), (4), and (5) of this section. It shall also be designed to meet the performance requirements in this paragraph under the following environmental conditions:

(i) At temperatures from 0 °C to 60 °C;

(ii) During a shock of 10 g. peak for 0.01 seconds in any axis.

(g) *Radio equipment.* (1) The radio transmitter in the rear unit and the radio receiver in the front unit shall comply with the applicable regulatory requirements of the Federal Communications Commission (FCC) and use of a transmission format acceptable to the FCC.

(2) If power is supplied by one or more batteries only, the operating life must be a minimum of 36 hours at 0 °C.

(3) If power is supplied by a generator—an air turbine or alternative technology—a backup battery or similar energy storage device is required with a minimum of 12 hours continuous power at 0 °C in the event the generator stops functioning as intended.

■ 24. Amend § 232.407 by revising paragraphs (b), (c), (e)(1), and (f)(2) to read as follows:

§ 232.407 Operations requiring use of two-way end-of-train devices; prohibition on purchase of nonconforming devices.

* * * * *

(b) *General.* All trains not specifically excepted in paragraph (e) of this section shall be equipped with and shall use either a two-way end-of-train device meeting the design and performance requirements contained in § 232.405 or a device using an alternative technology approved by FRA pursuant to § 232.17 to perform the same function.

(c) *New devices.* Each newly manufactured end-of-train device purchased by a railroad shall be a two-way end-of-train device meeting the design and performance requirements contained in § 232.405 or a device using an alternative technology approved by FRA pursuant to § 232.17 to perform the same function.

* * * * *

(e) * * *

(1) Trains with a locomotive, locomotive consist, or air repeater unit located at the rear of the train that is capable of making an emergency brake application, through a command effected by telemetry or by a crew member in radio contact with the controlling locomotive.

* * * * *

(f) * * *

(2) The rear unit batteries must be sufficiently charged at the initial terminal or other point where the device is installed and throughout the train's trip to ensure that the end-of-train device will remain operative until the train reaches its destination. Air-powered generator equipped devices must be tested for a minimum charge at installation before initiating generator operation.

* * * * *

■ 25. Amend § 232.409 by revising paragraph (d) and adding paragraphs (e) and (f) to read as follows:

§ 232.409 Inspection and testing of end-of-train devices.

* * * * *

(d) The telemetry equipment must be tested for accuracy and calibrated if necessary according to the manufacturer's specifications and procedures. If the manufacturer's specifications requires periodic calibration of the telemetry equipment, the date and location of the last calibration or test and the name or unique employee identifier of the person performing the calibration or test must be legibly displayed on a weather-resistant sticker affixed to the outside of both the front unit and the rear unit; however, if the front unit is an integral part of the locomotive or is inaccessible, then the information may be recorded on Form FRA F6180–49A instead, provided that the serial number of the unit is recorded.

(e) The air pressure sensor contained in the end-of-train device must be tested by the processes and frequency identified in § 229.27 or by manufacturer specifications approved under § 232.307. The date and location of the test and the name or unique employee identifier of the person performing the test must be legibly displayed on a weather-resistant marking device affixed to the outside of the unit.

(f) Each manufacturer of telemetry transceiver equipment must either:

(1) Establish and communicate publicly to its customers a reasonable recommended calibration period; or

(2) Submit to FRA an annual report including:

(i) The total number of transceivers—itemized by model name, number, or type—sold to date;

(ii) The number of transceivers that have been reported as inoperative or otherwise malfunctioning or returned for servicing; and

(iii) The number of transceivers reported or returned for service with frequency modulation or transmit power outside of either manufacturer's specifications or FCC-approved specifications.

■ 26. Amend § 232.603 by revising paragraphs (a) introductory text, (d), and (f) and adding paragraph (g) to read as follows:

§ 232.603 Design, interoperability, and configuration management requirements.

(a) *General.* A freight car or freight train equipped with an ECP brake system must, at a minimum, meet the Association of American Railroads (AAR) standards contained in the AAR Manual of Standards and Recommended Practices related to ECP brake systems listed in paragraph (g) of this section; an alternate standard approved by FRA pursuant to § 232.17; or a modified standard approved in accordance with the provisions contained in paragraph (g) of this section.

* * * * *

(d) *Exceptions.* (1) A freight car or freight train equipped with a standalone ECP brake system is excepted from the requirement in § 232.103(l) referencing AAR Standard S–469–01, ''Freight Brakes—Performance Specification.''

* * * * *

(f) *Modification of standards.* The AAR or other authorized representative of the railroad industry may seek

modification of the industry standards identified in or approved pursuant to paragraph (g) of this section. The request for modification will be handled and shall be submitted in accordance with the modification procedures contained in § 232.307.

(g) *Incorporation by reference.* The Director of the Federal Register approves the incorporation by reference of the standards required in this section into this section in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may inspect a copy at the Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC, 202–493–6300 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.* You may obtain the material from the following source(s):

(1) Association of American Railroads, 425 Third Street SW, Washington, DC 20024, telephone: (202) 639–2345, email: *publications@aar.com,* website: *https://aarpublications.com.*

(i) AAR S–4200, ''Electronically Controlled Pneumatic (ECP) Cable-Based Brake Systems—Performance Requirements,'' Revised 2014, (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment).

(ii) AAR S–4210, ''ECP Cable-Based Brake System Cable, Connectors, and Junction Boxes—Performance Specifications,'' Revised 2014, (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment).

(iii) AAR S–4220, ''ECP Cable-Based Brake DC Power Supply—Performance Specification,'' Version 2.0, Revised 2002, (contained in AAR Manual of Standards and Recommended Practices, Electronically Controlled Brake Systems).

(iv) AAR S–4230, ''Intratrain Communication Specification for Cable-Based Freight Train Control System,'' Version 4.1, Revised 2014, (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment).

(v) AAR S–4240, ''ECP Brake Equipment—Approval Procedure,'' Adopted 2007, (contained in AAR Manual of Standards and Recommended Practices, Electronically Controlled Brake Systems).

(vi) AAR S–4250, ''Performance Requirements for ITC Controlled Cable-Based Distributed Power Systems,'' Version 3.0, Revised 2014, (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment).

(vii) AAR S–4260, ''ECP Brake and Wire Distributed Power Interoperability Test Procedures,'' Revised 2008 (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment).

(viii) AAR S–4270, ''ECP Brake System Configuration Management,'' Adopted 2008, (contained in AAR Manual of Standards and Recommended Practices, Electronically Controlled Brake Systems).

(2) [Reserved]

* * * * *

■ 27. Add Subpart H to read as follows:

Subpart H—Tourist, Scenic, Historic, and Excursion Operations Braking Systems

Sec.

§ 232.700 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart applies to standard gage railroads.

(b) This subpart does not apply to:

(1) A railroad that operates only on track inside an installation which is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

(c) As used in this subpart, carrier means ''railroad,'' as that term is defined by 49 CFR 232.5

§ 232.701 Power brakes; minimum percentage.

On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

§ 232.702 Drawbars; standard height.

Not included in this subpart. Moved to 49 CFR part 231.

§ 232.703 Power brakes and appliances for operating power-brake systems.

Requirements are contained in 49 CFR 232.103(l).

§ 232.710 General rules; locomotives.

(a) Air brake and hand brake equipment on locomotives including tender must be inspected and maintained in accordance with the requirements of the Locomotive Inspection and United States Safety Appliance Acts and related orders and regulations of the Federal Railroad Administrator (FRA).

(b) It must be known that air brake equipment on locomotives is in a safe and suitable condition for service.

(c) Compressor or compressors must be tested for capacity by orifice test as often as conditions require but not less frequently than required by law and orders of the FRA.

(d) Main reservoirs shall be subjected to tests periodically as required by law and orders of the FRA.

(e) Air gauges must be tested periodically as required by law and orders of the FRA, and whenever any irregularity is reported. They shall be compared with an accurate deadweight tester, or test gauge. Gauges found inaccurate or defective must be repaired or replaced.

(f)(1) All operating portions of air brake equipment together with dirt collectors and filters must be cleaned, repaired and tested as often as conditions require to maintain them in a safe and suitable condition for service, and not less frequently than required by law and orders of the FRA.

(2) On locomotives so equipped, hand brakes, parts, and connections must be inspected, and necessary repairs made as often as the service requires, with date being suitably stenciled or tagged.

(g) The date of testing or cleaning of air brake equipment and the initials of the shop or station at which the work was done shall be placed on a card displayed under transparent covering in the cab of each locomotive unit.

(h)(1) Minimum brake cylinder piston travel must be sufficient to provide proper brake shoe clearance when brakes are released.

(2) Maximum brake cylinder piston travel when locomotive is standing must not exceed the following:

	Inches
(i) Steam locomotives:	
(A) Cam type of driving wheel brake	3½
(B) Other types of driving wheel brakes	6
(C) Engine truck brake	8
(D) Engine trailer truck brake	8
(E) Tender brake (truck mounted and tender bed mounted)	8
(F) Tender brake (body mounted)	9
(ii) Locomotives other than steam:	
(A) Driving wheel brake	6
(B) Swivel type truck brake with brakes on more than one truck operated by one brake cylinder	7
(C) Swivel type truck brake equipped with one brake cylinder	8
(D) Swivel type truck brake equipped with two or more brake cylinders	6

(i)(1) Foundation brake rigging, and safety supports, where used, must be maintained in a safe and suitable condition for service. Levers, rods, brake beams, hangars and pins must be of ample strength and must not bind or foul in any way that will affect proper operation of brakes. All pins must be properly applied and secured in place with suitable locking devices. Brake shoes must be properly applied and kept approximately in line with treads of wheels or other braking surfaces.

(2) No part of the foundation brake rigging and safety supports shall be closer to the rails than specified by law and orders of the FRA.

(j)(1) Main reservoir leakage: Leakage from main air reservoir and related piping shall not exceed an average of 3 pounds per minute in a test of three minutes' duration, made after the pressure has been reduced 40 percent below maximum pressure.

(2) Brake pipe leakage: Brake pipe leakage must not exceed 5 pounds per minute after a reduction of 10 pounds has been made from brake pipe air pressure of not less than 70 pounds.

(3) Brake cylinder leakage: With a full service application of brakes, and with communication to the brake cylinders closed, brakes must remain applied not less than five minutes.

(4) The main reservoir system of each unit shall be equipped with at least one safety valve, the capacity of which shall be sufficient to prevent an accumulation of pressure of more than 10 pounds per square inch above the maximum setting of the compressor governor fixed by the chief mechanical officer of the carrier operating the locomotive.

(5) A suitable governor shall be provided that will stop and start the air compressor within 5 pounds above or below the pressures fixed.

(6) Compressor governor when used in connection with the automatic air brake system shall be so adjusted that the compressor will start when the main reservoir pressure is not less than 15 pounds above the maximum brake-pipe pressure fixed by the rules of the carrier and will not stop the compressor until the reservoir pressure has increased not less than 10 pounds.

(k) The communicating signal system on locomotives when used in passenger service must be tested and known to be in a safe and suitable condition for service before each trip.

(l) Enginemen when taking charge of locomotives must know that the brakes are in operative condition.

(m) In freezing weather drain cocks on air compressors of steam locomotives must be left open while compressors are shut off.

(n) Air pressure regulating devices must be adjusted for the following pressures:

	Pounds
(1) Locomotives:	
(i) Minimum brake pipe air pressure:	
(A) Road Service	70
(B) Switch Service	60
(ii) Minimum differential between brake pipe and main reservoir air pressures, with brake valve in running position	15
(iii) Safety valve for straight air brake	30–55
	30–68
(iv) Safety valve for LT, ET, No. 8–EL, No. 14 El, No. 6–DS, No. 6–BL and No. 6–SL equipment	30–75
(v) Safety valve for HSC and No. 24–RL equipment	30–50
(vi) Reducing valve for independent or straight air brake	50
(vii) Self-lapping portion for electro-pneumatic brake (minimum full application pressure)	30–50
(viii) Self-lapping portion for independent air brake (full application pressure)	40–60
(viiii) Reducing valve for air signal	50
(x) Reducing valve for high-speed brake (minimum).	
(2) Cars:	
(i) Reducing valve for high-speed brake	58–62
(ii) Safety valve for PS, LN, UC, AML, AMU and AB–1–B air brakes	58–62
(iii) Safety valve for HSC air brake	58–77
(iv) Governor valve for water raising system	60
(v) Reducing valve for water raising system	20–30

§ 232.711 Train air brake system tests.

(a) Supervisors are jointly responsible with inspectors, enginemen and trainmen for condition of train air brake and air signal equipment on motive power and cars to the extent that it is possible to detect defective equipment by required air tests.

(b) Communicating signal system on passenger equipment trains must be tested and known to be in a suitable condition for service before leaving terminal.

(c) Each train must have the air brakes in effective operating condition, and at no time shall the number and location of operative air brakes be less than permitted by Federal requirements. When piston travel is in excess of 10½ inches, the air brakes cannot be considered in effective operating condition.

(d) Condensation must be blown from the pipe from which air is taken before connecting yard line or motive power to train.

§ 232.712 Initial terminal road train airbrake tests.

(a)(1) Each train must be inspected and tested as specified in this section by a qualified person at points—

(i) Where the train is originally made up (initial terminal);

(ii) Where train consist is changed, other than by adding or removing a solid block of cars, and the train brake system remains charged; and

(iii) Where the train is received in interchange if the train consist is changed other than by:

(A) Removing a solid block of cars from the head end or rear end of train;

(B) Changing motive power;

(C) Removing or changing the caboose; or

(D) Any combination of the changes listed in paragraphs (a)(1)(iii)(A), (B), and (C) of this section. Where a carman is to perform the inspection and test under existing or future collective bargaining agreement, in those circumstances a carman alone will be considered a qualified person.

(2) A qualified person participating in the test and inspection or who has knowledge that it was made shall notify the engineer that the initial terminal road train air brake test has been satisfactorily performed. The qualified person shall provide the notification in writing if the road crew will report for duty after the qualified person goes off duty. The qualified person also shall provide the notification in writing if the train that has been inspected is to be moved in excess of 500 miles without being subjected to another test pursuant to either this section or § 232.713 of this part.

(b) Each carrier shall designate additional inspection points not more than 1,000 miles apart where intermediate inspection will be made to determine that:

(1) Brake pipe pressure leakage does not exceed five pounds per minute;

(2) Brakes apply on each car in response to a 20-pound service brake pipe pressure reduction; and

(3) Brake rigging is properly secured and does not bind or foul.

(c) Train airbrake system must be charged to required air pressure, angle cocks and cutout cocks must be properly positioned, air hose must be properly coupled and must be in condition for service. An examination must be made for leaks and necessary repairs made to reduce leakage to a minimum. Retaining valves and retaining valve pipes must be inspected and known to be in condition for service. If train is to be operated in electro-pneumatic brake operation, brake circuit cables must be properly connected.

(d)(1) After the airbrake system on a freight train is charged to within 15 pounds of the setting of the feed valve on the locomotive, but to not less than 60 pounds, as indicated by an accurate gauge at rear end of train, and on a passenger train when charged to not less than 70 pounds, and upon receiving the signal to apply brakes for test, a 15-pound brake pipe service reduction must be made in automatic brake operations, the brake valve lapped, and the number of pounds of brake pipe leakage per minute noted as indicated by brake pipe gauge, after which brake pipe reduction must be increased to full service. Inspection of the train brakes must be made to determine that angle cocks are properly positioned, that the brakes are applied on each car, that piston travel is correct, that brake rigging does not bind or foul, and that all parts of the brake equipment are properly secured. When this inspection has been completed, the release signal must be given and brakes released and each brake inspected to see that all have released.

(2) When a passenger train is to be operated in electro-pneumatic brake operation and after completion of test of brakes as prescribed by paragraph (d)(1) of this section the brake system must be recharged to not less than 90 pounds air pressure, and upon receiving the signal to apply brakes for test, a minimum 20 pounds electro-pneumatic brake application must be made as indicated by the brake cylinder gage. Inspection of the train brakes must then be made to determine if brakes are applied on each car. When this inspection has been completed, the release signal must be given and brakes released and each brake inspected to see that all have released.

(3) When the locomotive used to haul the train is provided with means for maintaining brake pipe pressure at a constant level during service application of the train brakes, this feature must be cut out during train airbrake tests.

(e) Brake pipe leakage must not exceed 5 pounds per minute.

(f)(1) At initial terminal piston travel of body-mounted brake cylinders which is less than 7 inches or more than 9 inches must be adjusted to nominally 7 inches.

(2) Minimum brake cylinder piston travel of truck-mounted brake cylinders must be sufficient to provide proper brake shoe clearance when brakes are released. Maximum piston travel must not exceed 6 inches.

(3) Piston travel of brake cylinders on freight cars equipped with other than standard single capacity brake, must be adjusted as indicated on badge plate or stenciling on car located in a conspicuous place near the brake cylinder.

(g) When test of airbrakes has been completed the engineman and conductor must be advised that train is in proper condition to proceed.

(h) During standing test, brakes must not be applied or released until proper signal is given.

(i)(1) When train airbrake system is tested from a yard test plant, an engineer's brake valve or an appropriate test device shall be used to provide increase and reduction of brake pipe air pressure or electro-pneumatic brake application and release at the same or a slower rate as with engineer's brake valve and yard test plant must be connected to the end which will be nearest to the hauling road locomotive.

(2) When yard test plant is used, the train airbrakes system must be charged and tested as prescribed by paragraphs (c) to (g) of this section inclusive, and when practicable should be kept charged until road motive power is coupled to train, after which, an automatic brake application and release test of airbrakes on rear car must be made. If train is to be operated in electro-pneumatic brake operation, this test must also be made in electro-pneumatic brake operation before proceeding.

(3) If after testing the brakes as prescribed in paragraph (i)(2) of this section the train is not kept charged until road motive power is attached, the brakes must be tested as prescribed by paragraph (d)(1) of this section and if

train is to be operated in electro-pneumatic brake operation as prescribed by paragraph (d)(2) of this section.

(j) Before adjusting piston travel or working on brake rigging, cutout cock in brake pipe branch must be closed and air reservoirs must be drained. When cutout cocks are provided in brake cylinder pipes, these cutout cocks only may be closed and air reservoirs need not be drained.

§ 232.713 Road train and intermediate terminal train air brake tests.

(a) *Passenger trains.* Before motive power is detached or angle cocks are closed on a passenger train operated in either automatic or electro-pneumatic brake operation, except when closing angle cocks for cutting off one or more cars from the rear end of train, automatic air brake must be applied. After recouping, brake system must be recharged to required air pressure and before proceeding and upon receipt of proper request or signal, application and release tests of brakes on rear car must be made from locomotive in automatic brake operation. If train is to be operated in electro-pneumatic brake operation, this test must also be made in electro-pneumatic brake operation before proceeding. Inspector or trainman must determine if brakes on rear car of train properly apply and release.

(b) *Freight trains.* Before motive power is detached or angle cocks are closed on a freight train, brakes must be applied with not less than a 20-pound brake pipe reduction. After recoupling, and after angle cocks are opened, it must be known that brake pipe air pressure is being restored as indicated by a rear car gauge or device. In the absence of a rear car gauge or device, an air brake test must be made to determine that the brakes on the rear car apply and release.

(c)(1) At a point other than an initial terminal where a locomotive or caboose is changed, or where one or more consecutive cars are cut off from the rear end or head end of a train with the consist otherwise remaining intact, after the train brake system is charged to within 15 pounds of the feed valve setting on the locomotive, but not less than 60 pounds as indicated at the rear of a freight train and 70 pounds on a passenger train, a 20-pound brake pipe reduction must be made and it must be determined that the brakes on the rear car apply and release. As an alternative to the rear car brake application and release test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or device.

(2) Before proceeding it must be known that brake pipe pressure as indicated at rear of freight train is being restored.

(3) On trains operating with electro-pneumatic brakes, with brake system charged to not less than 70 pounds, test must be made to determine that rear brakes apply and release properly from a minimum 20 pounds electro-pneumatic brake application as indicated by brake cylinder gauge.

(d)(1) At a point other than a terminal where one or more cars are added to a train, after the train brake system is charged to not less than 60 pounds as indicated by a gauge or device at the rear of a freight train and 70 pounds on a passenger train. A brake test must be made by a designated person as described in § 232.712(a)(1) to determine that brake pipe leakage does not exceed five (5) pounds per minute as indicated by the brake pipe gauge after a 20-pound brake pipe reduction has been made. After the test is completed, it must be determined that piston travel is correct, and the train airbrakes of these cars and on the rear car of the train apply and remain applied, until the release signal is given. As an alternative to the rear car brake application and release portion of the test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or device. Cars added to a train that have not been inspected in accordance with § 232.712 (c) through (j) must be so inspected and tested at the next terminal where facilities are available for such attention.

(2)(i) At a terminal where a solid block of cars, which has been previously charged and tested as prescribed by § 232.712 (c) through (j), is added to a train, it must be determined that the brakes on the rear car of the train apply and release. As an alternative to the rear car application and release test, it shall be determined that brake pipe pressure of the train is being reduced as indicated by a rear car gauge or device and then that brake pipe pressure of the train is being restored as indicated by a rear car gauge or device.

(ii) When cars which have not been previously charged and tested as prescribed by § 232.712 (c) through (j) are added to a train, such cars may either be given inspection and tests in accordance with § 232.712 (c) through (j), or tested as prescribed by paragraph (d)(1) of this section prior to departure in which case these cars must be inspected and tested in accordance with § 232.712 (c) through (j) at next terminal.

(3) Before proceeding it must be known that the brake pipe pressure at the rear of freight train is being restored.

(e)(1) Transfer train and yard train movements not exceeding 20 miles, must have the air brake hose coupled between all cars, and after the brake system is charged to not less than 60 pounds, a 15-pound service brake pipe reduction must be made to determine that the brakes are applied on each car before releasing and proceeding.

(2) Transfer train and yard train movements exceeding 20 miles must have brake inspection in accordance with § 232.712 (c)–(j).

(f) The automatic air brake must not be depended upon to hold a locomotive, cars or train, when standing on a grade, whether locomotive is attached or detached from cars or train. When required, a sufficient number of hand brakes must be applied to hold train, before air brakes are released. When ready to start, hand brakes must not be released until it is known that the air brake system is properly charged.

(g) As used in this section, device means a system of components designed and inspected in accordance with § 232.719.

(h) When a device is used to comply with any test requirement in this section, the phrase brake pipe pressure of the train is being reduced means a pressure reduction of at least five pounds and the phrase brake pipe pressure of the train is being restored means a pressure increase of at least five (5) pounds.

§ 232.714 Inbound brake equipment inspection.

(a) At points where inspectors are employed to make a general inspection of trains upon arrival at terminals, visual inspection must be made of retaining valves and retaining valve pipes, release valves and rods, brake rigging, safety supports, hand brakes, hose and position of angle cocks and make necessary repairs or mark for repair tracks any cars to which yard repairs cannot be promptly made.

(b) Freight trains arriving at terminals where facilities are available and at which special instructions provide for immediate brake inspection and repairs, trains shall be left with air brakes applied by a service brake pipe reduction of 20 pounds so that inspectors can obtain a proper check of the piston travel. Trainmen will not close any angle cock or cut the locomotive off until the 20-pound service reduction has been made.

Inspection of the brakes and needed repairs should be made as soon thereafter as practicable.

§ 232.715 Double heading and helper service.

(a) When more than one locomotive is attached to a train, the engineman of the leading locomotive shall operate the brakes. On all other motive power units in the train the brake pipe cutout cock to the brake valve must be closed, the maximum main reservoir pressure maintained and brake valve handles kept in the prescribed position. In case it becomes necessary for the leading locomotive to give up control of the train short of the destination of the train, a test of the brakes must be made to see that the brakes are operative from the automatic brake valve of the locomotive taking control of the train.

(b) The electro-pneumatic brake valve on all motive power units other than that which is handling the train must be cut out, handle of brake valve kept in the prescribed position, and air compressors kept running if practicable.

§ 232.716 Running tests.

When motive power, engine crew or train crew has been changed, angle cocks have been closed except for cutting off one or more cars from the rear end of train or electro-pneumatic brake circuit cables between power units and/or cars have been disconnected, running test of train air brakes on passenger train must be made, as soon as speed of train permits, by use of automatic brake if operating in automatic brake operation or by use of electro-pneumatic brake if operating in electro-pneumatic brake operation. Steam or power must not be shut off unless required and running test must be made by applying train air brakes with sufficient force to ascertain whether or not brakes are operating properly. If air brakes do not properly operate, train must be stopped, cause of failure ascertained and corrected and running test repeated.

§ 232.717 Freight and passenger train car brakes.

(a) *Testing and repairing brakes on cars while on shop or repair tracks.*

(1) When a freight car having brake equipment due for periodic attention is on shop or repair tracks where facilities are available for making air brake repairs, brake equipment must be given attention in accordance with the requirements of Rules 3 and 4 of the 2020 Field Manual of the AAR Interchange Rules (AAR Field Manual); or an alternative procedure approved by FRA under paragraph (d) of this section. Brake equipment shall then be tested by use of a single car testing device as prescribed by § 232.305.

(2)(i) When a freight car having an air brake defect is on a shop or repair track, brake equipment must be tested by use of a single car testing device as prescribed by § 232.305.

(ii) All freight cars on shop or repair tracks shall be tested to determine that the air brakes apply and release. Piston travel on a standard body mounted brake cylinder which is less than 7 inches or more than 9 inches must be adjusted to nominally 7 inches. Piston travel of brake cylinders on all freight cars equipped with other than standard single capacity brake, must be adjusted as indicated on badge plate or stenciling on car located in a conspicuous place near brake cylinder. After piston travel has been adjusted and with brakes released, sufficient brake shoe clearance must be provided.

(iii) When a car equipped for use in passenger train service not due for periodical air brake repairs, as indicated by stenciled or recorded cleaning dates, is on shop or repair tracks, brake equipment must be tested by use of single car testing device as prescribed by the applicable standards referenced in § 232.305 or by the American Public Transportation Association (APTA) standard referenced in § 238.311(a) of this chapter. Piston travel of brake cylinders must be adjusted if required, to the standard travel for that type of brake cylinder. After piston travel has been adjusted and with brakes released, sufficient brake shoe clearance must be provided.

(iv) Before a car is released from a shop or repair track, it must be known that brake pipe is securely clamped, angle cocks in proper position with suitable clearance, valves, reservoirs and cylinders tight on supports and supports securely attached to car.

(b) *Clean, repair, lubricate and test (COT&S).* (1) Brake equipment on cars other than passenger cars must be cleaned, repaired, lubricated and tested (''COT&S'') as often as required to maintain it in a safe and suitable condition for service but not less frequently than as required by Rules 3 and 4 of the AAR Field Manual.

(2) Brake equipment on passenger cars must be cleaned, repaired, lubricated and tested (''COT&S'') as often as necessary to maintain it in a safe and suitable condition for service but not less frequently than as required in Standard S–4045–13 in the Manual of Standards and Recommended Practices of the AAR or an alternative procedure approved by FRA pursuant to § 232.717(d).

(c) *Discontinued brake systems.* For a brake system once, but no longer, included in AAR's current Code of Rules or Code of Tests (presently known as the Field Manual of the AAR Interchange Rules or the Manual of Standards and Recommended Practices), the brake system must be maintained in a safe and suitable condition for service according to a railroad's written maintenance plan. The maintenance plan, including its COT&S component and a periodic attention schedule, must be based upon a standard appropriate to the equipment. The railroad must comply with and make its written maintenance plan available to FRA upon request.

(d) *Modification of standards.* The AAR or other authorized representative of the railroad industry may seek modification of the industry standards identified in or approved pursuant to paragraph (a) of this section. The request for modification will be handled and must be submitted in accordance with the modification procedures contained in § 232.307 of this part.

(e) *Incorporation by Reference.* The Director of the Federal Register approves the incorporation by reference of the standards required in this section into this section in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may inspect a copy of the material at the Federal Railroad Administration, Docket Clerk, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: 855–368–4200). You may also inspect the material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.* You may obtain the material from the following source(s):

(1) Association of American Railroads (AAR), 425 Third Street SW, Washington, DC 20024, telephone: (202) 639–2345, email: *publications@aar.com,* website: *https://aarpublications.com.*

(i) 2020 Field Manual of the AAR Interchange Rules, Rule 3—Testing of Air Brakes and Rule 4—Air Brake Valves and Parts, effective January 1, 2020.

(ii) AAR Standard S–4045, ''Passenger Equipment Maintenance Requirements,'' Revised 2013 (contained in AAR Manual of Standards and Recommended Practices, Brakes and Brake Equipment), also referred to as AAR Standard S–4045–13.

(2) [Reserved]

§ 232.719 End-of-train devices.

Requirements are contained in subpart E of this part.

APPENDICES A AND B TO PART 232—[REMOVED]

■ 28. Remove appendices A and B to part 232.

Issued in Washington, DC.

Quintin C. Kendall,

Deputy Administrator.

[FR Doc. 2020–25817 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–06–P

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